GENERAL GUIDELINES

Concerning the reporting obligation to the Tax and Customs Authority of certain internal or cross-border arrangements with tax relevance

Law No. 26/2020, of July 21

Version 1.0

February 2021

AT autoridade tributária e aduaneira

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I. INTRODUCTION

1. Law No. 26/2020, of July 21

Law No. 26/2020, of July 21, establishes the obligation to communicate to the Tax and Customs Authority (AT), for the purposes provided for in Articles 16 and 17, of certain internal or cross-border arrangements with tax relevance, transposing Council Directive (EU) 2018/822[1], of May 25, 2018, and repealing Decree-Law no. 29/2008, of February 25.[2]

Law No. 26/2020, of July, 21 thus constitutes an entirely new and reinforced legal regime, which coherently integrates the internal and European Union aspects, of mandatory communication to the AT of specific arrangements, as they contain, at least, some of the specific hallmarks categorized in their article 5.

Law No. 26/2020, of July 21, explains the reason for such a definitive classification, when defining "specific hallmarks" [cf. subparagraph b) of no. 1 of article 2] as "those that objectively and by themselves indicate the potential risk of tax evasion, including circumventing legal obligations to report financial information or identification of beneficial owners ".

In line with Council Directive (EU) 2018/822, of May 25, 2018, Law No. 26/2020, of July 21, the "intermediary" or the "relevant taxpayer" is responsible for this reporting obligation - entities corresponding to legal concepts also defined in it [cf., on the one hand, paragraph 2, e) of Article 2 and paragraph 2 of Article 9 and, on the other hand, subparagraph c) of no. 1 of article 2] - and regulates the assumptions of the respective obligation and the terms of compliance with it.

However, Law No. 26/2020, of July 21, was amended and complemented by Decree-Law No. 53/2020, of August 11, having also been the subject of Order No. 444/2020-XXII , of

[1] Directive (EU) 2018/822 amended Council Directive 2011/16 / EU of February 15, 2011, with regard to the mandatory automatic exchange of information in the field of taxation in relation to the cross-border arrangements to be reported.
[2] Decree-Law no. 29/2008, of February 25, established the duty to communicate certain arrangements to the AT ("schemes" or "actions", in its own terminology).

November 19, of the Assistant Secretary of State and Tax Affairs, essentially in the sense of the deferral of deadlines due to the COVID-19 pandemic, in line with that allowed by Council Directive (EU) 2020/876, of June 24, 2020.

On the other hand, under the provisions of article 24 of Law no. 26/2020, of July 21, Ordinance no. 304/2020, of December 29, approved the Statement "Modelo 58" intended to ensure the compliance with the aforementioned declaratory obligation to inform the AT of an internal or cross-border arrangement with tax relevance, as well as the general information and instructions for filling in such declaration.

This same Statement "Modelo 58" also serves to fulfill the other reporting obligations to the AT provided for in Law No. 26/2020, of July 21, in particular:

a) For the communication of cross-border arrangements, the first step of which has been implemented between June 25, 2018 and June 30, 2020 (see article 22);
b) For the communication of the waiver from communication of the arrangement, in cases where the communication of this arrangement has already occurred, by means of documentary evidence of this other communication (see no. 6 or no. 8 of article 10 or no. 4 or no. 6 of article 12);
c) For the communication of information updates (see no. 4 of article 10 or no. 2 of article 12).

The deadlines for submitting the statement "Modelo 58" duly completed to the AT, for any of the objectives just stated, are provided for in Law No. 26/2020, of July 21, which, as stated, were amended and complemented by Decree-Law No. 53/2020, of August 11, and by Order No. 444/2020-XXII, of November 19, of the Assistant Secretary of State and Tax Affairs, and in the general information approved by Ordinance no. 304/2020, of December 29, the deadlines for communicating those updates of information are specified.

2. Council Directive (EU) 2018/822 of May 25, 2018

Council Directive (EU) 2018/822 of May 25, 2018 - known by the English-language acronym DAC[3] 6, as it was conceived essentially as a deepening, for the fifth time, of administrative cooperation in the field of taxation established by Directive 2011 / 16 / EU -, institutes a regime that is essentially based on two moments:

a) The obligation to communicate to the tax authorities of the Member States of the European Union, in accordance with certain connecting criteria, the arrangements indicating the potential risk of tax evasion - "potentially aggressive tax planning arrangements", as also referred to in the Directive - which have a cross-border structure, since they concern more than one Member State or one Member State and a third country;

b) The automatic (and mandatory) exchange of the information thus collected between tax authorities in all Member States; reason why article 16 of Law no. 26/2020, of July 21, stipulates that the information related to cross-border arrangements received by AT is communicated by AT, through automatic exchange, to the competent authorities of all other Member States.

3. Meaning of these general guidelines

These general guidelines, relating to the declaratory obligation, established in Law no. 26/2020, of July 21, of reporting to AT of internal or cross-border arrangement with fiscal relevance, have no normative nature, constituting administrative doctrine intended to contribute for a better perception and understanding of the legal regime approved by Law no. 26/2020, of July 21, and, thus, to standardize its interpretation and application.

The present general guidelines were previously the subject of the work of the monitoring forum for the implementation of Law No. 26/2020, of July 21 ("Forum DAC 6"), created by the aforementioned Decree-Law No. 53 / 2020, of August 11. Within this scope the hearing was promoted, and were also considered the respective contributions, of the

[3] Directive on Administrative Cooperation.

respective members (Portuguese Bar Association, Portuguese Chartered Accountants and Certified Accountants Association) and other entities invited to participate in it.

II. SUBJECTS OF THE COMMUNICATION OBLIGATION TO THE AT OF INTERNAL OR CROSS-BORDER ARRANGEMENT WITH TAX RELEVANCE

1. Intermediary or relevant taxpayer

The declarative obligation, established in Law No. 26/2020, of July 21, of reporting to the AT an internal or cross-border arrangement with fiscal relevance, affects the intermediary or the relevant taxpayer, as respectively characterized in the definitions, either from subparagraph e) of paragraph 1 of article 2 and paragraph 2 of article 9, or of subparagraph c) of paragraph 1 of article 2.

Law No. 26/2020, of July 21, also typifies, in Articles 9 and 11, connections to Portugal that determine the submission of the intermediary or relevant taxpayer's declaratory reporting obligation to the AT.

As explained in the general information approved by Ordinance No. 304/2020, of December 29, a person who is linked to the intermediary or the relevant taxpayer through a subordination relationship typical of dependent work (that is, through an employment contract)) is not characterized as an “intermediary” or “relevant taxpayer”, even though, within the scope of this labor subordination, it develops an activity with the content specified in subparagraph e) of no. 1 or Article 2 or in no. 2 of Article 9 of Law No. 26/2020, of July 21.

On the other hand, the person who makes available to the intermediary or the relevant taxpayer a type of activity defined in subparagraph e) of no. 1 of article 2 or in no. 2 of article 9 of Law no. 26/2020, July 21, through the contracting of services, is considered “intermediary”.

Thus, it should be considered an "intermediary", either the person who contracts with the relevant taxpayer the provision of services related to an arrangement, or the person who provides the referred typified services related to that arrangement.

This situation of plurality of intermediaries can occur, namely, in the case of professional companies (regulated by Law No. 53/2015, of June 11), whose corporate purpose consists precisely in the joint exercise of professional activities organized in a single association professional public; only then, not happening when one of the following situations occurs:

a) It is unequivocal that the professional is linked to the professional society by an employment contract and it is within the scope of this labor subordination that the activity with the same content as that described in subparagraph e) of no. 1 of article 2 or in no. 2 of article 9 of Law no. 26/2020, of July 21;
b) It is not the company of professionals that contracts the provision of services specified in subparagraph e) of paragraph 1 of article 2 or in paragraph 2 of article 9 of Law no. 26/2020, of July 21, such contracting being made directly with the professional or professionals.

In situations of plurality of intermediaries involved in the same arrangement to be communicated, the obligation to communicate to the AT falls upon each of them, without prejudice, however, to the possibility of waiving that obligation, all under the terms of paragraphs 7 and 8 of article 10 Of Law No. 26/2020, of July 21.

As provided for in articles 10, 12 and 13 of Law no. 26/2020, of July 21, the obligation to report to the AT each of the arrangements, internal or cross-border, is in principle a matter for to the intermediary, and the relevant taxpayer is responsible for presenting any of the aforementioned connections to Portugal only in case of any of the following situations:

a) Absence of intervention by any intermediary in the arrangement to be communicated;
b) Intermediary intervention in the arrangement to be communicated, but without that intermediary presenting any of the aforementioned connections to Portugal;

c) Intervention by an intermediary in the arrangement to be reported, presenting that intermediary with any of the aforementioned connections to Portugal and being subject to the obligation of reporting the arrangement to the AT, but invoking a legal or contractual duty of secrecy in relation to a relevant taxpayer who presents any of the respective referred connections to Portugal.

It should be stressed that in this situation of invocation by the intermediary of a legal or contractual duty of secrecy, there remains a subsidiary obligation to communicate to the AT, provided for in no. 4 of article 13 of Law no. 26/2020, July 21, if he does not receive timely information from the relevant taxpayer, duly substantiated, that he has fulfilled the obligation to report to the AT that has now become his responsibility under the same article 13 or that this obligation to report has been waived , in this case as provided for in no. 4 or no. 6 of article 12 of Law no. 26/2020, of July 21.

2. Intermediary

2.1. Qualification of intermediary

Subparagraph e) of no. 1 of article 2 of Law no. 26/2020, of July 21, defines "intermediary" in the following terms: "any person who designs, markets, organizes or makes available for application or manages the application of an arrangement to be communicated, these actions not integrating the mere communication of information strictly descriptive of existing tax regimes, including tax benefits, and the advice given strictly regarding an existing tax situation of the relevant taxpayer, including the exercise of the mandate within the scope of the administrative tax procedure, the tax appeal procedure, the criminal tax procedure or the tax administrative offense procedure, including advice regarding the conduct of the respective procedures ".

In its turn, paragraph 2 of article 9 of Law no. 26/2020, of July 21, stipulates that the "qualification as an intermediary" is "extendable to any person" who, "taking into

account relevant facts and circumstances and based on the information available and the relevant knowledge and skills needed to provide these services, knows or can reasonably be expected to know that he or she has made the commitment to provide, directly or through other people, help, assistance or advice in design, commercialization, organization or availability for the application of an arrangement to be communicated or that has committed him or herself to the management of the application of such an arrangement".

It follows from these provisions that the legal characterization of the intermediary for the purposes of Law No. 26/2020, of July 21, is based on the content of the services provided, with the legislator establishing a negative boundary rule and two positive boundary rules.

In the second part of subparagraph e) of no. 1 of article 2 of Law no. 26/2020, of July 21, the legislator typifies the provision of services that do not allow to characterize the provider as an intermediary, namely:

a) "Communication of strictly descriptive information on existing tax schemes, including tax benefits";
b) The "advice strictly given as to an existing tax situation of the relevant taxpayer, including the exercise of the mandate within the scope of the administrative tax procedure, the tax appeal procedure, the criminal tax procedure or the tax infraction procedure, including counseling regarding the conduct of the respective proceedings".

On the other hand, the legislator typifies the content of the services that determine the characterization of the provider as an intermediary, namely:

a) The creation, marketing, organization or availability for application or, still, the management of the application of an arrangement to be reported, according to subparagraph e) of paragraph 1 of article 2 of Law no. 26 / 2020, of July 21, determining the characterization as an intermediary to provide services with one or more than one of these contents;

b) The provision, directly or through other people, of help, assistance or advice in the design, commercialization, organization or availability for the application or, still, in the management of the application of an to be reported, according to no. 2 of article 9 of Law no. 26/2020, of July 21, also determining the characterization as an intermediary of help, assistance or advice in relation to one or more of these contents.

It is clear from these positive delineations typical of the legal characterization of the intermediary for the purposes of Law No. 26/2020, of July 21, that the services provided - whether the services of design, marketing, organization or availability for application or, still, application administration, whether it is help, assistance or advice in designing, marketing, organizing or making available for the application, or even managing the application - must have as their object an arrangement to report, implying knowledge, on the part of the service provider, that the services provided actively affect a reality characterized as an arrangement to be reported for the purposes of that same Law..

The need for this knowledge is also extracted from the provisions of paragraphs 1, 2 and 3 of article 10 of Law no. 26/2020, of July 21, when imposing on the intermediary the duty to report to the AT “all information known or in the person's possession or under his/ her control” concerning the arrangement to be reported.

Such knowledge is taken for granted by the legislator in the case of design, marketing, organization or availability for application or, still, the management of the application of the arrangement.

In the case of the provision of help, assistance or advice in the design, marketing, organization or availability for the application or, still, in the management of the application of the arrangement, the legislator extracts this knowledge from elements expressly objectified, whatever the existence “relevant facts and circumstances”, “available information” and “relevant knowledge and skills”, which allow us to conclude that the service provider (even if supported by third parties) knows, or is reasonable to be expected to know, according to with the information that is made

available to them and with the actions commonly inherent to the provision of their concrete services, that these have as their object an arrangement to report.

And, precisely because according to no. 2 of article 9 of Law no. 26/2020, of July 21, that knowledge of the service provider, the legislator, is extracted from those elements expressly aimed at no. 3 of the same article 9, took care, also expressly, to accept the production of counterproof, in the following terms: “For the purposes of the previous number, any person has the right, against the evidence presented by AT, to counter-argument with evidence that he or she did not know or that the person could not reasonably be expected to know that he or she was involved in an arrangement to be reported, and he/she can also make reference to all relevant facts and circumstances, as well as the information available and the relevant knowledge and skills.” Such counter-proof is produced under the terms and for the purposes provided for in article 346 of the Civil Code.

Thus, taking up, as an example, the previously mentioned situation of a professionals society regulated by Law No. 53/2015, of June 11, it will be characterized as an intermediary, for the purposes of Law No. 26/2020, of July 21, whenever it can be concluded that some of the professionals within them can also be characterized as an intermediary, for providing the services typified in subparagraph e) of no. 1 of article 2 or in no. 2 of article 9 of Law no. 26/2020, of July 21, and for knowing or being reasonably expected to know that the services provided have as their object an arrangement to be reported (even if it may have the contribution of third parties, whether or not they are part of this professionals society, who do not hold nor is it reasonable to be expected to hold such knowledge).

Assuming such a conclusion that the service provider does not demonstrate that he or she did not know or that it could not reasonably be expected to know that there was involvement in an arrangement to be reported, for example, proving it unreasonable to be expected to know that the services provided made it possible to consider the main benefit test to be verified in a specific hallmark that claims that test.

Thus, it is important to keep in mind that there may be intervention by someone who collaborates in specific tasks related to the design, marketing, organization or availability for the application or, still, the management of the application of an arrangement to be reported without such a collaboration intervention allows to qualify that intervenient as intermediary.

Finally, it should be noted that Law No. 26/2020, of July 21, uses, without defining it, the concept of "participant (s) in the arrangement[4] ". The intermediary, being an intervener in the arrangement - precisely for providing the services typified in subparagraph e) of no. 1 of article 2 or in no. 2 of article 9 of Law no. 26/2020, of July 21 -, however, it does not integrate this concept of "participant (s) in the arrangement".

2.2. Reporting obligation of the intermediary

In accordance with no. 1 of article 9 of Law no. 26/2020, of July 21, the obligation to notify the AT of an internal or cross-border arrangement with fiscal relevance whose responsibility falls upon the intermediary depends on the filling, of at least, one of the following conditions:

a) Is resident, for tax purposes, in Portuguese territory;
b) Has a permanent establishment in Portuguese territory through which the services related to the arrangement are provided;
c) Is incorporated in Portugal or governed by Portuguese law;
d) Is registered in Portugal with a professional association related to the provision of legal nature services, tax or consultancy services; it should be understood that a professional association is only relevant for this purpose if it is a professional public association.

It should be borne in mind that the obligation to report to the AT of a cross-border arrangement due to the verification of any of the aforementioned connections related

[4] Namely, regarding the definition of "cross-border arrangements" or the typification of some specific hallmarks.

to the intermediary is not necessarily dependent on the arrangement to be reported also presenting some connection to Portugal, either because of its objective aptitude to be applied or producing effects, totally or partially, in Portuguese territory, either due to the fulfillment of the respective specific hallmark(s) in Portugal.

Pursuant to no. 1 and 3 of article 10 of Law no. 26/2020, of July 21, the intermediary has a deadline of 30 (thirty) days to comply with the obligation to report to the AT of an internal or cross-border arrangement with tax relevance, this period counting from the following relevant facts, whichever occurs first (without prejudice to the transitional norm of no. 1 of article 5 of Decree-Law no. 53/2020, of August 11):

a) In the case of the provision of conception, marketing, organization or availability services for application or, still, management of the application of an arrangement to be reported, the day after the one in which the arrangement to be reported is made available to be applied or the day following that when the arrangement to be communicated is ready to be applied or the moment when the first step in the application of the arrangement to be reported has been carried out;

b) In the case of the provision of help, assistance or advice in the design, marketing, organization or availability for the application or, still, in the management of the application of an arrangement to be reported, the day after the one in which it was provided, directly or through other people, help, assistance or advice.

The aforementioned relevant facts, relating to the arrangements to be reported, the availability for application, the readiness for application and the completion of the first step in the application[5], are most likely the end of processes with different previous phases, these previous phases not per se, a relevant fact for the purposes of the beginning of the counting of that period for the intermediary to fulfill the obligation to report to the AT an internal or cross-border arrangement with fiscal relevance.

[5] This first step in the application corresponds to the first act, legal or not, necessary for the application of the arrangement.

These same relevant facts shall be considered, as regards the specific hallmarks of subparagraph a) ii) of no. 3 of article 5 of Law no. 26/2020, of July 2 from the time of assessment whether or not a particular jurisdiction appears on the list identified there.

On the other hand, according to no. 4 of article 10 of Law no. 26/2020, of July 21 (without prejudice to the transitional rule of no. 3 of article 5 of Decree-Law no. 53/2020, of August 11), in the case of reporting of a marketable internal or cross-border arrangement (whose characterization will be made below), the intermediary must also submit a report to AT every three months, an update report that includes certain new information that has emerged since the initial communication or since the presentation of the previous report; specifying the general information approved by Ordinance No. 304/2020, of December 29, whose deadline for reporting to the AT of this quarterly communication is 30 (thirty) consecutive days, counted from the end of the calendar quarter (ie., from March 31, June 30, September 30 and December 31) in which new information may have appeared.

2.3. Waiver from the intermediary's reporting obligation

No. 5 of article 10 of Law no. 26/2020, of July 21, stipulates that if, in addition to the AT, the intermediary is subject to the obligation to report information also before the competent authorities of other Member States, this information (but only when it relates to a cross-border arrangement) can only be communicated to the competent authorities, whichever comes first (it should be noted that the obligation to report always falls upon the person, whether natural or legal, of the intermediary and not on his permanent establishment, considering that, under subparagraph b), only for the purpose of fixing a first complementary connection to a Member State where the reporting from the intermediary should take place):

a) The Member State in which the intermediary is resident for tax purposes;
b) The Member State in which the intermediary has a permanent establishment through which the services related to the arrangement to be reported are provided;

c) The Member State in which the intermediary is constituted or whose laws are governed;

d) The Member State in which the intermediary is registered with a professional association related to the provision of legal, tax or consultancy services.

This regime applicable to the cross-border arrangement may result in a multiple reporting obligation that includes a communication to AT. However, no. 6 of article 10 of Law no. 26/2020, of July 21, allows the intermediary to be waived from reporting to the AT if it produces documentary evidence of whereas the same information has already been communicated to the competent authority of another of the said Member States; clarifying the instructions for filling in the "Modelo 58" statement approved by Ordinance No. 304/2020, of December 29, that such documentary evidence consists of a document or copy of a document proving the delivery of the respective statement to the tax administration of another Member State.

It should be borne in mind that such a waiver of reporting presupposes effective communication to the competent authorities of the other Member State. If such effective reporting does not occur for any reason (for example, because these competent authorities understand that there is no duty to communicate or because the intermediary invokes a duty of secrecy before them), there is no legal requirement for waiver from communication. Thus, an intermediary based in another Member State that provides services related to the arrangement to be reported through a permanent establishment located in Portugal must report the arrangement to AT, pursuant to subparagraph b) of no. 5 of article 10 of Law no. 26/2020, of July 21, if in that other Member State there is no effective communication of such arrangement.

On the other hand, there may be more than one intermediary, because several intermediaries can intervene in the same internal or cross-border arrangement to communicate, acting, jointly or autonomously, in the aforementioned services that determine the characterization of the provider as an intermediary: be it the design, marketing, organization or availability for application or, still, the management of the application of the arrangement to be communicated [cf. e) of no. 1 of article 2 of Law

no. 26/2020, July 21], be it help, assistance or advice in the design, marketing, organization or availability for the application or , still, in the management of the application of the arrangement to be communicated [cf. 2 of article 9 of Law no. 26/2020, of July 21].

Regarding such situations:

a) No. 7 of article 10 of Law no. 26/2020, of July 21, enshrines that, if there is more than one intermediary, the obligation to report information to AT rests with all intermediaries involved in the same arrangement to be communicated;

b) However, no. 8 of the same article 10 allows intermediaries to be waived from reporting to AT if they present, within the deadline set forth therein, documentary evidence that the same information has already been communicated to AT by another intermediary involved in that same arrangement to report; as a result of the instructions for filling in the "Modelo 58" statement approved by Ordinance No. 304/2020, of December 29, that such documentary evidence is sufficient with the indication, made in the statement template itself, of the identification of the statement submitted to the AT by that other intermediary.

The presentation of the statement of waiver from communication and the respective documentary proof shall not, however, be required in situations where the intermediary (s) exercise (s) their profession exclusively within the scope of one of the company of professional regulated by the Law No. 53/2015, of June 11, this company of professionals has contracted the services specified in subparagraph e) of no. 1, article 2 or in no. 2 of article 9 of the Law no. 26/2020, of July 21, and the arrangement is communicated, within the legally established deadline, by that company of professionals or by one of these professional intermediaries.

On the other hand, even in situations where the intermediary (s) exercise their profession exclusively within the scope of one of the aforementioned companies of professional and this has contracted the services identified in subparagraph e) of no. 1 of article 2 or no. 2 of article 9 of Law no. 26/2020, of July 21, it is incumbent only

on the company of professionals or one of these professional intermediaries to present, within the legally indicated period, of the statement of waiver from communication with the respective documentary evidence, as the case may be, that the same information has already been reported to the competent authority of another Member State or that the arrangement has already been reported to AT, within the legally foreseen period, by a third party involved in the same arrangement to be reported.

It should be borne in mind that the system of Council Directive (EU) 2018/822, of May 25, 2018 - and, thus, also the system of Law No. 26/2020, of July 21 - is designed in a logic in which, for reasons of effectiveness of the regime and guarantee of communication of the arrangement as early as possible, the obligation of communication is preferably committed to the intermediary, assuming that the same arrangement can be communicated in different Member States. Therefore, the said rules for waiver from the obligation to reporting of the intermediary must not be extrapolated beyond the hypotheses provided for therein.[6]

3. Relevant taxpayer

3.1. Qualification of relevant taxpayer; associated enterprise and other entities

Subparagraph c) of no.1 of article 2 of Law no. 26/2020, of July 21, defines “relevant taxpayer” in the following terms: “any person or entity without legal personality to which it is made available for application an arrangement to report or that is prepared to apply an arrangement to report or even that has applied any step or part of an arrangement to report”.

From this definition it follows that, for the purposes of Law No. 26/2020, of July 21, the position of relevant taxpayer is legally structured by reference to an internal or

[6] Thus, for example, that rule of no. 6 of article 10 of Law no. 26/2020, of July 21, does not authorize the intermediary to be waivered from communicating to the AT due to a reporting from another intermediary or the relevant taxpayer in another Member State.

cross-border arrangement to be communicated. The relevant taxpayer is an entity covered by this arrangement to be reported, as a participant in that arrangement and as relevant to it (because without it the arrangement does not act in the same way), affecting or being affected by it.

This characterization of a relevant taxpayer results that, depending on the relationship between them inherent to the configuration or use of the specific arrangement available for application, there may be more than one relevant taxpayer for each specific arrangement to be reported, being that no. 5 of article 12 of Law no. 26/2020, of July 21, distinguishes in this situation of plurality of relevant taxpayers between those who "have agreed with the intermediary the arrangement to report" and those who "manage the application of the same"; It should be noted that this situation differs from that in which the same type of arrangement to be communicated is used by different relevant taxpayers without any relationship between them.

In conjunction with the characterization of a relevant taxpayer, Law No. 26/2020, of July 21, defines and uses the concept of "associated company". It uses it for the purpose of classifying some specific hallmarks and, in this logic, also for the definition of "intangible assets that are difficult to evaluate" [cf. Article 2 (1) (a)]; and uses it in subparagraph a) of no. 1 of article 15, in relation to the information to be reported to AT, referring in this head office to the "associated enterprises of the relevant taxpayer".

Paragraph 1 d) of article 2 of Law no. 26/2020, of July 21, defines "associated enterprise" as "a person who is related to another person, at least, in of one of the following forms:

i) A person participates in the management of another person because he or she is in a position to exert significant influence[7] over the other person;

[7] The Accounting Standard for Financial Reporting 13 defines "Significant influence" in the following terms: "it is the power to participate in the decisions of the investee's financial and operating policies or of an economic activity but that is neither control nor joint control over those policies. Significant influence can be obtained through ownership of shares, statutes or agreement. "

ii) A person participates in the control of another person through a participation greater than 25% of the voting rights;

iii) A person participates in another person's capital through a property right that, directly or indirectly, is greater than 25% of the capital;

iv) A person is entitled to 25% or more of another person's profits."

And no. 2 of article 2 of Law no. 26/2020, of July 21, complements this definition of "associated company" in the following transcribed terms:

a) If more than one person participates in the management, control, capital or profits of the same person, all persons concerned are considered associated enterprises;

b) If the same persons participate in the management, control, capital or profits of more than one person, all persons concerned are considered to be associated enterprises;

c) A person acting jointly with another person with respect to the voting rights or share capital of an entity is treated as holding an interest in the entire voting rights or share capital of that entity that are held by the other person;

d) In indirect participations, the fulfillment of the requirements established in subparagraph d) iii) of the previous number is determined by multiplying the percentages of participation by the successive levels, considering that a person who holds more than 50% of the vote holds 100%;

e) An individual, his or her spouse and his/her relatives in the straight line ascending or descending are considered a single person.

Also, the associated company is an entity covered by the arrangement to be reported, as a participant in this arrangement and as relevant to it (since without the arrangement it does not act in the same way), affecting it or being affected by it.

It should be noted that, in addition to the relevant taxpayer and the associated enterprise, other persons or entities without legal personality may also consider themselves covered by the same arrangement to report, as is clear, moreover, from

paragraph 1 h) of article 15 of Law no. 26/2020, of July 21, regarding the information to be reported to AT.

Law No. 26/2020, of July 21, uses, without defining it, the concept of "participant (s) in the arrangement": regarding the definition of "cross-border arrangements" or regarding the typification of some specific hallmarks. The relevant taxpayer, the associated enterprise and the other persons (natural or legal) or entities without legal personality covered by the arrangements to be reported integrate this concept of "participant (s) in the arrangement", while, precisely, entities susceptible to be covered by this arrangement to report, affecting it or being affected by it with such participation.

As clarified in the general information approved by Ordinance No. 304/2020, of December 29, filling in the annexes to the "Modelo 58" statement relating to the associated enterprise of the relevant taxpayer (Annex B) and the entity covered (Annex C) must occur in cases where the reported arrangement implies this information, namely when the arrangement depends on a specific hallmark that implies the existence of associated enterprises or when there are other entities (other than associated enterprises) that may be covered by the arrangement.

3.2. Reporting obligation by the relevant taxpayer

According to article 11 of Law no. 26/2020, of July 21, the obligation to notify the AT of an internal or cross-border arrangement with fiscal relevance that is the responsibility of the relevant taxpayer depends on the latter filling in at least one of the following conditions:

a) Being resident, for tax purposes, in Portuguese territory;
b) Having a permanent establishment in Portuguese territory that benefits from the arrangement;
c) Receiving or generating income in Portuguese territory;

d) Performing an activity in Portuguese territory;

e) Being registered, for tax purposes, in Portugal.

As already mentioned, the obligation to report to the AT of each of the arrangements, internal or cross-border, falls upon the relevant taxpayer who presents any of the aforementioned connections to Portugal only in the event of any of the following situations:

a) Absence of intervention by any intermediary in the arrangement to be reported;

b) Intermediary intervention in the arrangement to be reported, but without that intermediary presenting any of the aforementioned connections to Portugal;

c) Intervention by an intermediary in the arrangement to be reported, presenting that intermediary with any of the aforementioned connections to Portugal and being subject to the obligation of reporting the arrangement to the AT, but invoking a legal or contractual duty of secrecy with respect to the relevant taxpayer who presents any of the respective connections to Portugal.

Referring to this point later, (see below II.4) this particular situation of invocation by the intermediary of a legal or contractual duty of secrecy in relation to the relevant taxpayer, it is important to note that those other two situations - absence of intervention by any intermediary in the arrangement to be reported or intervention by an intermediary without any of the aforementioned connections to Portugal in the arrangement to be reported - they are considered in no. 1 of article 12 of Law no. 26/2020, of July 21, when referring to the inexistence of “an intermediary under the terms provided for in Article 9”.

Precisely these cases of the absence of “an intermediary under the terms provided for in article 9” constitute the typical situation in which the obligation to report to the AT of each of the internal or cross-border arrangement starts to fall upon the relevant taxpayer and, according to no. 1 of article 12 of Law no. 26/2020, of July 21, he has a period of 30 (thirty) consecutive days, counting the term of the following relevant facts, whichever comes first (without prejudice to the transitional rule of no. 1 of article 5 of Decree-Law no. 53/2020, of August 11):

a) The day after the day on which the arrangement to be reported is made available for application;

b) The day after the day on which the arrangement to be reported is ready for application;

c) The day after the first step in the application of the arrangement to be reported.

As mentioned above with regard to the intermediary, the relevant facts mentioned, relating to the arrangement to be reported, the availability for application, the readiness for application and the completion of the first step in the application, most likely constitute the end of procedures with different previous phases, with these previous phases not constituting, per se, a relevant fact for the purposes of the beginning of the counting of that period for the relevant taxpayer to fulfill the obligation to report to the AT an internal or cross-border arrangement with fiscal relevance.

And now it is also important to note that these same relevant facts must be considered, as regards the specific hallmarks of subparagraph a) ii) of no. 3 of article 5 of Law no. 26/2020, of July 21, for the purpose of determining the time of assessment whether a particular jurisdiction is included on the list referred to or not.

On the other hand, according to no. 2 of article 12 of Law no. 26/2020, of July 21, the relevant taxpayer must, in each of the years in which the reported arrangement is applied, shall inform this to the AT, including an update of previously reported information. And the general information approved by Ordinance No. 304/2020, of December 29, specifies whether such an annual duty to inform AT only occurs in cases where the arrangement has been reported to AT by the relevant taxpayer himself, or that the deadline for complying with this annual information duty is 30 (thirty) consecutive days, counting from the day following the end of the annual period in which the arrangement has been applied.

That same general information clarifies that, in cases where the obligation to report the arrangement falls upon the relevant taxpayer, the taxpayer only has to fill in the annex to the "Modelo 58" statement concerning the intermediary (Annex A) when one of the following situations occurs:

a) The obligation to report has started to fall upon the relevant taxpayer under the provisions of article 13 of Law no. 26/2020, of July 21, that is, since the intermediary has invoked legal or contractual duty of secrecy in relation to that same relevant taxpayer;

b) The intermediary involved in the arrangement does not present any of the connections to Portugal typified in no. 1 of article 9 of Law no. 26/2020, of July 21.

3.3. Waiver from the obligation to report by the relevant taxpayer

Article 12 (3) of the Law no. 26/2020, July 21, states that, in addition to the AT, the relevant taxpayer is also subject to the obligation to report information to the competent authorities of the other Member States, such information (but only if they adhere to a cross-border arrangement) may be communicated only to the competent authorities, as it is the first place to check (it should be pointed out that the obligation to report lies always on the person who, or entity of the taxpayer, is relevant, and not on the permanent establishment, considering this, in accordance with subparagraph (b), and only for the purpose of establishing a first connection to complement the Member State in which the reporting of the relevant taxpayer that can occur):

a) Of the Member State in which the relevant taxpayer is resident for tax purposes;

b) Of the Member State in which the relevant taxpayer has a permanent establishment benefiting from the arrangement to be reported;

c) Of the Member State in which the relevant taxpayer receives or generates income, despite not being a resident for tax purposes or having a permanent establishment in any member state;

d) Of the Member State in which the relevant taxpayer carries out an activity, despite not being resident for tax purposes or having a permanent establishment in any Member State.

This regime applicable to the cross-border arrangement may result in a multiple reporting obligation including reporting to the AT. However, article 12 (4) of Law no.

26/2020, July 21, allows the relevant taxable person to be waivered from communicating to the AT, if it produces, within the period laid down therein, the documentary evidence that the same information has been already reported to the competent authority of the other Member States; in order to clarify the instructions for completing the statement "Modelo 58", adopted by Ordinance no. 304/2020, on December 29, such documentary evidence consists of a document, or a copy of the document certifying the delivery of the statement to the tax authorities of another Member State.

On the other hand, there may exist, depending on the relationship between them inherent in the configuration or use of the specific arrangement available for application, more than one relevant taxpayer for each specific arrangement to be reported. In this situation of plurality of relevant taxpayers, Law no. 26/2020, of July 21, there is another regime of waiver of communication to AT, with the following outlines:

a) Article 12 (5) allows that, if there is more than one relevant taxpayer, the obligation that exists to report information to the AT is, as first occurs, the relevant taxpayer that has agreed with the intermediary the arrangement to be communicated or the relevant taxpayer that administers the application of the same;

b) Article 12 (6) indicates that the taxpayers that are relevant shall be waivered from the notification to the AT with this submission, within the period laid down therein, the documentary evidence of the same information that has already been reported by another relevant taxpayer in another country covered by this particular arrangement to report; as a result, the instructions for completing "Modelo 58", approved by the Decree no. 304/2020, on the December 29, and that any such documentary evidence if it is enough to state, that is made in the statement, the identification of the statement submitted to the AT by the other relevant taxpayer.

4. Invocation by the intermediary of a legal or contractual duty of secrecy in relation to the relevant taxpayer

4.1. Duty of secrecy under the provisions of Law No. 26/2020, of July 21

Under the heading "duty of secrecy", Article 14 of Law no. 26/2020, of July 21, establishes two different normative moments:

a) That the fulfillment of the reporting obligations to the AT to which the intermediaries or the relevant taxpayers are bound prevails over the duty of secrecy to which, legally or contractually, they are obliged, and this duty cannot be invoked by them under Law no. 26/2020, of July 21, and considering excluded their liability for violation of the duty of secrecy to which they were bound (cf. No. 1 and 2);

b) The information reported to the AT by the intermediaries or relevant taxpayers shall be covered by the duty of secrecy provided for in Article 64 of the General Tax Law, without prejudice to the pursuit of the typical purposes for which such information is intended, according to Articles 16 and 17 of Law no. 26/2020, of July 21 (cf. no. 3).

On the other hand, according to Article 15 (3) and (4) of Law no. 26/2020, of July 21, the treatment by AT of the data reported by them respects the legal requirements applicable to the protection of the same. These requirements are primarily the result of the General Data Protection Regulation (RGPD)[8] and Law no.58/2019, of August 8. On the other hand, Articles 16 and 17 of Law no. 26/2020, of July 21, typify the possible purposes of the information received by the AT.

Establishing Law no. 26/2020, of July 21, essentially, an obligation to disclose practices that objectively indicate a potential risk of tax evasion, understandably the legislator understood that such an obligation should, in terms of principle, prevail over the duty of secrecy that, legally or contractually, imposes on the subjects of this same

[8] Regulation (UE) 2016/679 of the Parliament and the Council, of Abril 27, 2016.

obligation, the intermediaries or the relevant taxpayers; in the path, incidentally, of the repealed Decree-Law 29/2008 of February 25 and as also preferably recommended by Council Directive (EU) 2018/822 of May 25, 2018.[9]

Law no. 26/2020, of July 21, embodied that principle that compliance with the reporting obligations established therein takes precedence over the duty of secrecy, doing so through a specific regulation attributing certain relevance "to situations covered by the legal or contractual duty of secrecy" of the intermediary, in the expression of no. 1 of its Article 13.

4.2. Relevance of the duty of secrecy of the intermediary

Such a specific regulation attributing a certain relevance "to situations covered by the legal or contractual duty of secrecy" of the intermediary constitutes an "intermediate solution", as referred to in the Explanatory Memorandum of the proposal of Law no. 11/XIV, admitted in the Assembly of the Republic on February 4, 2020, which was at the origin of Law no. 26/2020, of July 21.

That specific regulation, contained in conjunction with Article 10 (2) and of Article 13 of Law no. 26/2020, of July 21, is based on the following essential and sequential moments:

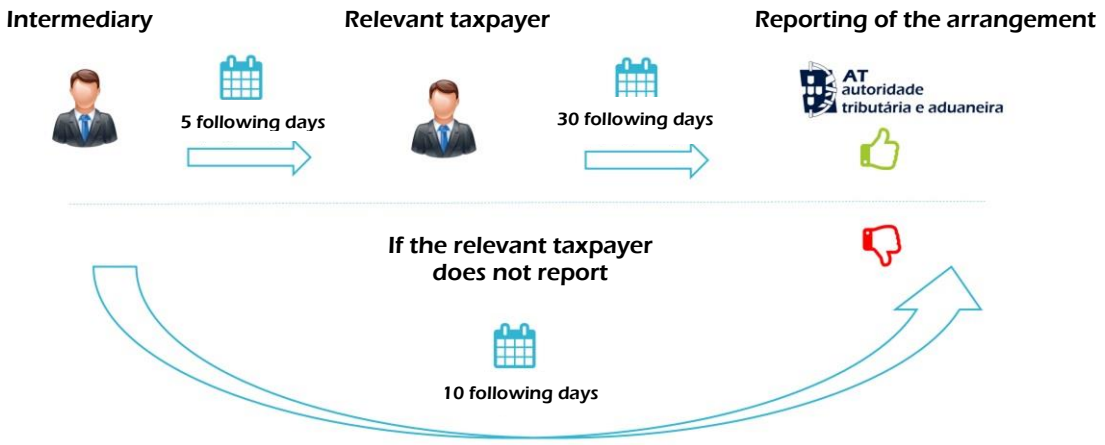
a) In situations covered by the legal or contractual duty of secrecy of the intermediary, the intermediary may invoke such a duty (in the sense that the prerogative of secrecy may prevail) and, if it does, the obligation to report to the AT of the internal or cross-border arrangement with fiscal relevance falls upon the relevant taxpayer (cf. Article 13 (1));

[9] The Directive (EU) 2018/822 states that each Member State "may" release intermediaries from the obligation to report if this internally violates a legal duty of professional secrecy, in which case the dismissed intermediaries would have to take responsibility for notifying another intermediary or the relevant taxpayer for them to assume the duty of communication. Therefore, it does not automatically establish such a waiver in view of a legal duty of professional secrecy; but admitting, yes, a mere "possibility" of dismissal, depending on the judgment that each national legislator makes regarding the confrontation of professional secrecy with the objectives now in question to prevent and combat tax evasion.

b) In order for this to occur, the intermediary shall notify the relevant taxpayer within the time limit provided for such notification (without prejudice to the transitional rule of Article 5 (2) of Decree-Law no. 53/2020, of August 11), that it shall comply with the reporting obligation to the AT, which thus came to fall upon it (cf. Article 13 (2));

c) The relevant taxpayer informs the intermediary, within 30 days following receipt of that notification, of the fulfillment of the obligation to report to the AT that has fallen upon him, presenting to the intermediary the proof of submission before the AT of the respective statement (cf. Article 13 (3));

d) If such information and proof does not arrive, within that period of 30 days in a row, the intermediary must comply with the obligation to report to the TA of the internal or cross-border arrangement with fiscal relevance, within 10 days in a row (CF. Article 13 (4)).



In view of this regime, the obligation to communicate to the AT of each of the internal or cross-border arrangements – which, in principle, falls upon the intermediary - becomes the responsibility of the relevant taxpayer, when, there is intermediary intervention in the arrangement to be reported, presenting this intermediary some of the connections to Portugal provided for in Article 9 (1) of Law no. 26/2020, of July 21, and being subject to the reporting obligation of the arrangement to the AT, it invokes

a legal or contractual duty of secrecy regarding a relevant taxpayer who presents any of the connections to Portugal provided for in Article 11 of Law no. 26/2020, of July 21.

And, in view of this same regime, the general information approved by Ordinance No. 304/2020, of December 29, clarify that, according to Article 13 (4) of Law no. 26/2020, of July 21, in situations of invocation by the intermediary of a legal or contractual duty of secrecy, there remains a subsidiary obligation to report to the AT, if it does not receive timely information from the relevant taxpayer, duly substantiated, that it has fulfilled the obligation to report to the AT that became his responsibility or that this obligation of reporting has been waived, in this case as provided for in no. 4 or no. 6 of Article 12 of Law no. 26/2020, of July 21.

In fact, in systematic terms, the condition that exempts the intermediary from such a subsidiary obligation to report to the AT must be considered fulfilled, provided for in Article 13 (3) of Law no. 26/2020, of July 21, in the cases, already mentioned, in which the relevant taxpayer upon whom the obligation to report to the AT of this obligation falls is exempted in accordance with no. 4 or no. 6 of Article 12 of the same Law.

It should be noted that the provision of Article 13 (3) of the Law no. 26/2020, July 21, is proved next to the intermediary that the relevant taxpayer has complied with the reporting obligation to the AT that fell upon him as soon as is submitted to the intermediary the receipt of the submission of the statement to the AT, being the intermediary's responsibility to verify whether such statement was actually submitted to the AT, and that it effectively concerns the arrangement, the report in question, without, the relevant taxpayer however, having the duty to verify the correctness of the information provided to the AT.

Precisely because of its specificity, this regulation presupposes an application in compliance with its strict limits, as set by the legislator, by:

a) Whether in the exclusively national (or internal) character of the same;

b) Whether it only highlights, of course, the legal or contractual duty of secrecy of the intermediary that may cover the already detailed analyzed typical services that qualify someone as an intermediary, which are:

i) The creation, marketing, organization or making available for application or the administration of the application of a arrangement to be reported in accordance with Article 2 (1) (e) of Law no. 26/2020, of July 21;

ii) The provision, directly or through other persons, of help, assistance or advice in the creation, marketing, organization or making available for the application or in the administration of the application of an arrangement to be reported, as referred to in Article 9 (2) of Law no. 26/2020, of July 21;

c) Finally, if it depends on the existence of an intermediary subject to the reporting obligation of the arrangement to the AT and also on the existence of a relevant taxpayer who can also be considered subject to the reporting obligation of the arrangement to the AT.

In view of this requirement for strict application, it should be noted that:

a) In order for the intermediary to be waived from reporting the arrangement to the AT in accordance with Article 10 (8) of Law no. 26/2020, of July 21, the said subsidiary obligation of reporting provided for in Article 13 (4) of the same law by another intermediary is only relevant if the respective communication proves to be concretely compatible with the deadline provided for in Article 10 (8), because, otherwise, the obligation to report to the AT that falls upon that first intermediary prevails;

b) And, symmetrically, the intermediary upon whom the subsidiary reporting obligation laid down in Article 13 (4) is imposed on Law no. 26/2020, of July 21, he or she may only be waived if next to the AT may be presented, within the term of this same no. 4 of Article 13, the proof provided for in that other article 10 (8) of the same Law.

Naturally, an intermediary who is exempted from communication to the AT in accordance with Article 10 (6) of Law no. 26/2020, of July 21, there is no need to invoke in Portugal any duty of secrecy. And the same is said of the intermediary who will soon be exempted from the communication to the TA now under Article 10 (8) of Law no. 26/2020, of July 21.

Finally, it should be clarified that, since there is a situation covered by the legal or contractual duty of secrecy of the intermediary in relation to a relevant taxpayer, the possibility of the intermediary not invoking such a duty for the purposes of the obligation to communicate to the TA established in Law no. 26/2020, of 21 July, depends exclusively on the legal and contractual terms conforming to that same duty and what on the matter is agreed between the intermediary and the relevant taxpayer.

III. PURPOSE OF THE REPORTING OBLIGATION TO THE AT: INTERNAL OR CROSS-BORDER ARRANGEMENT WITH TAX RELEVANCE

1. Characterization of the object of the reporting obligation

As referred to in the general information approved by Ordinance No. 304/2020, of December 29, for each arrangement, cross-border or internal, to be reported to the AT, it must be completed and submitted the statement for the purpose of that reporting (Modelo 58).

As mentioned in the same general information, the situation corresponding to the legal definition of “arrangement” (and “cross-border arrangements” or “internal arrangements”) must be reported to the AT, but provided that this situation is , one of the specific hallmarks, defined in paragraph b) of no. 1 of article 2 and typified in a definitive manner in article 5 of Law no. 26/2020, of 21 July, some of which are only relevant if the principal benefit test, defined in subparagraph k) of no. 1 of the same article 2, is verified jointly, and also, provided that the same situation concerns covered taxes, as these are identified

in articles 4 (as for cross-border arrangements) or 8 (as for internal arrangement) of the same Law; being that article 7 of this delimits more closely the specific hallmarks that are relevant in the case of internal arrangements.

2. Arrangement

2.1. Qualification of the arrangement

Under the definition contained in subparagraph f) of no. 1 of article 2 of Law no. 26/2020, of July 21, "arrangement" means "any plan, project, proposal, council, instruction or recommendation, expressed directly or tacitly, object or not of materialization in agreement or transaction, constituted by a construction with one or more of a stage or part, or by a series of constructions, simultaneous or sequential, being able to be marketed or bespoke".

The existence of an arrangement is the first condition for the birth of a specific obligation to report to the AT for the purposes of Law No. 26/2020, of July 21.

Thus, the fiscal situation that for Law No. 26/2020, of July 21, is relevant and is only that which constitutes as a result of the arrangement itself and not that which results from the mere fulfillment of the legal presuppositions that the same depends on, or, to put it another way, that results as a whole from the direct and immediate realization of the fiscal norm and its purpose, not being, in whole or in part, the objective result of that "construction" or "construction series" that make up the arrangement.

2.2. Marketable or bespoke arrangement

Law No. 26/2020, of July 21, makes the distinction between "marketable arrangements" and "bespoke arrangements":

a) “Marketable arrangements” [cf. subparagraph g), no. 1 of article 2] "the arrangements designed, marketed, ready to apply or made available for application, dispensing with a substantial adaptation thereof";

b) “Bespoke arrangements” [cf. subparagraph i) of no. 1 of article 2] “any arrangements that are not considered marketable arrangements”.

This distinction between marketable and bespoke agreements is relevant for the purposes of Law No. 26/2020, of July 21, essentially because:

a) Only in relation to marketable arrangements does the aforementioned additional obligation of the intermediary, provided for in no. 4 of article 10, exist, to submit to AT, every three months, an update report that includes certain new information that has arose since the initial communication or since the presentation of the previous report;

b) The generic specific hallmark related to the main benefit test provided for in subparagraph c) of paragraph 1 of article 5 concerns precisely the marketable arrangement, given the terms as it is typified: “The arrangement implies documents and or a substantially standardized structure that is available to more than one relevant taxpayer, without the arrangement needing to be substantially adapted to apply.”

2.3. Internal or cross-border arrangement

Law No. 26/2020, of 21 July, also distinguishes between "internal arrangements" and "cross-border arrangements":

a) “Internal arrangements” [cf. subparagraph h) of no. 1 of article 2] "those that, depending on their objective characteristics, are able to be applied or to produce effects, totally or partially, in Portuguese territory and are not cross-border arrangements”;

b) “Cross-border arrangements” [cf. Article 2 (1) (j)] are “those who have a cross-border structure because they concern more than one Member State of the

European Union or one Member State and a third country, if at least, it has one of the following conditions:

i) Not all participants in the arrangement are, for tax purposes, resident in the same jurisdiction;

ii) Any of the participants in the arrangement is, for tax purposes, simultaneously resident in more than one jurisdiction;

iii) Any of the participants in the arrangement carries out an activity in another jurisdiction through a permanent establishment located in that jurisdiction and the arrangement forms part or all of the activity of that permanent establishment;

iv) Any of the participants in the arrangement is active in another jurisdiction without being resident for tax purposes in that jurisdiction or creating a permanent establishment located in that jurisdiction;

v) The arrangement has a possible impact on the automatic exchange of information related to financial accounts or on the identification of the beneficial owner".

This distinction between internal and cross-border arrangement is relevant for the purposes of Law No. 26/2020, of July 21, essentially because:

a) In the internal arrangements, only the specific hallmarks typified in no. 2 to 5 of article 5 (see article 7) are relevant, while in cross-border arrangements, all the specific hallmarks typified in article 5 are relevant (see article 3);

b) In internal arrangements, the taxes covered are those listed in article 8, while in cross-border arrangements the taxes covered are those described in article 4;

c) The already analyzed waiver from the obligation to report the intermediary provided for in no. 6 of article 10 and exemption from reporting of the relevant taxpayer provided for in no. 4 of article 12 only apply in the case of cross-border arrangements and not in the case of internal arrangements;

d) The automatic information exchange regime between Member States in Article 16 applies only in the case of cross-border arrangements and not in the case of internal arrangements;

e) The transitional regime of article 22 only applies in the case of cross-border arrangements and not in the case of internal arrangements.

It is important to underline that, if legally the concepts of "internal arrangements" and "cross-border arrangements" do not overlap - precisely because, as we have seen, the definition of "internal arrangements" contained in Article 2 (1) (h). Of Law no. 26/2020, of July 21, assumes that only "non-cross-border arrangements" are internal arrangements-, in substantial terms, such an overlap can perfectly occur, insofar as the cross-border arrangements, in accordance with their concrete objective characteristics, "whether they are apt to be applied or to produce effects, totally or partially, in Portuguese territory".

When this is so, however, for the purposes of the entire regime of Law No. 26/2020, of 21 July, the characterization of the arrangement as a cross-border arrangement, without prejudice, of course, to the taxes covered described in article 4, prevails. º - with the exception of value added tax - may be included the covered taxes listed in article 8.[10]

On the other hand, it is important to bear in mind that, as stated, article 7 of Law no. 26/2020, of July 21, has all the specific hallmarks typified in paragraphs 2 to 5 of Article 5.

[10] Article 4 of Law no. 26/2020, of 21 July, stipulates, within the scope of the section of Chapter II on cross-border arrangements: "Taxes of any nature covered by the reporting obligation provided for in this section by the Member States, or on their behalf, or by their territorial or administrative political subdivisions, or on their behalf, including local authorities, charged in the territory to which treaties under Article 52 of the Treaty on European Union apply , with the exception of value added tax, customs duties, excise duties covered by other European Union legislation on administrative cooperation between Member States and mandatory social security contributions due to a Member State, to a subdivision of the Member State, or to Social security institutions governed by public law. " In view of this description, the taxes covered in article 8 of Law no. 26/2020, of July 21, regarding internal arrangements - with the exception of value added tax - can be integrated, namely: the personal income tax, as well as the autonomous taxation related to it; the corporate income tax, as well as autonomous taxation and related spills; the municipal property tax; the municipal tax on onerous transfers of property; the stamp duty tax.

Hence it cannot, ab initio and in a general and abstract perspective, exclude from the content of the internal arrangements any specific hallmarks related to the main benefit test, any specific hallmark related to cross-border operations, any specific hallmark related to legal obligations to inform financial accounts or to identify beneficial owners and also any specific hallmarks related to transfer pricing.

In fact, only in view of each concrete situation of internal arrangement can it be verified whether it contains, or not, any of these specific hallmarks[11]; although some of them may have been conceived primarily from the perspective of cross-border arrangements.

3. Specific hallmark

3.1. Qualification of specific hallmark

Subparagraph b), no.1 of article 2 of Law no. 26/2020, of July 21, defines "specific hallmarks" as "those that translate, objectively and by themselves, the indictment of a potential risk of tax evasion, including circumventing legal obligations to inform financial accounts or identify beneficial owners".

And article 5 of Law no. 26/2020, of July 21, by means of an exhaustive typicality, lists the specific hallmarks to be taken into account for the purpose of reporting to the AT of internal or cross-border arrangements.

In fact, the aforementioned concept of specific hallmark is core in the normative system of Law No. 26/2020, of July 21, similarly, in fact, to what occurs in the Directive (EU) 2018/822 of the Council of May 25, 2018.

And this concept is central to the normative system of Law No. 26/2020, of July 21, since, as we have seen, it establishes the duty to report to the AT:

[11] As an example, an operation that involves a transfer of assets within the scope of a merger between associated enterprises headquartered in Portugal is not relevant for the purposes of filling in the specific hallmarks provided for in subparagraph c) of no. 5 of article 5 of Law No. 26/2020, of July 21.

a) Any cross-border arrangement that contains at least one of the specific hallmarks typified in article 5 (see article 3);

b) Any internal arrangement that contains at least one of the specific hallmarks typified in no. 2 to 5 of article 5 (see article 7).

Article 5 of Law no. 26/2020, of July 21, categorically typifies all relevant specific hallmarks, following the categories established by the Council Directive (EU) 2018/822, of May 25, 2018:

- ✓ Generic hallmarks related to the main benefit test (cf. no. 1);
- ✓ Generic hallmarks related to the main benefit test (cf. no. 2);
- ✓ Specific hallmarks related to cross-border operations (cf. no. 3);
- ✓ Specific hallmarks related to legal obligations to inform on financial accounts or to identify beneficial owners (cf. no. 4);
- ✓ Specific hallmarks related to transfer pricing (see no 5).

If the identification of the specific hallmarks respected the categories of Council Directive (EU) 2018/822, of May 25, 2018, article 5 of Law no. 26/2020, of July 21, did not fail to assume occasional drafting adaptations, as is the case with subparagraph b) of no. 2, with subparagraphs a) iii) and iv) of no. 3, with subparagraph b) of no. 4 or with subparagraphs a), b) and c) of no. 5.

The list, duly encoded, of the specific hallmarks categorized in terms of taxation in Article 5 of Law no. 26/2020, of July 21, is included in the instructions for filling out the "Modelo 58" statement approved by Administrative Rule no. of December 29, where this list is matched with the one contained in Council Directive (EU) 2018/822 of May 25, 2018 (DAC6), all in accordance with the following table:

Code	*DAC6*	Article 5 of Law No. 26/2020, of July 21	
	A	**1**	**1 – It is considered to be present generic specific hallmarks related to the main benefit test, whenever:**
01	A1	1, a)	*(a)* the relevant taxpayer or any other participant in the arrangement undertakes not to disclose to any third party, such as other intermediaries or to the AT, how the arrangement may provide a tax advantage;
02	A2	1, b)	*(b)* the intermediary shall be entitled to receive fees by the arrangement, including provisions, interest or remuneration for financing costs and other charges, and such fees shall be fixed by reference to the amount of the tax advantage resulting from the arrangement or whether or not the arrangement actually allows the obtaining of a tax advantage, and may include the obligation to refund, in whole or in part, the fees if part or all of the tax advantage;
03	A3	1, c)	*(c)* the arrangement involves substantially standardized documents and / or a structure that is available to more than one relevant taxpayer, without the arrangement needing to be substantially adapted to apply.
	B	**2**	**2 – It is considered to be present generic specific hallmarks related to the main benefit test, whenever:**
04	B1	2, a)	*(a)* one of the participants in the arrangement takes artificial measures consisting in the acquisition of a loss-making enterprise, the cessation of the main activity of that enterprise and the use of the losses in that enterprise to reduce its tax burden, including by transferring those losses to another jurisdiction or accelerating the use thereof;
05	B2	2, b)	*(b)* an arrangement has the effect of converting income into capital, donations or other categories of income taxed more favorably, exempt from taxation or not subject to it;
06	B3	2, c)	*(c)* an arrangement includes circular transactions resulting in a (round-tripping) of funds, through the involvement of interposed entities with no other primary business function, or transactions that reward or cancel each other, or that have other similar characteristics.

Code	*DAC6*	Article 5 of Law No. 26/2020, of July 21	
	C	**3**	**3 – It is considered to be present generic specific hallmarks related to the main benefit test, whenever:**
	C1	3, a)	*(a)* an arrangement involves the deductibility of cross-border payments made between two or more associated enterprises and where at least one of the following conditions is met:
07	C1, a)	3, a), i)	*i)* the recipient is not resident, for tax purposes, in any tax jurisdiction;
08	C1, b), ii)	3, a), ii)	*ii)* although the addressee is resident, for tax purposes, in a tax jurisdiction, it is included in a list of jurisdictions in third countries that have been assessed as non-cooperating by Member States, collectively or within the framework of the Organization for the Economic Cooperation and Development (OECD);
09	C1, b), i)	3, a), iii)	*iii)* although the recipient is resident, for tax purposes, in a tax jurisdiction, that jurisdiction does not subject him to any corporation tax or subject him to corporate income tax, exempting him or applying to him a nominal rate of less than 1 %;
10	C1, c), d)	3, a), iv)	*iv)* the payment is more favorably taxed, exempt from taxation or not subject to taxation in the jurisdiction in which the recipient resides for tax purposes;
11	C2	3, b)	*(b)* deductions on the same depreciation of an asset are required in more than one tax jurisdiction;
12	C3	3, c)	*(c)* the elimination or mitigation of double taxation on the same income or capital item is required in more than one tax jurisdiction;
13	C4	3, d)	*(d)* an arrangement includes transfers of assets and the existence involved of a material difference in the amount treated as payable in respect of those assets in the tax jurisdictions.
	D	**4**	**4 – It is considered to be present specific hallmarks related to legal obligations of information on financial**

Code	*DAC6*	Article 5 of Law No. 26/2020, of July 21	
			accounts or identification of beneficial owners, whenever:
	D1	4, a)	*(a)* an arrangement may have the effect of circumventing the reporting obligation set out in rules implementing European Union law on the automatic exchange of information relating to financial accounts or in any equivalent agreements, including agreements with third countries, or of taking advantage of the absence of such rules or agreements, and in which at least one of the following conditions is met:
14	D1, a)	4, a), i)	*i)* the use of an account, product or investment which is not, or is intended not to be, a financial account but which has substantially similar characteristics to that of a financial account;
15	D1, b)	4, a), ii)	*ii)* the transfer of financial accounts or financial assets to jurisdictions that are not subject to the automatic exchange of financial account information with the relevant taxpayer's state of residence, as well as any other use of those jurisdictions;
16	D1, c)	4, a), iii)	*iii)* the reclassification of income or capital in products or payments that are not subject to the automatic exchange of financial account information;
17	D1, d)	4, a), iv)	*iv)* the transfer or conversion of a financial institution, financial account or assets contained therein to a financial institution, financial account or assets not subject to the reporting obligation under the automatic exchange of financial account information;
18	D1, e)	4, a), v)	*v)* the use of legal entities, arrangements or structures that eliminate, or intend to eliminate, the obligation under the automatic exchange of information relating to financial accounts to communicate the identity of one or more financial account holders or persons exercising control;
19	D1, f)	4, a), vi)	*vi)* defrauding or exploiting gaps in due diligence procedures used by financial institutions to fulfil their reporting obligations relating to financial accounts, including the use of jurisdictions with inadequate or insufficient regimes to ensure enforcement of anti-money

Code	*DAC6*	Article 5 of Law No. 26/2020, of July 21	
			laundering legislation or with insufficient transparency requirements regarding legal persons or legal arrangements;
	D2	4, b)	*(b)* an arrangement which involves a non-transparent chain of legal ownership or beneficial ownership, using legal persons, arrangements or structures:
20	D2, a), b), c)	4, b), i), ii), iii)	*i)* Not pursuing a substantial economic activity supported by adequate personnel, equipment, assets and facilities; and *ii)* Are incorporated, managed, resident, controlled or established in any jurisdiction other than the jurisdiction of residence of one or more of the beneficial owners of the assets held by such persons, arrangements or legal structures; and, *iii)* In which it is not possible to identify the beneficial owners of these persons, arrangements or legal structures, applying the definition of "beneficial owners" contained in Law No. 83/2017, of August 18.
	E	**5**	**5 – It is considered to be present specific hallmarks related to the main benefit test, whenever:**
21	E1	5, a)	*(a)* an arrangement involves the use of safeguard or protection regimes unilaterally assumed in a jurisdiction but not provided for in the international consensus enshrined in the OECD standards on transfer pricing;
22	E2	5, b)	*(b)* an arrangement involves the transfer of intangible assets that are difficult to assess;
23	E3	5, c)	*(c)* an arrangement involving the cross-border transfer within a group of companies, the functions and/or risks and/or assets, and whether the results of the annual projected before interest and taxes (EBIT) for the period of three years following the transfer, the transferor or the originator, this is less than 50 % of the NET annual projected on that or those lenders if the transfer had not been made.

Regarding the specific hallmarks set out in Article 5 (2) (a) of Law No. 26/2020, of July 21, it should be considered that the main business activity mentioned therein refers to the activity pursued in substantial terms by the company, regardless of the classification of economic activity mentioned in the register, and that such main activity corresponds to the most important activity, taking into account the average turnover in the last three exercises.

For the purposes of the specific hallmark typified in subparagraph b) of no. 2 of article 5 of Law no. 26/2020, of July 21, it should be borne in mind that the expression “other categories of income” does not refer to the income categories as defined in Portuguese tax legislation, maximal to the income categories provided for in the Personal Income Tax Code, referring instead, in coherence with Council Directive (EU) 2018/822, of May 25, 2018, to any other type of income whose legal-tax framework provides for a more favorable taxation, an exemption from taxation or a non-subjection to taxation.

It should be borne in mind that the specific hallmarks related to cross-border transactions referred to in Article 5 (3) (A) (iv), of the Law n ° 26/2020, July 21, is the result of the combination of the specific hallmarks provided separately in subparagraphs c) and d) of no. 1 of Part II of the Annex to the Directive (EU), 2018/822 of the Council of May 25, 2018 at the latest, so it should be interpreted as a reference to a payment that is “being favorably taxed” in the jurisdiction in which the beneficiary resides for tax purposes in line with the reference to the payment that "benefits from preferable tax scheme”, in the jurisdiction in which the beneficiary resides for tax purposes reference mentioned in subparagraph d), n. º 1, C) of Part II of the Annex to the Directive (EU), 2018/822 of the Council of May 25, 2018.

Thus, the concrete verification of whether or not a payment is “taxed more favorably” in the jurisdiction in which the recipient resides implies, in addition to actually more favorable taxation in that jurisdiction, that, cumulatively, the jurisdiction in which the recipient resides constitutes a country, territory or region with a clearly more favorable tax regime included in the list approved by the ordinance provided for in article 63-D

of the General Tax Law and / or that the treatment of this specific payment in the jurisdiction in which the beneficiary resides for tax purposes is considered, at the time the payment is received, as a harmful tax practice by the *Forum on Harmful Tax Practices* (FHTP), within the framework of Action 5 of the Action Plan of the OECD's BEPS (Base Erosion and Profit Shifting) Action Plan.

With regard to the specific hallmark typified in subparagraph b) of no. 3 of article 5 of Law no. 26/2020, of July 21, considering the accounting and tax repercussions of the absence of individuality of the permanent establishment in view of the legal entity that holds it, it should be considered that the situations in which the same element of the asset is subject to depreciation in the sphere of the permanent establishment, under the terms of the jurisdiction in which it is held, do not count for verification of this specific hallmark is located, and in the sphere of the entity that owns that same permanent establishment, when the income obtained through that permanent establishment is subject to taxation, and not exempt, in the sphere of this entity.

On the other hand, it should be borne in mind that, in line with (13) of Council Directive (EU) 2018/822 of May 25, 2018, in the qualification of a situation within the scope of the specific hallmarks related to the legal reporting obligations concerning financial accounts or of identification of beneficial owners, it is possible to use the OECD's published work on mandatory reporting of arrangements that can be used to circumvent such legal reporting obligations, in particular the OECD publication (2018), *Model Mandatory disclosure rules for CRS avoidance arrangements and opaque offshore structures*.

It should also be noted that the specific hallmark provided for in Article 5 (5) of Law No. 26/2020, of July 21, presupposes the non-compliance of the arrangement with the international consensus on permissible safeguard or protection regimes, reflected in the OECD standards on transfer pricing [cf. *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines),* of July 2017], and such compliance with the established canons as a result of the work of the *EU Joint Transfer Pricing Forum* (EU JTPF) may be

considered to exist. Thus, the "safeguard or protection regimes unilaterally assumed in a jurisdiction" referred to in that same article 5 (5) (a) of Law No. 26/2020, of July 21, refer to the concept of "*safe harbour*", according to the aforementioned OECD *Transfer Pricing Guidelines*.

Finally, it should be noted that for the purposes of the specific hallmarks typified in Article 5 (5) (b) of Law No. 26/2020, of July 21, the notion of "intangible assets difficult to assess" is contained in Article 2 (1) (a) of the same Law, in accordance with the following: "the intangible fixed assets or rights upon intangible assets and fixed assets, for which, at the time of their transfer between related companies, there are no elements of comparison to be reliable, and, at the time of the completion of the transaction, the estimated future cash flows or of the expected revenues arising from the intangible assets transferred, or the assumptions used in the assessment of the intangible asset are highly uncertain, making it difficult to predict at the time of the transfer, the degree of successful outcome of the intangible asset".[12]

Since transfers between associated companies are involved (CF. definition of Article 2 (2) of Law no. 26/2020, of July 21), are not relevant for this specific hallmark typified in Article 5 (5) (b) the transfers involving a permanent establishment, because this does not present individuality in view of the legal entity who holds it.

The same is true for the specific hallmark typified in Article 5 (5) (c) of Law no. 26/2020, of July 21, which, in fact, only reveals when the expected reduction foreseen in the value of EBIT (determined under the financial reporting standards) occurs in a positive EBIT.

3.2. Purpose of specific hallmarks

Given the aforementioned legal definition of "specific hallmarks" such as " those that translate, objectively and by themselves, the indictment of a potential risk of tax evasion, including the circumvention of legal obligations of information on financial

[12] In this regard should be considered *The OECD Transfer Pricing Guidelines* and the June 2018 publication of OECD *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles.*

accounts or identification of beneficial owners", it is useful to quote here what about the purpose of the same was written in the Explanatory Statement of the proposal of Law no. 11 / XIV, which was at the origin of Law no. 26/2020, of July 21:

> *It should be stressed that the specific hallmarks do not reflect an effective situation of tax evasion and, even less, an anticipation of what the reaction of the tax authorities should be to the tax situations revealed by the reported arrangements. As follows from Article 2 (b) (...), in line with Directive (EU) 2018/822, the specific hallmarks, by themselves and given their objective configuration, translate, that yes, "the indictment of a potential risk of tax evasion" - "indication", in the expression also used by the Directive.*

And it does not cease to be so in cases where the specific hallmarks can only be taken into account if the main benefit test can cumulatively be considered verified.

Nor does it cease to be so at other times in Article 5.º of Law no. 26/2020, of July 21, namely: in the specific hallmark that refers to "artificial measures "[cf. No. 2 (a)]; in the specific hallmarks referring to the absence of "other primary commercial function" [cf. point (C) of paragraph 2]; in the specific hallmark that refers to the "circumvention of obligations "[cf. subparagraph (a) of no. 4]; in the specific hallmark that refers to "defrauding of procedures "[cf. paragraph 4 (A) (vi)]; in the hallmark that refers to the absence of the pursuit of a "substantial economic activity" [cf. No. 4 (b) (i)].

In fact, quoting again the Explanatory Statement of the proposal for Law no. 11 / XIV, which was at the origin of Law no. 26/2020, of July 21:

> *It is important to bear in mind that such an "indictment of a potential risk of tax evasion", translated by the key characteristic itself, given its objective configuration, it is sufficient to establish the obligation to report any of the arrangements containing at least one of the specific hallmarks typified; therefore, there is no need for any definition of tax evasion or-in the terminology also used by the directive - of aggressive tax planning.*

The system of Council Directive (EU) 2018/822 of May 25, 2018 – and necessarily also the system of Law no. 26/2020 of July 21 – is based on an abstract list of marker aspects ("specific hallmarks"), including when they claim verification of the main benefit test, capable of determining the concrete situations of arrangements whose report must be carried out.[13]

The option of Council Directive (EU) 2018/822 of May 25, 2018 – and necessarily also the option of Law no. 26/2020 of July 21 – was not, therefore, to have its system built on the definitions of tax evasion or aggressive tax planning; but just as little was to list the concrete situations of arrangements whose reporting should be made (blacklist) or should not be made *(whitelist)*.

The list of such specific hallmarks, contained in article 5 of Law no. 26/2020, of July 21, is a typical and exhaustive list, which means that it is a necessary and sufficient condition for the characterization of a concrete arrangement as an arrangement to report, that is, such a list has to be interpreted and applied strictly, whether the arrangement is internal or cross-border, not dismissing any element contained therein or allowing any element not included in it to be added.

Thus, by way of example, any of the conditions set out in Article 5 (4) (a) of Law no. 26/2020, of the July 21, the only relevant feature is the specific hallmark, if, cumulatively, at least one of them occurs in an arrangement, (and the object of the report is on the arrangement, it is not in any of those conditions per se), that is, in accordance with the terms of this paragraph (a) to the effect that, considered objectively and per se, even in the context of their circunstancialism, to avoid the obligation of presenting the information (on the assumption, therefore, of the existence of such an obligation, and in the exact terms in which it is normatively bounded)" laid down in the rules implementing the law of the European Union on the automatic

[13] Please note what is written in Council Directive (EU) 2018/822 of 25 May 2018:
Aggressive tax planning arrangements have evolved over the years, becoming increasingly complex and subject to constant changes and adjustments in reaction to defensive countermeasures adopted by tax authorities. In view of this situation, it might be more effective to try to cover potentially aggressive tax planning arrangements by compiling a list of aspects and elements of transactions that may constitute strong evidence of tax evasion or abusive tax practices rather than defining the concept of aggressive tax planning. These indications are referred to as "specific hallmarks".

exchange of information in the financial account statements or in any equivalent agreements, including any agreements with third-party countries, or to take advantage of the absence of such policies or contracts".

Such "rules implementing European Union law on the automatic exchange of information relating to financial accounts or in any equivalent agreements, including agreements with third countries" comply with the reporting obligation on financial accounts for the purposes of the automatic exchange of information inherent in the Common Reporting Standard (*CRS*), drawn up by the OECD and accepted in the European Union by Directive 2014/107/EU (*DAC2*), transposed by Decree-Law no 64/2016, October 11, including third jurisdictions that apply the CRS under a European Union legal instrument or jurisdictions that shall, under a conventional international legal instrument, automatically exchange information with Portugal specified in the CRS.

4. Main benefit test

4.1. Qualification of the main benefit test

Article 2 (1) (k) of Law no. 26/2020 of July 21, defines the "main benefit test" as "one that is considered satisfied if it can be determined, without reasonable doubt, that obtaining a tax advantage, in the legal sphere of the relevant taxpayer or third party, is the main benefit or one of the main benefits that, objectively and in the light of all relevant facts and circumstances, can reasonably be expected from the arrangement".

In its turn, Article 2 (1) (l) of Law no. 26/2020, of July 21, defines "tax advantage as "the reduction, elimination or temporal deferral of tax, including the use of tax losses, or the obtaining of tax benefit, which would not be achieved, in whole or in part, without the use of the arrangement".

And, for its part, article 6.º of Law no. 26/2020, of July 21, establishes which specific hallmarks are "only relevant for the purposes of the obligation to communicate if they

can be considered to have verified the test of the main benefit": these are the specific hallmarks contained in no. 1, no. 2, iii) and iv) of subparagraph a) of no. 3 of Article 5.

Thus, in these cases, the non-verification (or non-satisfaction) of the main benefit test translates an additional factor that inhibits the constitution of the reporting obligation of any arrangement to the AT.

4.2. Verification of the main benefit test

As referred to in the general information approved by Ordinance no. 304/2020, of December 29, "in cases where Law no. 26/2020, of July 21, makes depend the relevance of specific hallmark(s) of the joint verification of the main benefit test, it should be clarified that the mere fact of enjoying a tax advantage (namely a tax benefit[14]) it does not necessarily translate the verification of the main benefit test".

In addition, we add the following to this general information:

> *As follows from the definition of "main benefit test" in Article 2 (1) (k) of Law no. 26/2020, of July 21, the verification (or satisfaction) of such a test presupposes that it can be determined, without reasonable doubt and given the concrete objective circumstantialism, that obtaining a tax advantage constitutes, according to a criterion of reasonable expectation, the main result or one of the main results provided by the arrangement. And the definition of "tax advantage", contained in paragraph l) of Article 2 (1) of Law no. 26/2020, of July 21, reinforces that it only highlights the tax advantage that "would not be achieved, in whole or in part, without the use of the arrangement".*
>
> *Therefore, the verification of the main benefit test assumes, cumulatively, the existence of an arrangement and the existence of a tax advantage that would*

[14] Or, also by way of example, an exemption or reduction of taxation in terms and within the terms and for the respective purpose, either of a convention to avoid double taxation, or of a duly transposed European Union regime.

not be obtained, in whole or in part, without it. Thus, it is not deemed to have met the main benefit test when a tax benefit will be fully achieved as a result of the mere fulfillment of legal requirements that it depends on, or, to put it another way, when the taking of that tax advantage constitutes the outcome, is direct and immediate, the standard of tax and its purpose, and will not be, in whole or in part, the result of the objective of the "construction" and "series of constructions" that make up the arrangement, as defined in subparagraph (f) of no. 1) of article 2 of the Law no. 26/2020, July 21.

In fact, it follows from such definitions that the verification of the main benefit test presupposes that it can be assumed, without reasonable doubt and in the face of concrete objective circumstantialism, that obtaining a tax advantage is the main result or one of the main results that, according to a criterion of reasonable expectation, is provided by the arrangement. It only highlights, therefore, the tax advantage that "would not be achieved, in whole or in part, without the use of the arrangement" [cf. Article 2 (1) (l) of Law no. 26/2020, of July 21].

Therefore, the verification of the main benefit test assumes, cumulatively, the existence of an arrangement and the existence of a tax advantage that would not be obtained, in whole or in part, without it. And hence, in the same way, the main benefit test is not verified when the tax advantage is fully obtained as a direct and immediate result (without intermediation of an arrangement) of the fulfillment of the legal assumptions on which it depends, or, in another terminology, when the tax advantage constitutes the direct and immediate realization of the statute itself or provision of the tax norm and its purpose.

5. Content of the reporting obligation to AT

Article 15 (1) of Law no. 26/2020, of July 21, identifies, as provided for in Council Directive (EU) 2018/822, of May 25, 2018, the information elements to become knowledge of the AT regarding each of the arrangements to be reported.[15]

Such information to be communicated to the AT, are, as applicable, the following:

a) The identification of the intermediaries and relevant taxpayers, including their names, dates and places of birth, natural persons, residences for tax purposes, tax identification numbers and, if applicable, persons who are associated enterprises of the relevant taxpayer;

b) The details of the specific hallmarks that configure the arrangement as one to report;

c) A summary of the content of the arrangement to be reported, including a reference to the name by which it is commonly known, if any, and a description, in abstract terms, of the relevant business activities or relevant regulatory arrangements, unless that description leads to the disclosure of a commercial, industrial or professional secret or a commercial process, or of information whose disclosure is contrary to public order;

d) The date on which the first step in the application of the arrangement was or will be carried out must be indicated;

e) The details of the regulatory provisions forming the basis of the arrangement to be reported, and such provisions may, depending on the arrangement, integrate more than one jurisdiction;

f) The value of the transactions constituting the arrangement itself to be reported, irrespective of the tax advantage expected from the arrangement;

g) The identification of the Member State of the relevant taxpayers and of any other member state likely to be related to the reporting arrangement;

[15] No. 2 of the same article provides for the possibility of the AT notifying the subject of the reporting obligation so that the subject, within a reasonable period (to be fixed between 10 and 20 days in a row), clarifies, perfects or completes such information properly.

h) The identification of any other person or entity without legal personality in a Member State likely to be covered by the arrangement to be reported, with an indication of the Member States to which that person or entity is linked.

It was precisely considering the content of these information elements to be reported to the AT, that ordinance no. 304/2020, of December 29, under the provisions of Article 24.º of Law no. 26/2020, of July 21, was approved the statement "Modelo 58" aimed at ensuring compliance with said declarative obligation of reporting to the AT of internal or cross-border arrangement with fiscal relevance, as well as the general information and instructions for filling in such statement.

It should be noted that, in the absence of an arrangement to report, the information related to the same arrangement – in view of the special nature of the purposes thereof, and as to the reporting, including the automatic exchange between the Member States, should be declared to the AT, regardless of the judgment of the declarant to make, about whether the information is already in the possession of the AT by any other type of procedure, or statement.

6. Purposes of the information reported to AT

In addition to the above mentioned automatic exchange between Member States of information relating to cross-border arrangements, as provided for in Article 16 of Law no. 26/2020, of July 21, the information reported to the AT regarding arrangements, internal or cross-border, allows to pursue certain internal purposes, especially if this information communicated concerns arrangements that, depending on their objective characteristics, are able to be applied or to produce effects, totally or partially, in Portuguese territory.

These internal purposes are regulated in Article 17 and 18 of Law no. 26/2020, of July 21, in terms consistent with that purpose indicated to the specific hallmarks, which "do not translate an effective situation of tax evasion and, even less, an anticipation of what should be the reaction of the tax authorities to the tax situations revealed by the reported arrangements", translating instead, "objectively and by themselves", an "indictment of a

potential risk of tax evasion, including the circumvention of legal identification of beneficial owners".

Thus, according to Article 18 of Law no. 26/2020, of July 21, the "absence of participation on behalf of the AT on an arrangement that is reported to it (...) does not have the effect of any tacit acceptance upon the tax framework intended with this arrangement", thus preserving the AT its competence to, under the terms and limits of the law, differently frame the tax situation revealed by the communicated arrangement, as a possibility that is expressly referred to in Paragraph a) of Article 17 (1) of the same Law.

And in accordance with Article 17 (1) (b), in possession of the information received, the TA may also, in the face of the limits of a legal system strictly delimited by the principle of closed or tax typicity, design and propose appropriate regulatory measures to better frame the tax situations revealed by the arrangements report.

On the other hand, the AT must adapt the programming and action of the tax inspection in view of the relevance of the arrangements reported, and, without prejudice to the powers of the other bodies and services of the AT, it is a prerogative of the tax inspection to verify compliance with the obligations provided for in Law no. 26/2020, of July 21, all in accordance with subparagraph c) of no. 1 and no. 3 of that Article 17.

Finally, in accordance with no. 1 (d) and Article 17 (2), the AT may disclose, for the purposes of preventing tax evasion, the arrangements reported and even the arrangements of which it has become aware for itself. However, it must do so without identifying the respective participants and in abstract and synthetic terms and, also, with the exception of cases in which the disclosure proves inadequate, for the purposes of preventing tax evasion itself or the defense of the public interest that it shall pursue.