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The transposition of Directive (EU) 2022/2523 into the Portuguese legal order

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Il recepimento della direttiva (UE) 2022/2523 nell'ordinamento giuridico portoghese

The Base Erosion and Profit Shifting (BEPS) project remains a significant international initiative aimed at fostering cooperation between states under the auspices of the Organisation for Economic Co-operation and Development (OECD). Pillar II represents a major milestone, driving countries toward the implementation of a global minimum tax rate to curb harmful tax competition. At the European Union (EU) level, concerns about maintaining the integrity of a single market played a crucial role in shaping legislative measures on corporate taxation. To address these concerns, the EU introduced a directive aimed at ensuring a harmonized approach among member states. The directive received unanimous approval, reflecting a collective commitment to prevent tax avoidance and safeguard fair competition. As part of this effort, Portugal, like other EU countries, transposed its directive into its national legal framework. This article examines the key aspects of the transposition process, its implications for the Portuguese legal system, and how it aligns with the broader EU and international tax policies.

Il progetto BEPS (Base Erosion and Profit Shifting) rimane un'importante iniziativa internazionale volta a promuovere la cooperazione tra Stati sotto l'egida dell'Organizzazione per la Cooperazione e lo Sviluppo Economico (OCSE). Il Secondo Pilastro rappresenta una pietra miliare importante, spingendo i Paesi verso l'attuazione di un'aliquota minima globale per frenare la concorrenza fiscale dannosa. A livello dell'Unione Europea (UE), le preoccupazioni relative al mantenimento dell'integrità del mercato unico hanno svolto un ruolo cruciale nella definizione delle misure legislative in materia di tassazione delle società. Per rispondere a tali preoccupazioni, l'UE ha introdotto una direttiva volta a garantire un approccio armonizzato tra gli Stati membri. La direttiva ha ricevuto l'approvazione unanime, riflettendo un impegno collettivo a prevenire l'elusione fiscale e a salvaguardare la concorrenza leale. Nell'ambito di questo sforzo, il Portogallo, come altri Paesi dell'UE, ha recepito la direttiva nel proprio quadro giuridico nazionale. Questo articolo esamina gli aspetti chiave del processo di recepimento, le sue implicazioni per l'ordinamento giuridico portoghese e il suo allineamento con le più ampie politiche fiscali dell'UE e internazionali.

Keywords: Tax Law; Pillar II; Global minimum tax rate; Directive (EU) 2022/2523; Portuguese legal order.

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1. Implementing the effective minimum tax in Portugal: preliminary thoughts

The European Council, in accordance with the agreement reached on the 8th of October 2021, by the OECD/G20 Inclusive Framework on Pillar II, was proposed and adopted by Directive (EU) 2022/2523 on the 14th of December 2022, to ensure a global regime minimum level of taxation (RGMT) for multinational enterprise groups and large-scale domestic groups in the Union.[1] The Directive's objective aligns with the Pillar Two rules and facilitates the adoption by all member states of a common framework for a global minimum level (GML) of taxation within the European Union (EU).

The primary concern of the European Union's is to "reinforce the fight against aggressive tax planning," as mentioned in the recitals contained within the directive. The recitals of the directive state further clarify that "the major reform aims to put a floor on competition over corporate income tax (…) by removing a substantial part of the advantages of shifting profits to jurisdiction with no or very low taxation, and that the global minimum tax reform will (…) allow jurisdictions to better protect their tax bases. In order to prevent the fragmentation of the internal market a global minimum tax reform must be implemented."[2] Therefore, the directive framework, and consequently, the legal text transposed by member states, is embedded with these aims.

Indeed, the first aim of the directive, by adopting top-up taxes, is to protect countries' tax bases from erosion and profit shifting to low-tax jurisdiction by the MNE.

In this context, we now list the main characteristics of these measures, which are essential for their proper understanding.

i) The top-up taxes are legal fictions

Although these taxes were designated by the OECD as anti-base erosion rules in line with the BEPS project, the top-up taxes do not work as anti-avoidance rules. This can be read in two ways: legal fiction or anti-avoidance rules as irrebuttable presumptions of avoidance, which could clash with the exercise of European Union fundamental freedoms.[3] Therefore, those rules must be seen as legal

1. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021* (8 October 2021) and Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

2. Recital 1 and 2, Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

3. *Editorial: The Pillar Two Top-up Taxes: Interplay, Characterization, and Tax Treaties*, in Intertax, 50, 2022, 388.

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fictions, "as they change the legal truth that is granted by international rules on the allocation of taxing rights and the tax base." Therefore, the law should be extended to situations that were not initially foreseen and that introduced new ethical and social values into the legislation.[4] In addition, the OECD also refers to the income inclusion rule (IIR) and the undertaxed profit rule (UTPR) as coordinated atypical direct taxes; however, they cannot be labelled as a conventional mechanism for collecting tax revenues based on the ability of multinational enterprises (MNEs) to pay taxes that conduct business in a single market between member states.[5] The IIR and UTPR are top-up taxes that operate via a cross-border switch-over mechanism akin to controlled foreign companies (CFC) regulations.[6]

Prior to conducting a legal analysis regarding each top-up tax in lieu of transposition work, it is essential to delve into the significant aspects of the rules. Therefore, these three points are of significant relevance, as they could potentially mislead legal drafters and those responsible for applying this legal regime.

The first critical consideration is that, since the launch of the BEPS Project in 2012, broad concepts such as aggressive tax planning and anti-base erosion measures have exacerbated the ambiguity between measures targeting taxpayers' abusive (or avoidance) behaviour and those addressing harmful tax competition among states. Avoidance or abuse necessitates an evaluation of the taxpayer's business purpose or valid commercial reasons, whether presumed or not. Conversely, measures such as the IIR and UTPR entail a response to tax competition by another state independent of purpose or rationale.[7] Thus, the core of these rules is to ensure that the taxation of MNE groups is not based on their ability to pay, but rather on the premise that MNEs must pay a minimum level of tax on the income generated in each jurisdiction where they operate. Therefore, it is unrelated to the avoidance behaviour.

ii) The top-up taxes apply even in the absence of aggressive tax planning

A second relevant clarification about these specific top-up taxes is that they do not only apply to aggressive tax-planning schemes, moreover, these rules are applicable, even in the absence of aggressive tax planning. The aggressive tax planning concept developed in the context of the BEPS Project is related to the concept of double non-taxation; thus, it can result from either tax avoidance or legal gaps raised by the interaction, disparities, or two or more tax legislations. As a result, the interlocking rules enacted by the RGMT are applicable in different situations, such as i) if CFC rules and other anti-base erosion rules preventing double non-taxation are applicable; ii) if value creation has been correctly allocated according to transfer pricing rules; and iii) if any specific or general anti-abuse rules are applicable. Finally, the last point that must be accentuated is that the GloBE rules are applicable even if there is no aggressive tax planning, disparity, or tax avoidance, and if there are any, other measures are taken to eliminate it. In summary, the GloBe rules are also pertinent when there is low or zero taxation in one jurisdiction, even if there is high taxation in other jurisdictions.

iii) The top-up taxes do not operate in accordance with the traditional premises of corporate income tax

An additional relevant and specific issue concerns the observation that they do not operate in accordance with the traditional premises of corporate income tax, and thus consider net income according to the ability to pay for an entity. In rigor, the aim of top-up taxes is to suppress tax competition

4. Ibid and AP Dourado, *O Princípio Da Legalidade Fiscal - Tipicidade, Conceitos Jurídicos Indeterminados e Margem de Livre Apreciação*, vol 1 (Almedina 2007).

5. *Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti Base Erosion Model Rules (2023)*, pag. 9 https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm.

6. AP Dourado, *Pillar Two from the Perspective of the European Union* [2022], in British tax Review, 573.

7. MP Devereux, J Vella and H Wardell-Burrus, *Pillar 2: Rule Order, Incentives, and Tax Competition*, in SSRN Electronic Journal, 2022.

among states, which leads to base erosion and profit shifting. Therefore, this top-up tax does not operate as a typical direct tax on an entity's income. Rather, they apply to the excess profits calculated on a jurisdictional basis, and only to the extent that those profits are subject to tax in a given year below the minimum rate. Rather than a typical direct tax on income, the rules are alternative minimum taxes that use a standardized base and calculation mechanism to identify pools of low-income taxes.[8]

While this specific aspect may appear to be of less importance in Portuguese legal RGMT, this misalignment in the correct understanding by legal drafters in the characterization of top-up taxes is highlighted in one specific article. Wording of Article 56. º of the RGMT, regarding the tax base of the Portuguese qualified domestic top-up tax, income inclusion rule, and undertaxed profit rule, reveals these ambiguities, as they are not accurate in the conceptualization of these taxes. The tax base of all three top-up taxes is not the corporate income of the entities as stated in nº1 of article 56: "the tax fact of QDTUT, IRR and UTPR is the obtention of income by the constituent entities subject to low tax according to the RIMG." Indeed, the tax base of top-up taxes constitutes the profit remaining after applying an initial tax rate that falls below the effective tax rate. In conclusion, income, net income, and profits for taxation purposes represent distinct concepts that require clarification to support those responsible for transposing and implementing law.

The final point highlighted is that the IRR and UTRR function as switch-over regulations, which can be understood by examining their historical context, as these top-up taxes are inspired by the US global intangible low-taxed income (GILTI), the base erosion anti-abuse tax (BEAT), the controlled foreign company (CFC) rules, and anti-hybrid rules. In the specific case of the IIR, it is applicable even if there is no income distribution. Consequently, it is important to critically examine this issue, emphasizing that complementary taxes elevate the overall tax burden on multinational enterprises' excess profits within a jurisdiction to meet the minimum rate. This means that, within an MNE Group, all rules impose a coordinated tax charge that brings the Group's ETR on that income in each jurisdiction to the Minimum Rate. The design of the GloBE rules as a top-tax facilitates their coordinated application by ensuring that the aggregate amount of incremental tax payable under the rules in each jurisdiction does not cause the ETR to exceed the minimum rate. The aim is to protect the resident country's tax base by neutralizing the competitive advantage of any other jurisdiction. The design of the IIR and UTPR as Top-up Taxes, however, does not restrict a jurisdiction from legislating those rules under a corporate income tax system in its domestic law."[9] Thus, by applying the IIR, the ultimate parent entity (UPE) applies a top-up tax to the profits accrued by an in-scope constituent entity in a low-tax-source jurisdiction. Unlike CFC rules on undistributed profits, the IIR applies to both distributed and undistributed profits. As mentioned, the GloBE rules' top-up taxes are based on a coordinated system of calculating the ETR, relying on "a standardized base and tax calculation mechanics to identify pools of low-taxed income within an MNE Group and imposing a coordinated tax charge that brings the Group's ETR on that income in each jurisdiction up to the Minimum Rate."[10]Although the due amount is charged to an ultimate parent entity or another constituent entity in a jurisdiction that applies the GloBE rules, the tax falls on the income of an in-scope entity located in a foreign low-tax jurisdiction. This is why the common approach requires that an Inclusive Framework (IF) member adhering to the rules accepts that other IF members apply the GloBE rules.

Considering all the points discussed, the standard strategy aims to encourage each jurisdiction to implement either the minimum effective tax rate or a qualified domestic minimum top-up tax. International coordination prevents profit shifting and establishes a floor on competition over corporate income tax rates by establishing a global minimum level of taxation. However, it is still

8. OECD, *Minimum Tax Implementation Handbook (Pillar Two)*, pag. 9 e segts, 2023.

9. OECD, 2015. *Addressing the Tax Challenges of the Digital Economy - Action 1*. OECD Publishing, Paris 1(1): 1–290. Tax Challenges Arising from the Digitalisation of the Economy—Global Anti-Base Erosion Model Rules (Pillar Two) (2023).

10. Ibid, 5.

uncertain whether tax competition will be reduced substantially by the joint action of BEPS 1.0 and Pillar Two.[11]

2. Transposition of the Directive (EU) 2022/2523 into Portuguese domestic law

2.1. Constitutional framework applicable to the transposition of the EU Directives

The Portuguese legal system embraces International Law and EU Law, as outlined in the Constitution of the Portuguese Republic (*Constituição da República Portuguesa* – CRP). Therefore, regarding EU Law, the primacy of EU law in its application is explicitly established in article 8, paragraph 4, of the CRP. Under this disposition, European Union Law enshrined in the Treaties that established the European Union, as well as the Law produced by European institutions (in particular, European regulations and directives), are applied directly in the national legal system, under the terms defined by Union Law. The final part of the aforementioned article, safeguards respect for the fundamental principles of the democratic Rule of Law "and with respect for the fundamental principles of a democratic state based on the rule of law". Although the extent of the application of this final part of the provision remains unclear in both doctrine and jurisprudence, the fact is that, to date, European solutions have not breached the Rule of Law principle.

The government, exercising its power of initiative as outlined in articles 167, paragraph 1, and article 197, paragraph d) of the CRP, introduced a bill that led to the enactment of Law no. 41/2024, responsible for implementing the transposition.

In accordance with the provisions of article 112, paragraph 8, of the CRP, the transposition of European Union legal acts into the internal legal system shall take the form of a Law, an Executive Law, or a Regional Legislative Decree.

Regarding the involvement of the Portuguese Parliament in matters involving the European dimension, the constitutionally relevant framework is as follows.

i) The Portuguese Parliament has the competence to pronounce, as laid down by law, on matters awaiting decision by European Union organs that concern the sphere of its exclusive legislative competence (article 161, line n).

ii) In relation to other entities and organs the Assembleia da República has the competence, as laid down by law, to monitor and consider Portugal's participation in the process of constructing the European Union (article 163, line f).[12]

2.2. The role of the Portuguese State in transposing Directive (EU) 2022/2523

Directive (EU) 2022/2523 was enacted in the domestic legal order under Law No. 41/2024, of November 8.[13] In the "Explanatory Memorandum" accompanying the Proposal of Law no. 21/XVI/71,[14] which precisely addressed the transposition of the Directive, it can be read that Portugal maintains its commitment and alignment with the policies of the BEPS initiative adopted by the EU regarding

11. Ibid, 7.

12. Law no. 43/2006, of 25 August, defines the powers of the Portuguese Parliament with regard to monitoring, assessing and pronouncing on Portuguese participation in the process of building the European Union and the exercise of the powers of national Parliaments set out in the treaties that govern the European Union.

13. The diploma can be consulted at https://diariodarepublica.pt/dr/detalhe/lei/41-2024-895990687 [19-02-2025].

14. Available at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=284024 [19-02-2025].

combating aggressive tax planning in the international context, of which the transposition of Directive (EU) 2022/2523 and consequent approval of the global minimum tax regime are a reflection. The Directive, however, was transposed disregarding the deadline set by the European Commission for this purpose – December 31, 2023. Until this date all EU Member States were, so, required to bring into force the laws necessary to comply with the Pillar 2 Directive and communicate the text of those measures to the Commission immediately.

The delayed transposition can be associated, amongst other possible factors: to the complexity of the measures in addition to some "grey areas" that may have raised more doubts regarding the terms of the transposition (from the outset, and as we will see, with regard to the consideration of extraordinary contributions and autonomous taxation to determine the application of the 15% rate), and to a politically turbulent period in Portugal. On the 7th of November 2023, the Portuguese Prime Minister resigned and triggered new legislative elections on the 10th of March, 2024.

Given this delay, the Commission issued reasoned opinions (in light of articles 258-260(3) TFEU) to Portugal in May 2024. On October the 3rd of 2024, the European Commission decided to refer Portugal (and, also, Spain, Cyprus and Poland) to the Court of Justice of the European Union for failing to notify measures for transposition into national law of Council Directive (EU) 2022/2523.

As mentioned above, the Law's "Explanatory Memorandum" emphasises that implementing the new regulatory framework will be challenging due to its extensive scope and intricate nature. This highlights the ambitious nature of this transposition, which is expected to present numerous difficulties during its execution. This document includes a description of the terms under which corporate income is taxed in Portugal. Technically, it is a quotation of the provisions of the Corporate Income Tax Code (*Código do Imposto sobre o rendimento das pessoas coletivas-CIRC*) dedicated to determining, essentially, who is the taxpayer, the income subject to tax, and the applicable rates. On the other hand, it sets out the main measures associated with the Directive, also in terms very close to the letter of the law. It does not, therefore, attempt to clarify the specific terms of articulation between what is already foreseen nationally and what results from the transposition of the Directive.

The preliminary draft diploma was prepared by an interdisciplinary "Working Group" within the Portuguese Tax and Customs Authority. Additionally, within the scope of this work, it was decided to consult, twice, the "Large Taxpayers Forum" (*Fórum dos Grandes Contribuintes* – FGC),[15] since the regime is primarily and predictably applicable to them. The FGC's contributions were, in the terms described in the aforementioned "Explanatory Memorandum", heard and its interventions were considered in the preparation of the preliminary draft presented. To ensure transparency and openness due to its importance and impact on society, the transposition proposal was also the subject of a broader discussion through public consultation, which took place from the 10th of July to the 31st, 2024, to allow broad participation by all sectors of civil society. According to the data provided online, the public consultation received six comments, the content of which was not available.

The proposal was then presented to the Parliament, on the 11th of September, 2024, and was not accompanied by any studies, documents, or opinions that would have substantiated it, nor by the aforementioned position taken by the FGC. The formula for correspondence with the rules of the Directive to be transposed into the domestic legal system was also not included in the proposal submitted to the Parliament, a requirement set out in Article 124, paragraph 4 of the Rules of Procedure of the Parliament, which determines that legislative initiatives that transpose European directives must be accompanied by a table of correspondence with the rules of the directive, which is intended to be transposed into the domestic legal system. However, in compliance with the pro-

15. The FGC's operational rules can be consulted here: https://info.portaldasfinancas.gov.pt/pt/Grandes_Contribuintes/Atualidade/Documents/Normas_Funcionamento_FGC.pdf [19-02-2025].

visions of Law No. 4/2018, of February 9, a “prior gender impact assessment” was also carried out regarding the transposition, which was assessed as “neutral”.[16]

2.3. Taxation of corporate profits in Portugal

Law No. 41/2024 made no alterations to the existing Portuguese legislation governing corporate income taxation—the CIRC—which must, by constitutional imposition, primarily affect their real income (article 104, no. 2) in the implementation of the principles of ability to pay and tax equality.

i) Subjective incidence: legal persons (commercial or civil companies in commercial form, cooperatives, public companies and other legal persons under public or private law, with headquarters or effective management in Portuguese territory; entities without legal personality, with headquarters or effective management in Portuguese territory, whose income is not taxable under personal income tax (*imposto sobre o rendimento de pessoas singulares* – IRS) or IRC directly owned by natural or legal persons; entities, with or without legal personality, which do not have headquarters or effective management in Portuguese territory and whose income obtained therein is not subject to IRS (article 2).

ii) Objective incidence: IRC is levied on income obtained, even when arising from illegal acts, during the assessment period, by the respective taxpayers (article 1).

    As regards the tax base, a distinction must be made between resident entities and non-resident entities (article 3):

    a) Regarding resident entities, if they carry out, as their main activity, a commercial, industrial, or agricultural activity, the tax basis is the profit (difference between the net asset values at the end and beginning of the tax period, with the corrections established by law); if they do not carry out, as their main activity, a commercial, industrial, or agricultural activity, the tax base is global income (algebraic sum of the income from the various categories considered for IRS purposes).

    b) Regarding non-resident entities, if they have a permanent establishment in Portuguese territory, the tax base is the profit attributable to the permanent establishment.

    c) If they do not have a permanent establishment in Portuguese territory, or if they do have one, such income is not attributable to it; the tax base is made up of each income from the different categories considered for IRS purposes.

iii) Extension of tax obligation: resident entities are subject to a personal obligation, paying IRC on all their income, whether obtained in Portuguese territory or abroad—worldwide income principle; non-resident entities pay IRC only on income obtained in Portuguese territory—source principle (article 4).

iv) Tax rates (article 87): the standard rate of 20% applies in mainland Portugal. Companies without headquarters or permanent establishments in Portugal are subject to a rate of 25%, except for the following income, where the rate is 35%: a) prizes from raffles, lotteries, lottery games, or any other draws and competitions, b) income paid or made available in accounts opened in the name of one or more holders but on behalf of unidentified third parties, or c) income obtained by companies that are headquartered in a country, territory or region subject to a clearly more favourable tax regime. Income from small or medium-sized companies and Small Mid Cap is subject to a rate of 16%, applicable to the first €50.000 (the normal rate

16. Available at https://app.parlamento.pt/webutils/docs/doc.pdf?path=5PNWQmiNeLmxTx219TEA0iGWbwoF7dxhA6KU1UQqNE%252f%252fP%252bx%252fk1w59TONgeoMy7GLC5Bky16GIQIa79MTFT4r8eU%252bmu2ZYeazUIq4dxqvZ7KmZYgLpPKvDeHtsXYQb%252bKGdzG55k0ZOf1kQDiwzrDKSqUmDmFx%252fVdhaVMZFUwbxrlZNr46GeV1NM8DzBNUUeAwKbbdNqe%252b8IXgDY2fX0tmdLm6J8vNW3FXb9FYpzeUz2EDailPouu0yjmQVXc4wvsey1HzLByHf1Dk6iU5MmZcILkRPsoURR3UlWQdrY%252fmLZrF2kuiwsSvLVt9hmlAwMpvDJLm67Dos1tQVOgA2S8SSVHPWvc4lGdjV3L2RLoDrBE%253d&fich=53543513-e82b-4689-aa5c-863c548d11c3.pdf&Inline=true [19-02-2025].

applies to the remainder). In the case of entities located in the Azores or Madeira, the rates are different (lower).

In July 2024, the Government presented a legislative proposal to change the IRC rates, "in order to increase the competitiveness of the Portuguese economy and promote financial policies that boost economic activity".[17] In short, the government intends to reduce the IRC rate to 19%, in general, and to 15%, in the case of taxpayers who directly and primarily carry out the economic activity of an agricultural, commercial, or industrial nature, which are classified as small- or medium-sized companies or small-mid-cap companies.

These rates have a tax base different from the minimum rate of 15% resulting from transposition of the directive under analysis. The 15% will, however, become the "flag" that States that want to attract companies will wave, and it is, therefore, expected that Portugal will move towards a corporate income tax rate of 15%.

Corporate income tax contributes to the calculation of a minimum rate of 15%. However, this calculation also includes the surtax [*derramas*] (state and municipal) that remains in Portugal. Article 87-A of the CIRC establishes and regulates the state surtax. This is a tax on the portion of taxable profit exceeding €1.500.000, which is subject to and not exempt from IRC, whether obtained by legal entities resident in Portuguese territory and which carry out, as their main activity, a commercial, industrial, or agricultural activity here, or obtained by non-resident legal entities that have a permanent establishment in Portugal. The existence of a state surtax transformed taxation on the taxable profit of legal entities into a progressive one, insofar as, as a rule, we have IRC taxation at a rate of 20%, but when the taxable profit is greater than €1.500.000, on this profit above €1.500.000 there is taxation whose rates increases as the taxable profit increases.

The determination of income subject to the 15% rate does not include extraordinary contributions to the energy and banking sectors (maintained in the State Budget for 2025) or autonomous taxes (article 88 of the CIRC), an option that is quite understandable since what is at stake is, in fact, taxes on expenses and not on income.

3. Analysis of the top-up taxes transposed for the Portuguese jurisdiction

A preliminary thought about Portugal's adoption of the Directive through Law n.° 41/2024, of 8th November 8, 2024, in line with some scholars, regarding the Globe Pillar II rules, is that the legal regimes are very close to the OECD options, rigid in terms of application, and at some point, mirror the directive text.[18]

Therefore, the text of the law enacted in Portugal adhered not only to EU standards but also to the OECD model rules approach, ensuring conformity with established international standards. This is evidenced by the references to soft law in the paragraphs (1) and (2) of the Directive preamble and the same happens with the Portuguese law. Portugal will cooperate and comply with this global effort to modify taxation practices and potentially impose sanctions for non-compliance with the regime.

The Portuguese corporate tax system with the transposition of the EU directive incorporated new regulations, ensuring that the effective tax paid by a multinational corporation is not less than the established threshold of 15% ETR. To ensure this goal, the Portuguese law also enacted three mechanisms that are top-up taxes, namely: i) Income Inclusion Rule (IIR), ii) Undertaxed Profits Rule (UTPR), and iii) the directive also provided member states with the possibility to enact a third

17. In accordance with *Proposta de Lei* n.° 12/XVI/1.ª GOV (available at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=273926 [19-02-2025]).

18. In this sense also, AP Dourado, *Debate: Is There a Need for a Directive on Pillar Two?*, in Intertax, 50, 2022, 521.

levy of tax, Qualified Domestic Minimum Top-up Tax (QDMTT). The first two top-up taxes bring the total amount of taxes paid to an MNE's excess profits in Portuguese jurisdiction to the minimum tax rate.

Thus, the directive and, by extension, Portuguese law, when enacted, the Globe rules top-up taxes, are predicated on a coordinated system of calculations for the effective tax rate, relying on international accounting standards.

3.1. Income Inclusion Rule

The income inclusion rule (IIR) serves as the primary mechanism to ensure a global minimum effective tax rate of 15%. The global minimum tax regime (RIMG) enacted by Law n.° 41/2024, establishes in its article 1.º, n.° 1, al. a) a definition of IIR, stating that "the parent company of a multinational group of companies or a domestic group calculates and pays for a complementary tax due to entities located in low tax jurisdiction." To fully understand this definition, it is necessary to read this article in conjunction with the content stated in articles 2.º, 5.º, 6.º, 23.º, and article 44.º of the RIMG.

Consequently, under IIR, article 5. º, n.° 1 stipulate that taxpayers subjected to a top-up tax are subject to taxation at the ultimate parent entity level of the group, where the profits of that group do not meet the 15% minimum effective rate.[19] Nevertheless, where the country of the ultimate parent entity does not apply an IIR, the IIR must be implemented at the level of another parent entity in the group further down the ownership chain, article5, n.° 2 and 3.[20] As previously stated, the RMGT established by article 2, n.° 1 that legislation applies to MNE groups and large-scale domestic groups with an annual revenue of EUR 750 million or more in their ultimate parent entity's consolidated financial statements in at least two of the four fiscal years immediately preceding the tested fiscal year. Nonetheless, during the first five years, in line with article 44. ºn.1a) and n.° 2, of the initial phase of their international activities, MNE groups and large-scale domestic groups were excluded from the application of the IIR, the undertaxed profits rule (UTPR), and the domestic minimum top-up tax (DMTT).[21]

This is in accordance with article 44. º, n.° 3, "a group shall be considered to be in the initial phase of its international activity if, during a fiscal year, it has constituent entities in no more than six jurisdictions, and the sum of the net book value of the tangible assets of all constituent entities of the MNE group located in all jurisdictions other than the reference jurisdiction does not exceed EUR 50 million." In addition to the exemption from the implementation of IIR, article 44. º, n. º 1, b) stipulates that large-scale domestic groups are also excluded from the application of the IIR for the first five fiscal years, starting from the beginning of the fiscal year in which they fall within the scope of application for the first time.

The IIR is applicable to fiscal years starting on or after the 1st of January 2024, as stated in article 7. º, n.° 2, from the law that enacted the RMGT, alongside with articles 5.º and 6.º of the RMGT. This implementation timeline is a result of the Portuguese Government's postponement of incorporating the directive and enacting corresponding legislation.

Regarding tax administrative actions, the top-up tax revenues under the IIR must be collected annually, with no requirement for payments on account or prepayments, during the fiscal year. As stipulated by article 46.º, n.° 1 and 3.º, and a), the administrative process to submit tax information and collect the tax follows a self-assessment model. Companies are required to submit tax returns within 15 months of a fiscal year's conclusion. However, for the initial year of implementation, an extended period of 18 months is allowed, superseding the provisions outlined in articles 46, n. º1, 3, and a). This tax obligation must be fulfilled within the specified timeframe mentioned in articles 47

19. Article 5, n.° 1.

20. Article 5, 2 and 3.

21. Article 44.º n. 2 and 3.

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and 48 of the RIMG. In addition, the subsidiary responsibility for liability is extended to all group entities, whether domestic or not, for the top-up tax due in accordance with article 48, n. 2, n. º5.

3.2. Undertaxed Profit Rules

Conversely, article 1, n.1, b), of the RMGT, states that the Undertaxed Profits Rule (UTPR) is defined as "supplementary tax, payable by one entity of a multinational group located in Portugal in relation to companies within the group ,intermediate parent entity, that are subject to low taxation due to the fact that the complementary tax was not collected through the IRR." For a comprehensive grasp of the UTPR legal regime, it is essential to examine it in conjunction with the information provided in articles 2.º, 8.º to 10.º, 44.º , 45 n.° 1, c), 46, nº1, n.° 1, n.° 3, a) and article 48 n.° 1, n.° 2 and n.° 5 of the RGMT. Thus, article 8.º stipulates that the taxpayers responsible for the supplementary tax are "the entities when the parent company is excluded or is not subject to IRR." Consequently, the jurisdiction hosts an entity owned by a foreign MNE that possesses at least one low-tax entity abroad. A foreign-owned entity in the host jurisdiction makes payments to other firms, and the MNE parent's jurisdiction does not apply to the IRR. Subsequently, in respect of the Undertaxed Payment Rule (UTPR) the directive provides an option to which the UTPR may be levied either as a top-up tax or a denial of a deduction against the taxable income of those constituent entities resulting in an amount of tax liability necessary to collect the UTPR top up tax amount allocated to that member state.[22] Meaning, permits the host country to deny the deductibility of the base-reducing payments such that the effective tax paid on the payment increases the effective tax payment on the low-taxed profit abroad up to the Global Anti-Base Erosion (GloBE) minimum rate. Following the option provided under the Directive, Portugal chose to levy any UTPR by means of a top up tax instead of denying a deduction, as presented in article 9, n.° 1 stating "it is the complementary tax computation according to the undertaxed profits rule UTPR, for an entity located in Portugal" calculated the tax according to article 10 of the RMGT. Concluding the top-up tax in Portugal shall be collected in the form of an additional charge and not by way of denying deductions. The computation and allocation of the UTPR top-up amount allocated to Portugal is computed by multiplying the total UTPR top-up tax, as determined in accordance with n.° 2 of Article 10. º by the percentage allocated to Portugal as determined in accordance with n.° 3 of article 10. The percentage of UTPR allocated to Portugal is computed for each fiscal year and for each MNE group according to the following formula:

50% number of employees in the Portugal

X ____

Number of employees in all UTPR Jurisdictions

Plus,

50% the total value of tangible assets in the Member States

____

The total value of tangible assets in all UTPR jurisdictions

Article 10.º, nº 9 stipulates a derogation to nº3 of the same article in line with article 14 od the directive, stipulation a situation where the percentage of UTPR is nil.

The effective date for UTPR applies to fiscal years commencing on or after the 1st of January 2025, according to Article 7. º. of the law that approved the RMGT. However, the UTPR applies from the 1st January, 2024, with respect to constituent entities whose ultimate parent entity is located in

22. Art.12(1) and 13 (1) of the Directive.

an EU Member State that has opted for the IIR and UTPR deferral provided for by article 50.º of Directive 2022/2053, in line with article 7.º, n. º 3 of the RIMG.

The top-up tax under the UTPR must be paid annually, no payments are required, and the administrative process follows a self-assessment system. According to Articles 46, n. º1, nº3, and a), the tax return must be filed within 15 months after the end of the fiscal year or 18 months if it is the first year of application. Tax revenues must be paid within the deadline presented in article 48, n. º1. The constituent entities located in Portugal liable for the top-up tax under the UTPR may appoint a single entity designated to pay the top-up tax in lieu of the wording in articles 45, n. º12, and article 48 n.° 2. In addition, the subsidiary responsibility for liability is extended to all group entities, whether domestic or not, for the top-up tax due in accordance with article 48, n. 2, n. º5.

3.3. Domestic Minimum Top-Up Tax (WDMTT)

In accordance with article 11, nº. 1 of the directive that granted room to member states to accommodate a qualified domestic top up tax, Portugal chooses to implement a domestic QDMTT, as stipulated in Article 2, n.° 1, c) and Article 7. º of the RIMG, referred to as the national minimum tax, which taxes the remaining profits of all entities of multinational or domestic groups subject to low taxation located in Portugal, regardless of the distribution of property interest titularity. The QDMTT is levied on the domestic excess of profits of all low-taxed Portuguese constituent entities of MNE groups and large-scale domestic groups, meaning an effective tax rate (ETR) below 15%. The QDMTT net income shall be calculated in accordance with the same rules as in article 11.º, as for the IIR and UTPR, however, in line with n.° 4.º of article 11 is not to be deducted in the calculation pursuant to Article 5.2.3 of the GloBE Rules. The QDMTT is fully levied on the domestic constituent entity concerned, irrespective of the shareholding of the ultimate parent entity. The constituent entities located in Portugal liable for the top-up tax under the QDMTT may appoint a designated filing entity to comply with the filing obligations and pay the QDMTT top-up tax (article 45 n.° 12 and article 48n.° 2. The effective date for the QDMTT is the 1st of January 2024 thus, the DMTT applies to fiscal years commencing on or after 1 January 2024.

In the Portuguese case, the adoption of the QDMTT is justified, from the outset, given the existence of companies with tax benefits and the recognized difference between accounting profits and tax profits. In this way, Portugal is able to safeguard some tax revenue, since if it did not adopt this regime, the revenue to be collected as tax could "escape" to the state of the parent company (IIR).

The Portuguese reality has another particularity: the Madeira Free Trade Zone, which allows companies to establish a lower tax rate. This was precisely one of the reasons Portugal adopted the QDMTT. In the case of companies in the Free Zone, which have a tax of 5%, the State can apply QDMTT to avoid transferring revenue to the state of the parent company, but all companies in the group that are within the same jurisdiction compete for the calculation of the minimum effective rate; that is, if a group has an entity in the Free Zone and another on the mainland, it is the joint rate that counts.

4. Methods of calculating tax rates and income

The RIMG lists the rules for calculating the ETR for MNEs or national groups of entities, qualifying income of the country, and calculation.[23] Therefore, the ETR "shall be calculated for each fiscal year, the net qualifying income, and for each jurisdiction according to the following ratio between the adjusted covered taxes of the country and the net qualifying income of the country' according to article 22. The relevant income or loss of each enterprise in the group is determined from the net accounting profit or loss of the enterprise, as derived from the consolidated financial statements of the ultimate parent company, without considering consolidation adjustments related to intragroup transactions according to Article 11. º. The figure in the consolidated financial statements

23. Article 22 and 26 of the Directive.

is then adjusted for specific changes to account for the consider permanent differences between the accounting results and the tax base relevant to taxation.[24] The computation of the minimum tax is based on the difference between the ETR applied to constituent entities in various jurisdictions and the agreed minimum tax rate of 15% under an inclusive framework.

To first calculate the minimum tax rate, the supplementary tax rate must be determined (a positive percentage difference between the minimum tax rate of 15% and the ETR of all group entities located in the country). This tax rate exclusively applies to global income less ordinary income covered by substance-based income exclusion and excludes costs associated with employees and the value of assets rooted in the jurisdiction (excess profits). To ensure a neutral tax treatment, the taxes paid by certain entities can be attributed to others within the group.

5. Coordination with certain domestic tax regimes and administrative provisions

The extensive OECD Model Rules require a careful analysis of how passive income, CFC regulations, and administrative adjustments may interact. This examination is crucial to ensure effective coordination and prevent unintended outcomes.

The law that transposes the directive also formalizes a push-down rule for relevant taxes applicable to the controlling company of an entity subject to the CFC regime.[25] The allocation of these taxes to the controlled foreign company or hybrid entity corresponds to the less relevant taxes applicable to passive income and virtual minimum taxes in each jurisdiction. This aligns with the OECD Model Rules and the directive and aims to prevent multinational groups from shifting passive income to low-tax jurisdictions. In this context, the definition of passive income implies that these components contribute to income or losses subject to taxation under the CFC or tax transparency regime. CFC rules mandate the transparent taxation of certain profits, commonly referred to as passive income or all profits of the subsidiary, irrespective of the actual distribution. From the onset of discussions on Pillar Two, the OECD assessed the compatibility of such CFC rules with the OECD Model Rules. The introduction of QDMTT into the OECD Model Rules is likely aimed at protecting the taxing authority of participating states, allowing them to benefit from additional taxes owing to a low-taxed controlled entity located in their territory. However, the push down of CFC taxes has the potential to compromise the functionality of QDMTT. Including CFC taxes in the covered taxes of the low-taxed controlled entity jurisdiction raises the ETR, thereby reducing or nullifying the recoverable amount of QDMTT.

The push-down of CFC taxes does not apply when calculating the ETR for QDMTT purposes in the LTCE jurisdiction.[26] By excluding CFC taxes from the relevant taxes, in making the QDMTT calculation, the risk of the source country appropriating differentials in taxation compared to the OECD Model Rules' minimum standard, through its domestic CFC regime, is eliminated. The allocation of the CFC taxes to the covered taxes of the LTCE's jurisdiction to calculate for the purposes of calculating the minimum tax remains, with the expectation that the minimum tax will subsequently be nullified through the QDMTT offset.

6. Safe harbours

The article 32.º of the Directive provides for the introduction of the safe harbours "under which at the election of the filling constituent entity, the top up tax due by a group in a jurisdiction shall be deemed to zero for a fiscal year if the effective level of taxation of the constituent entities

24. Article 12 to 15.

25. Article 20. CFC regime, in Portugal, is established by the article 66 of the CIRC.

26. Art. 7, n. 4 e 5.

located in the jurisdiction fulfils the requirements of qualifying international agreements on safe harbours". The frequently asked questions (FAQs) document on interpreting the Directive states that all European Union (EU) nations participating in the Inclusive Framework (IF) have consented to qualifying international agreements on safe harbours, specifically, EU member states that have accepted the Country-by-Country Reporting (CbCR) safe harbours, as outlined in reports by the Organization for Economic Co-operation and Development (OECD).[27]

Similarly, article 28.º of the RMGT, provides for a brief introduction of safe harbours under which "by derogation from Article 22 a 27. º, the top-up tax due by a group (…) shall be deemed to be zero for a fiscal year if the effective level of taxation of the constituent entities fulfils the conditions of a qualifying international agreement on safe harbours". According to nº 2 of Article 28 there is an explanation of what qualifies the international agreement on safe harbours. This is a short-term measure that allows the MNE group located in lower-risk countries to comply with the requirements for full calculation according to Pillar Two. It is expected to reduce compliance and administrative costs, but help tax certainty for MNE. The transitional safe harbour (TSH) mechanism is based on data from the group's country-by-country (CbCb) report and qualifying financial statements, and provides three tests to determine if a jurisdiction qualifies for temporary exclusion from the top-up tax computation. For this purpose, it should be noted that a CbCR report must be prepared and filed using qualified financial statements ("qualified CbCR report"). The tests would apply on an alternative basis; that is, in a case where one of the tests is met by a certain jurisdiction, the top-up tax for the jurisdiction would be deemed to be zero.

Based on articles 3.º and 4.º of the legislation that sanctioned the RMGT, and in accordance with articles 24.º, 26.º, 28.º, and 41.º of the RMGT, Portugal also implemented the safe harbours regime through enactment. Therefore, articles 3.º and 4.º and 26.º of the law that approved the RMGT, enacted the transitional safe harbour (TSH) rule, which provides for: a de minimis test, a simplified ETR test, and a routine profits test. According to the de minimis test, article 4.º n.° 1, a) and 26.º, the MNE group total revenue for the jurisdiction is less than EUR 10 million, and its profit before tax is less than EUR 1 million based on its qualified CbCR report for the tested tax year. The simplified effective tax rate test according to, article.º 4, .º1, b),2 c), the simplified ETR for a jurisdiction is equal to or greater than the "transition rate" for the year, that is, 15% for fiscal years beginning in 2024, 16% for fiscal years beginning in 2025, and 17% for fiscal years beginning in 2026. To compute the simplified ETR, the covered taxes (excluding uncertain tax positions) reported in the qualified financial statements of the entities of the jurisdiction would be divided by the profit before tax of the jurisdiction reported in the qualified CbCb report (a net unrealized fair value loss on an ownership interest would be excluded from profit/loss before income tax if that loss exceeded EUR 50 million in a jurisdiction). The routine profits test in which the profit before tax in a jurisdiction based on the qualified CbCR report is equal to or less than the substance-based income exclusion amount (SBIE), according to art.º 4, n.° 1, al.c) and 24.º RMGT, calculated using the Pillar Two rules. The SBIE in Portugal mirrors the EU directive's framework, allowing multinational enterprises (MNEs) to exclude a portion of income derived from substantial economic activities, based on tangible assets and payroll, from global minimum tax calculations. In the annual filling of the form by the constituent entity, in line with article 40, n.°, 3, the top-up tax should be equal to zero after meeting one of the situations listed in the article. The transitional CbCR safe harbour rules apply to the IIR and the UTPR, and DMTT. Therefore, a filing constituent entity may, under certain conditions, exercise an annual option to benefit from a safe harbour based on a qualifying international agreement on safe harbours, under which the top-up tax due to by a group in a jurisdiction is deemed to be zero, article 28 of the RMGT. Finally, the QDMTT safe harbour was also enacted in article 23.º n. º8, and nº 10.

The transitional CbCR safe harbour rules apply regarding the IIR and the UTPR, as well as the DMTT However, in lieu of nº 3, b) of article 28 this legal regime does not apply when the' tax administration gives notice according to article 38 or 38, º-A of the CPPT, from all circumstances that

27. Art. 32 in Directive.

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jeopardize the possibility of using these rules mentioned above. The entity does have six months to present an answer or reply the reasons presented by the tax administration.

1. Consideration of available exclusion;
2. Computation of the Effective Tax Rate;
3. Computation of the Potential Jurisdictional Top Up tax I QDMTT, IRR and UTRR): Net Income;
4. Allocation of the Top Up Tax.

7. Tax compliance duties under the Directive

As stipulated in Articles 45 and 46 of the RMGT, which align with Article 44 of the Directive, constituent entities situated in Portugal are required to submit to the tax authorities:

i) a statement informing the initial phase of international activity of the MNE or entering the scope of the RIMG for large domestic groups, and statements concerning the designation of the filing entities;

ii) top-up tax information return for each fiscal year;

iii) a top-up tax assessment if there is a top-up tax to be paid in Portugal for the fiscal year.

The applicable deadlines for the aforementioned filing requirements align with article 45, paragraph 1, subparagraph a) and article 46, paragraph 2 of the RIMG, as outlined below: i) nine months after the end of the fiscal year,12 months for the first reporting year, and the top-up tax information return and tax assessment must be filed online within 15 months following the end of the relevant fiscal year, or 18 months after the end of the transitional year, that is, the fiscal year in which a group falls within the scope of application of these rules for the first time, article 46,n.° 1), n.° 3,a) of the RMGT. The MNE or domestic group may designate a constituent entity to meet the filing obligations that constituent entities are not required to submit a top-up tax information return if the ultimate parent entity (UPE) or the designated filing entity located in another tax jurisdiction submits it in that jurisdiction insofar as there is an effective bilateral or multilateral agreement that provides for an automatic exchange of minimum tax reports between the competent authority of Portugal and the competent authority of the respective jurisdiction.

8. Sanctioning regime – penalties

Article 49 stresses that the obligations from the implementation of RGMT need to comply with article 63.º of the General Tax Law (*Lei Geral* Tibutária) and the Tax Inspection Regime (*Regime Complementar do Procedimento de Inspeção Tributária* – RCPIT). Taxpayers have multiple avenues for contesting decisions: they can file an appeal, present a complaint with the tax administration, or bring the matter to court, in accordance with the Portuguese legal system.

The penalties for failure to file or late filing vary from EUR 5,000 to EUR 100,000, plus 5% for each day of delay in fulfilling the obligation according to articles n.° 51, n.° 1. Penalties for other failures or inaccuracies vary from EUR 500 to EUR 23,500 article 51, n.° 2. The above-mentioned penalties are waived when the infraction committed refers to an obligation relating to a fiscal year beginning until December 31, 2026, and ending before July 11, 2028, provided that the entity acted in good faith, based on a plausible interpretation of the regime and having taken the appropriate measures to correctly comply with its obligations. Additionally, the penalties are waived during the same period if the infringement does not result in a reduction in the amount of top-up tax due in that or subsequent tax years, articles n.° 51, n.° 3.

9. Taxpayer guarantees

This is a topic that requires further reflection and implementation. In this section, we will limit ourselves to making a few brief notes.

The assumption of the complexity of the legal regime in question must be reflected in concrete measures.

Looking only at the special regime that arises from this law with regard to taxpayers' guarantees,[28] tax authorities benefit from a longer statute of limitations for auditing the correct application of the RIMG until the end of the 8th year following the relevant fiscal year, whereas the standard statute of limitations for corporate income tax runs until the end of the 4th year following the relevant fiscal year, according to Article 47, n.° 4.

Taxable persons, their representatives and entities jointly or subsidiarily liable for payment may file an administrative claim or challenge the settlement made in court. Such a reaction may be based on any illegality (non-compliance with the legal system) and may be filed within four years.

Given the complexity that characterises this legal regime, the extension of deadlines is understandable—both for settlement purposes and for the purposes of reaction. On the other hand, such complexity may, abstractly, also have an impact on what may eventually be the determination of an error attributable to the services.

10. Conclusion

In conclusion, although Law No. 41/2024 closely aligns with the objectives and core provisions of Directive (EU) 2022/2523, differences arise primarily from Portugal's delayed transposition and the resulting adjustments in implementation timelines and effective dates.

The Directive and Law No. 41/2024 both target MNE groups and large-scale domestic groups with annual consolidated revenues of at least EUR 750 million in at least two of the four preceding financial years, in accordance with the initial provisions of both diplomas. Their shared goal is to implement a minimum effective tax rate of 15% for these entities. Additionally, both the directive and the law mirror the Pillar Two Rules developed under the OECD's Pillar Two Global Anti-Base Erosion (GloBE) Model Rules, introducing mechanisms such as the Income Inclusion Rule (IIR) and the Undertaxed Profits Rule (UTPR) to ensure that the minimum taxation rate is achieved. Furthermore, both the instruments aim to establish a minimum threshold.

The key difference is related to the Transposition Timeline. The EU Directive mandated that member states incorporate its provisions into domestic law by December 31, 2023. However, Portugal's enactment of Law No. 41/2024 on November 8, 2024, indicates a delay in meeting the original transposition deadline, in terms that we have already had the opportunity to explain.

Regarding effective dates, the directive stipulated that the IIR should be applied for fiscal years beginning on or after December 31, 2023, and the UTPR for fiscal years starting on or after December 31, 2024. Given Portugal's delayed transposition, Law No. 41/2024 specifies that its provisions will take effect from November 9, 2024, potentially impacting the application timelines of the IIR and UTPR within Portuguese jurisdiction.

Portugal chose to enact a Qualified Domestic Minimum Top-Up Tax (QDMTT). While the directive allows member states to implement a QDMTT, it does not specify the application date. Law No. 41/2024 includes provisions for a QDMTT, but does not detail its effective date, potentially leading to differences in application compared to other jurisdictions.

28. In Portugal, it is essentially the General Tax Law (*Lei Geral Tributária*) and the Tax Procedure and Process Code (Código do Procedimento e do Processo Tributário) that define taxpayers' guarantees.

Finally, it seems that the effect resulting from the transposition of the Directive can be seen as positive, as it makes Portugal more competitive in attracting foreign investment than its EU partners, since the effective IRC rate is currently one of the highest in Europe. The minimum effective rate of 15%, therefore, gives Portugal room to lower its current IRC rate with the aim of making its taxes on companies more advantageous and competitive. Even so, this positive effect largely depends on what Portugal decides to do regarding the compatibility of investment incentives with the new regime. Specifically, it will be important to negotiate with multinationals present in Portugal, in order to prevent them from leaving the Portuguese territory and choosing other territories outside the European Union that have not adhered to the international agreement on the minimum tax.[29]

29. The Government *Portaria* No. 41/2025/1, of February 17, 2025, which changes the accounting statement models for entities that apply the Accounting Standardization System. Entities are now required to provide more detailed disclosure on income taxes, namely: (i) clear separation between current and deferred taxes; (ii) impact of changes in tax rates and new tax obligations; (iii) quantification of tax benefits arising from previous tax losses; (iv) accounting treatment of deferred taxes associated with investments in subsidiaries, branches and associates. The *Portaria* also introduces specific requirements related to Pillar Two, associated with new accounting and tax transparency requirements, namely: (i) qualitative information on how the entity may be affected by Pillar Two and the main jurisdictions involved; (ii) quantitative information, including the proportion of profits subject to taxation under Pillar Two.