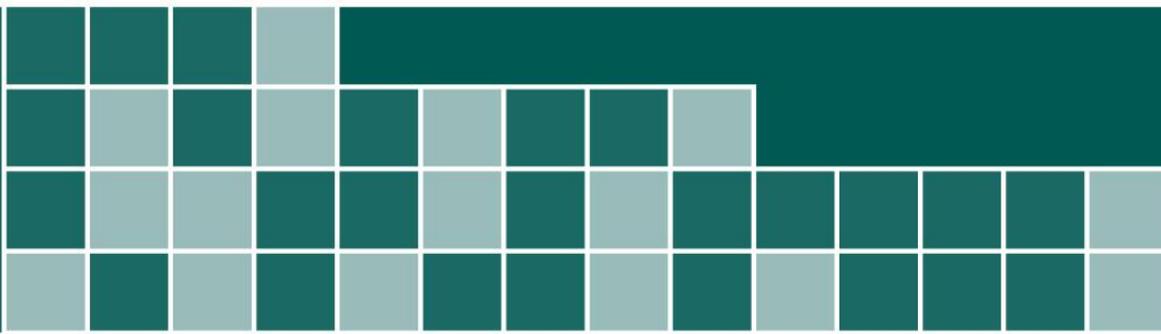


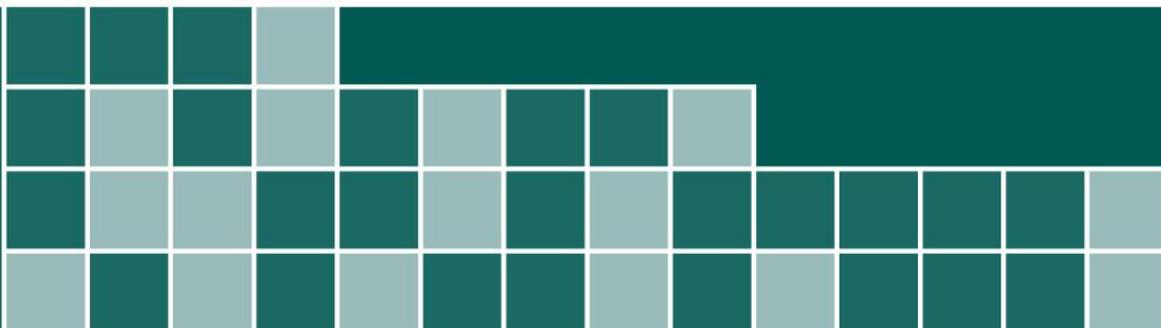
**Prof. Dr. Ana Paula Dourado**  
University of Lisbon

# **Mandatory Disclosure Rules: BEPS Action 12**



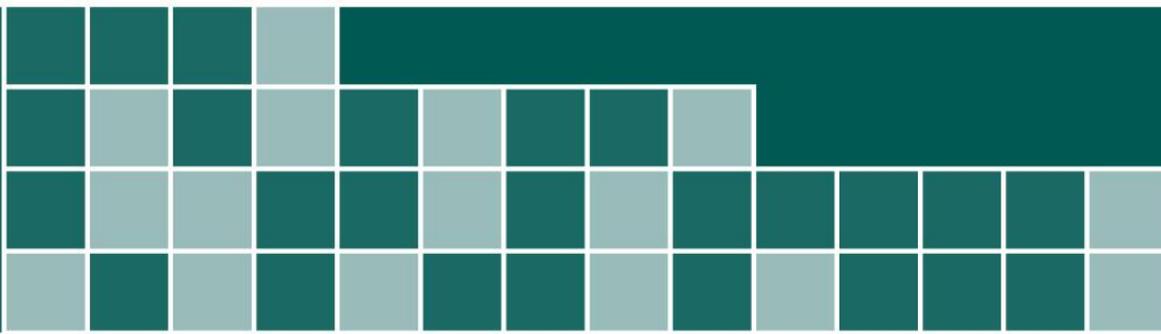
## OUTLINE

- Purpose
- 3 Key Outputs
- Modular Design
- Meaning of Aggressive Tax Planning (ATP) Schemes
- ATP in the BEPS Context
- ATP in Action 12
- Critical Aspects



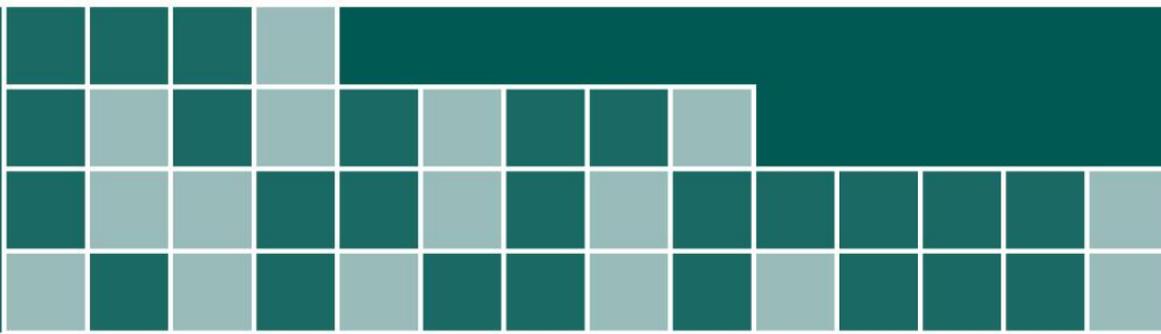
## OUTLINE

- Justification of Action 12 in the BEPS Action Plan
- Identification of ATP Arrangements: Flexibility
- The Right to Privacy and Confidentiality: the Right to Legal Advice and Legal Professional Privilege
- No Right to Silence in Respect of Tax Duties
- A Criminal Process Derived from Information obtained through Legal Duties Complied with by the Taxpayer
- The Right to Silence and the Nemo Tenetur
- Foreseeable Outcome



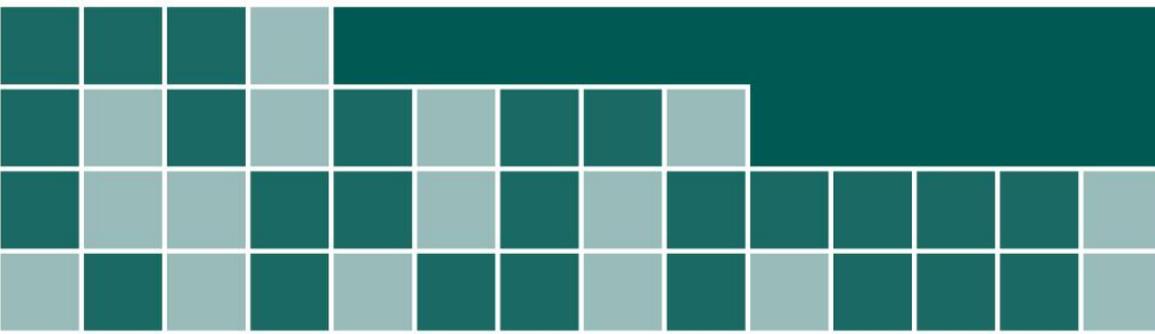
## Purpose

- To get comprehensive and relevant information on potentially aggressive or abusive tax planning strategies
- Opportunity to respond quickly:
  - Legislative reaction
  - Improved risk assessment and compliance
- Influence behaviour on sellers and buyers of ATP schemes



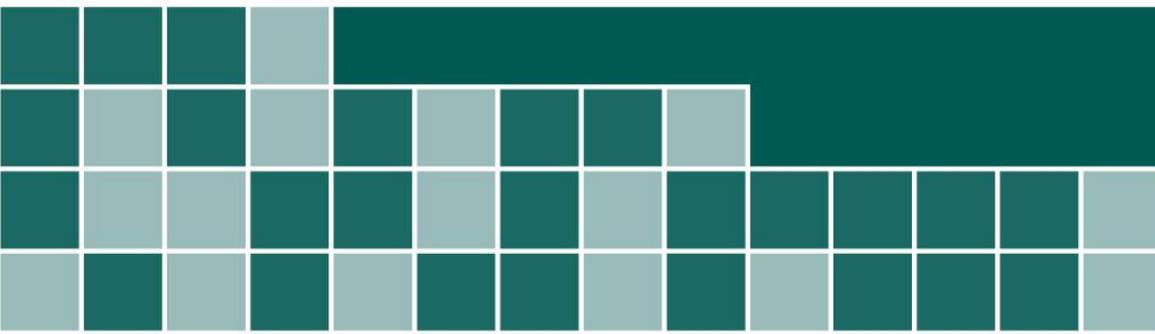
### **3 Key Outputs:**

- Modular design
- Focus on International Tax Schemes and consideration of a wide definition of tax benefit to capture relevant transactions
- Enhanced Models of Information Sharing



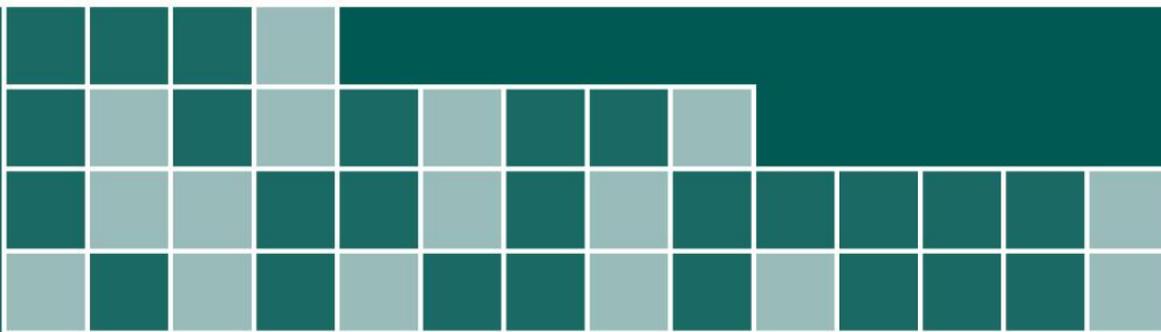
## Modular Design

- Flexible but identification of best practices
- Hallmarks (confidentiality and promotion fee) / main benefit test or de minimus filter
- differently in international schemes: reportable if it involves a domestic taxpayer and a cross-border element (within the same controlled group) or where the taxpayer was part to the arrangement
- specific hallmarks (hybrids)
- broad definition + offshore tax outcomes



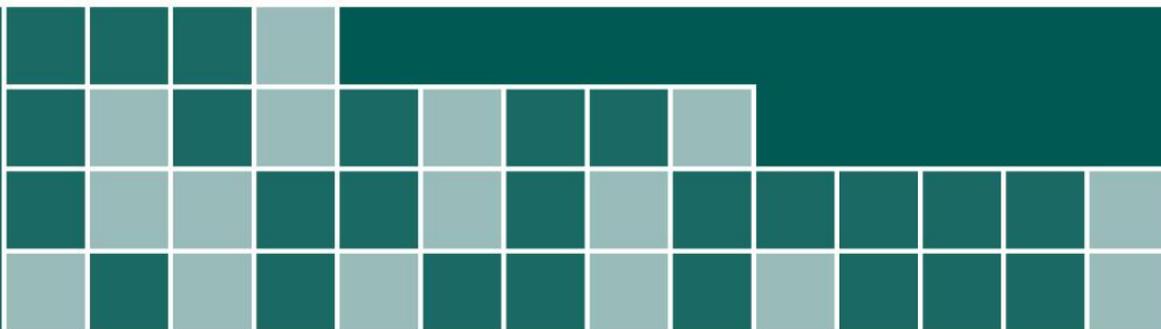
## Modular Design

- Promoters & Users: client lists and scheme ID numbers
- Timing aspects
- Communication with users: deterrence purpose
- Compliance costs and efficiency aspects: follow up in the tax administration departments/amendments to legislation



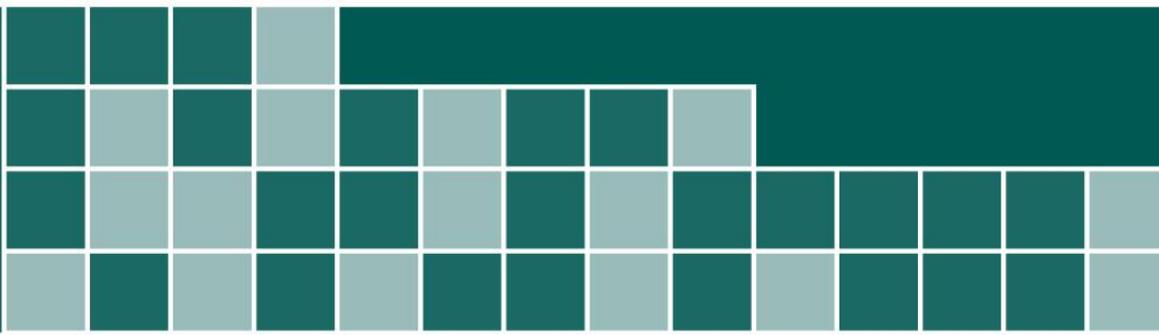
## Meaning of Aggressive Tax Planning (ATP) Schemes

- No definition of ATP Schemes: «designed to detect TP Schemes that exploit vulnerabilities in the tax system» (para. 26 Action 12)
- Clarification that not all ATP schemes constitute avoidance
- Ambiguity: ATP schemes to be communicated are the same that fall under a General Anti Abuse Rule (GAAR) or a Principal Purpose Test rule
- Unclear message: disclosure may lead to a tax reaction similar to the one resulting from a GAAR but also to legislative amendments in case of loopholes



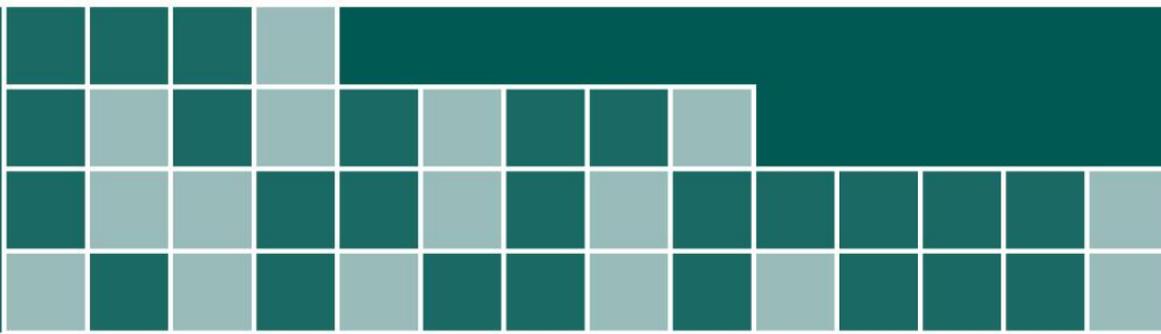
## ATP in the BEPS Context

- A (vague) concept linked to a call to new policy developments and coordinated international action
- ATP is generally described as the behaviour adopted by multinationals to explore the existing opportunities to decrease the tax burden granted by globalization and the interaction of tax rules in different jurisdictions
- It may cover both tax planning and tax avoidance or merely tax planning, depending on the context
- It is currently an umbrella concept to both (international) tax planning and tax avoidance



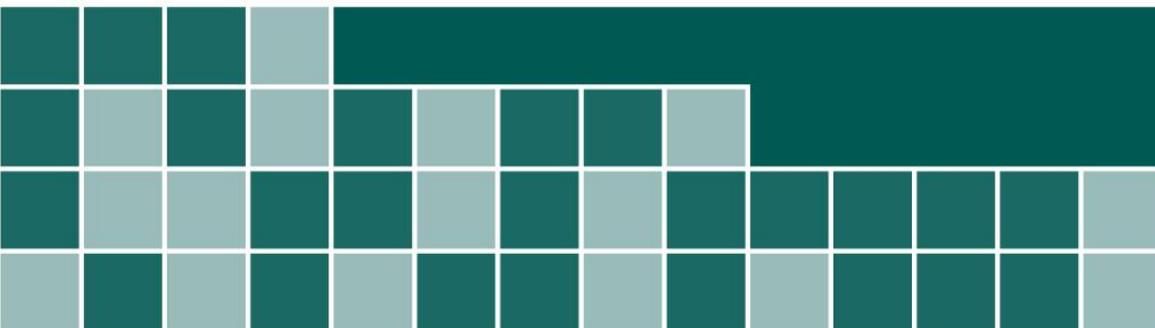
## ATP in Action 12

- It covers both ATP in the international context
- and
- In the domestic context



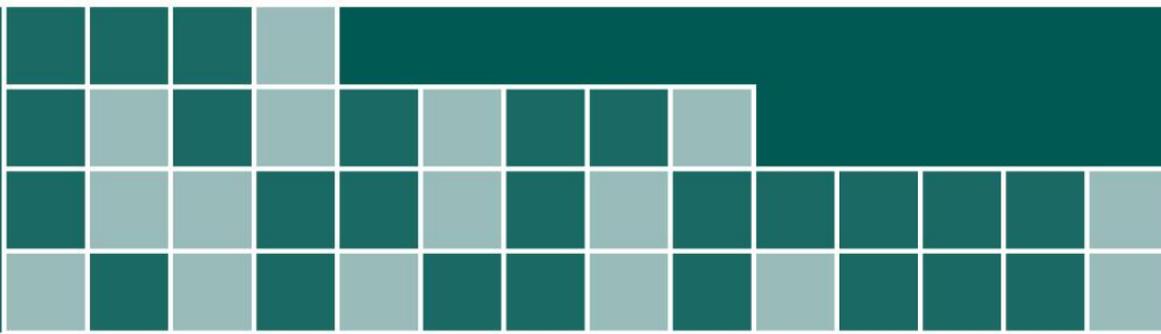
## Critical Aspects

- Justification of Action 12 in the BEPS Action Plan
- Identification of ATP arrangements: flexibility
- The right to privacy and confidentiality: the right to legal advice and legal professional privilege
- Sanctions: tax penalties and criminal liability



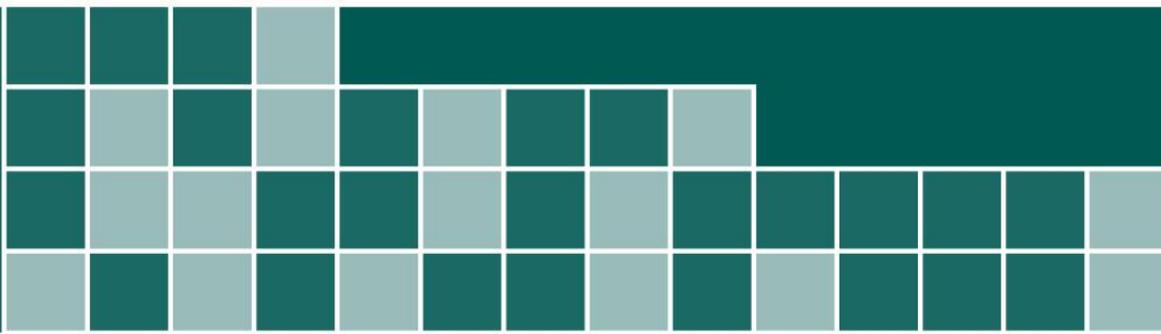
## Justification of Action 12 in the BEPS Action Plan

- Is it related to the BEPS Action Plan purposes?
- National Mandatory Disclosure Rules are essentially targeted at domestic schemes
- Canada, Ireland, The Netherlands, Portugal, South Africa, US, UK: PT and the UK
- Reduction of time in which tax authorities become aware of a loophole or interpretation issue
- OECD would lead moves for an early action to remedy those issues



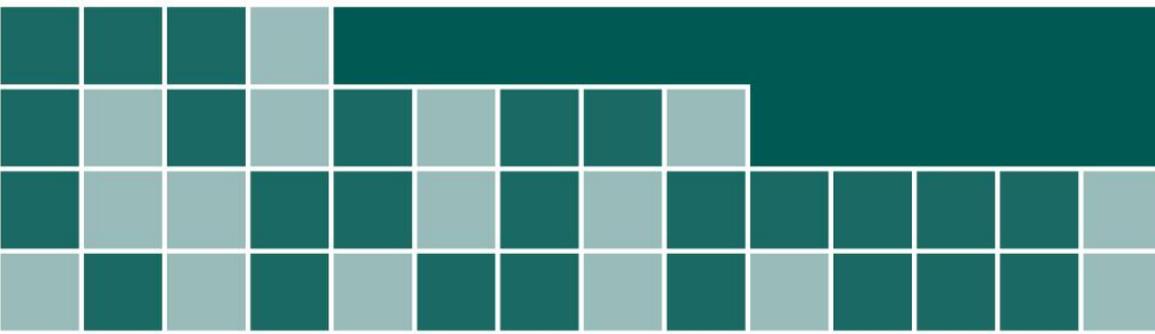
## Justification of Action 12 in the BEPS Action Plan

- Related to:
- Action 6 (Anti-avoidance measures)
- Action 2 (Hybrids): examples of mandatory disclosure focus on hybrid mismatch arrangements
- Action 15 (Multilateral treaty)
- The Global Forum action on exchange of information (EoI): BEPS complementary to EoI



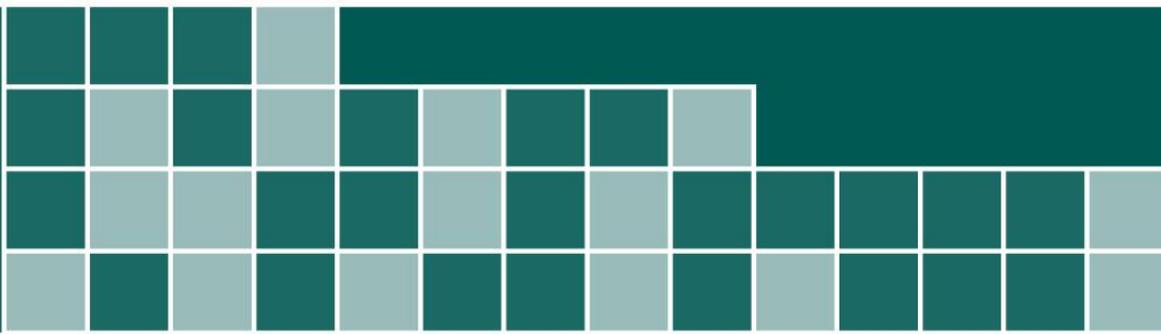
## Identification of ATP Arrangements: Flexibility

- Accommodation of different regimes and practices
- In detriment of coordination and certainty
- Communication of domestic practices among jurisdictions:  
deterrence effect



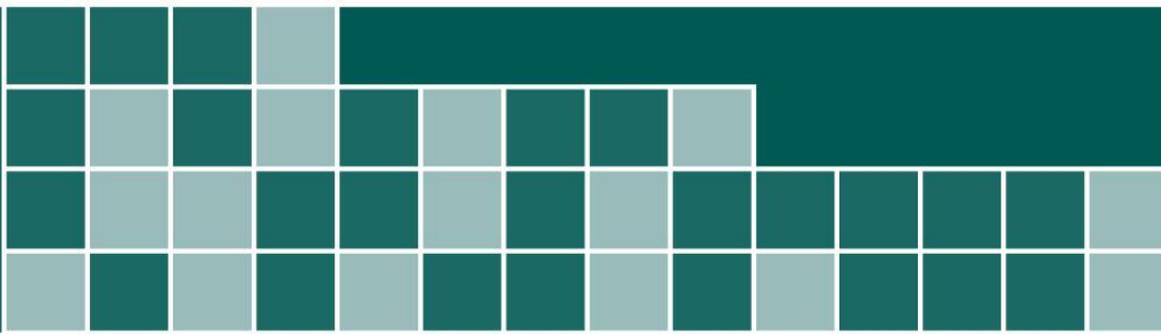
## **The Right to Privacy and Confidentiality: the Right to Legal Advice and Legal Professional Privilege**

- If it is not in the course of a trial, legal professional privilege cannot be invoked (ECJ, *Ordre des Barreaux Francophones et Germanophone et al.*, C-305/05, of 26 June 2007)
- The right to take legal advice and the broad concept of ATP (covering loopholes)
- The right to take legal advice if the scheme is not standardized: proportionality
- The right to confidentiality (Art. 8 ECHR)



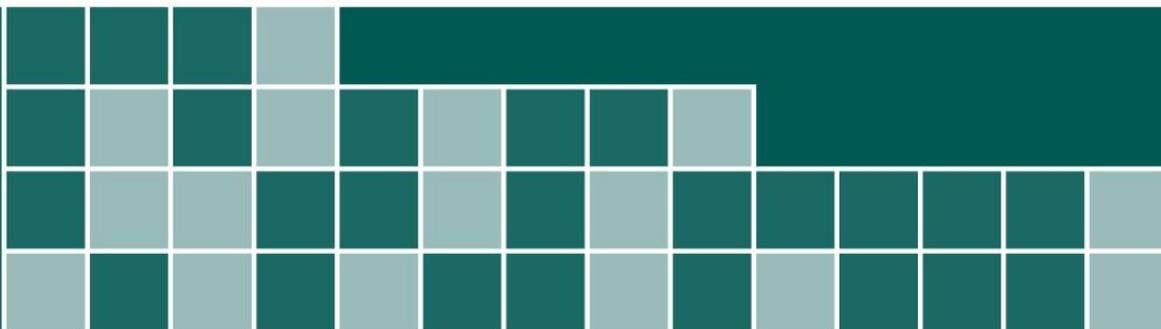
## **No Right to Silence in Respect of Tax Duties**

- If no disclosure of ATP schemes: penalties
- Legal uncertainty if based on a GAAR or PPT rule
- No right to silence in respect of tax duties (ECHR 5.4. 2012 – Chambaz c. Switzerland)



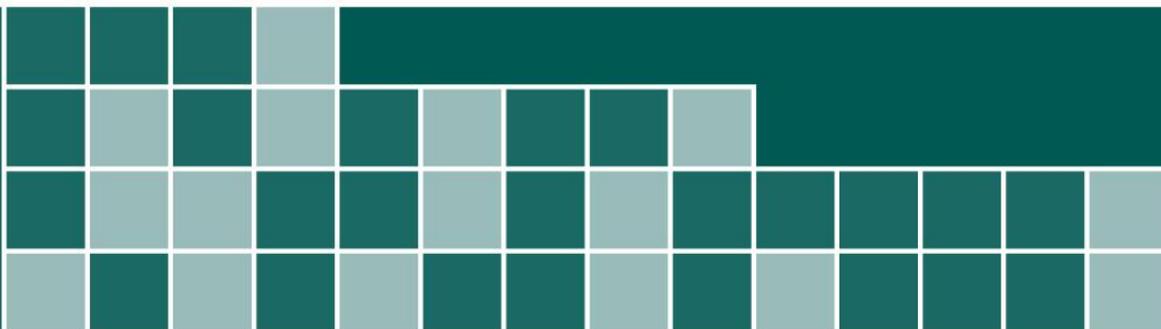
## **A Criminal Process Derived from Information obtained through Legal Duties Complied with by the Taxpayer**

- Where the taxpayer thoroughly cooperates with the tax officials during an audit
- Transfer pricing documentation for associated companies unveiling the company's business organization, strategy and flow of transactions for the purposes of negotiating an Advance Pricing Agreement
- The case of information and documentation requested to associated companies in the context of a mutual agreement procedure or tax arbitration by contracting states aimed at eliminating double taxation



## **A Criminal Process Derived from Information obtained through Legal Duties Complied with by the Taxpayer**

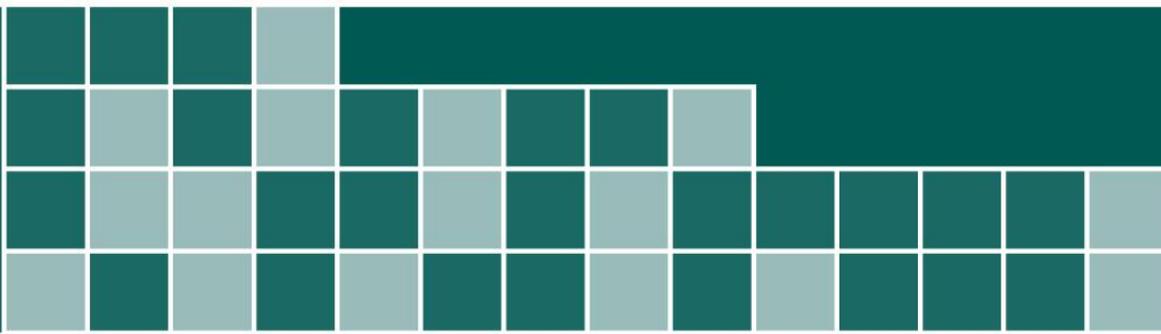
- The case of information and communication of “all relevant facts” in order to get a binding ruling on the interpretation of a certain tax regime or a tax benefit at the national level
- The case of mandatory disclosure and clarification of ATP schemes



## The Right to Silence and the Nemo Tenetur

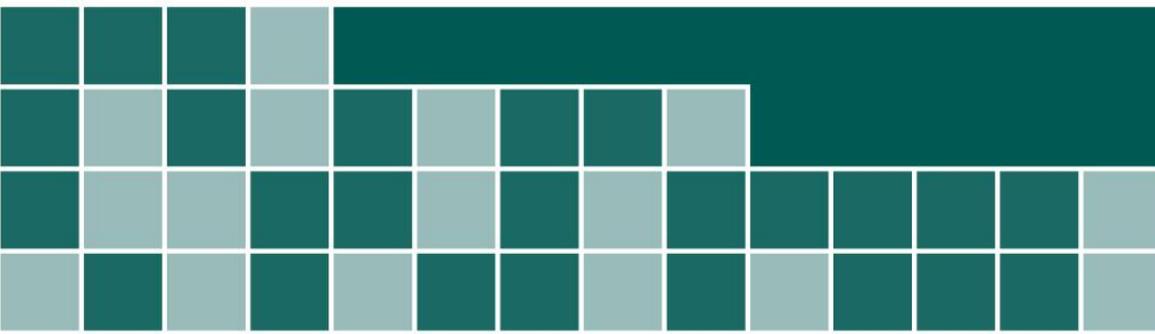
From the case law of the ECnHR and of the ECtHR, we can derive the following:

- The right to silence and the *nemo tenetur* may raise difficult issues for the administration of taxes, since information and cooperation duties are an integral part of tax systems in rule of law states
- Administration of taxes per se involves disclosure of information by the taxpayer (see again, *Funke v. France*, 10828/84)



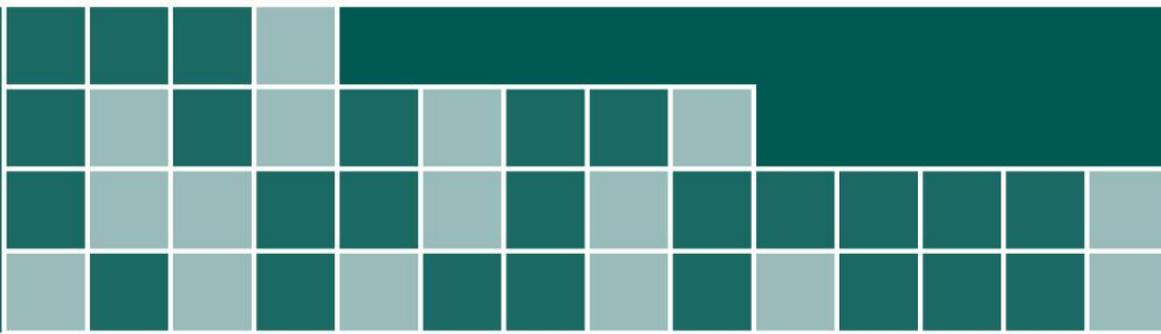
## The Right to Silence and the *Nemo Tenetur*

- Where a criminal charge is involved, the right to silence and the *nemo tenetur may apply*
- The exact moment when the situation of a taxpayer becomes “substantially affected” has to be determined, so that Article 6 ECHR comes into play
- That moment starts where the purposes of the investigation are no longer exclusively connected with tax purposes, but with punitive ones



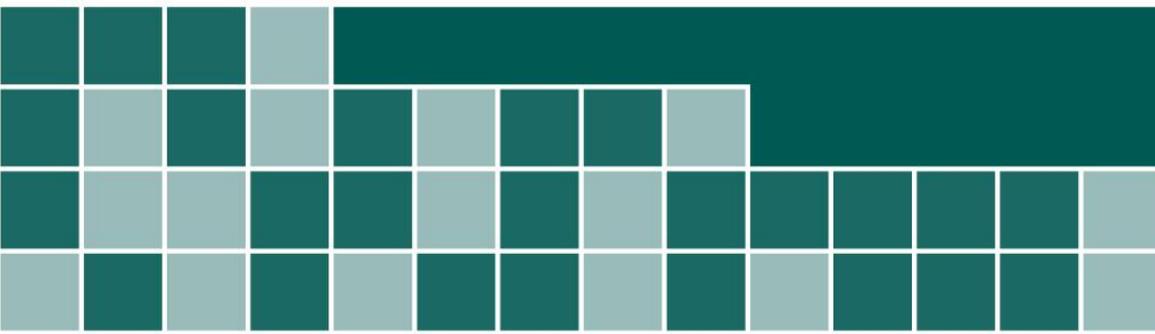
## The Right to Silence and the Nemo Tenetur

- Although the *nemo tenetur* is only applicable to criminal charges
- Definition of a criminal charge is broad
- And it is settled case law that it implies the verification of three criteria (the Engel criteria<sup>27</sup>):
  - How the national law at stake characterizes the offence;
  - The nature of the latter;
  - Its seriousness



## The Right to Silence and the Nemo Tenetur

- The principles of material truth and investigation of relevant facts (verdade material e inquisitório)
- Separation of audit departments and the ones that will apply any administrative penalties or represent the tax authorities' revenue interests in court
- Tax administration should warn the taxpayer if data disclosed may lead to incrimination



## Foreseeable Outcome

- Difficult to foresee
- May be relatively successful if the international standard on EoI is taken as the example
- The value of International Standards