

Brussels, 27 November 2024  
(OR. en)

16328/24  
ADD 2

LIMITE

FISC 252  
ECOFIN 1451

## REPORT

---

From: General Secretariat of the Council  
To: Delegations  
Subject: Code of Conduct Group (Business Taxation)  
- Report to the Council

---

*ADDENDUM 2*

### **Portugal – Draft Assessment: Tax Incentive Scheme for the Capitalisation of Companies (PT019)**

#### **1. General Description of the Measure**

The measure concerns a new tax incentive scheme for the capitalisation of companies (PT019) which was introduced in Portugal in 2023.

The tax benefit provided by the measure consists of a notional interest deduction (NID) based on equity increases which encourages companies to finance through equity rather than incurring debts. The measure replaces Portugal's previous NID regime (PT018).

The assessment is carried out under paragraph B.1, subparagraphs 1-4, of the Code of Conduct on Business Taxation on the basis of the agreed description<sup>1</sup> that was adopted by the Code of Conduct Group on 25 September 2024. The measure is assessed against all Code criteria and relevant agreed guidance<sup>2</sup>.

To provide a true view of the current measure, the assessment will focus on the NID which was adopted in 2023 including the amendments which have been introduced as of 2024<sup>3</sup>.

## 2. Assessment of the Measure

### **B. Significantly lower level of taxation:**

“Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code”

The measure provides for a NID which is deductible against the corporate income tax base. The NID is calculated as a percentage of the net equity increase over a 7-year period.

The percentage follows the average interest rate on the market as determined by Euribor added a premium of 2% for SMEs and 1.5% for other companies. The NID rates are increased by 50% in 2024, 30% in 2025, and 20% in 2026.

The net equity increase is defined as the sum of certain new share capital contributions after deducting outflows. The eligible share capital contributions cover:

- Contributions in cash made as part of the incorporation of companies or an increase in the share capital of the company;
- Contributions in kind made as part of a share capital increase corresponding to the conversion of credits into capital;
- Share premium;
- Appropriation of accounting results which may be distributed to retained earnings or directly to reserves or capital increases.

<sup>1</sup> Agreed Description – PT019 – Tax Incentive Scheme for the Capitalisation of Companies (WK 11635/2024 INIT)

<sup>2</sup> Guidance on Notional Interest Deduction Regimes (WK 5814/6/18 REV 6) endorsed by the Council on 5 December 2019 (WK 13075/2019)

<sup>3</sup> The amendments concern inter alia shifting from a fixed NID rate (4.5%) to a rate that follows the market, a shorter period for the calculation of the net equity increase (from 9 to 6 years) and a higher ceiling (from EUR 2 million to EUR 4 million). As the 2023 rules were only applicable for 1 year, the potential effects on the location of business activities can best be determined on the basis of the 2023 rules including the 2024 amendments.

The NID is capped at the highest of EUR 4 million or 30% of EBITDA. A deductible amount that exceeds 30% of EBITDA may be carried forward for up to 5 years.

On this basis, the measure provides for a tax deduction that could lead to a significantly lower effective level of taxation which is potentially harmful within the meaning of paragraph A of the Code.

**Criterion 1:**

“Whether advantages are ringfenced de facto or de jure from the domestic market, e.g., they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base”

Criterion 1 contains two elements. The first element is whether the measure is only or mainly available to non-residents or transactions with non-residents (criterion 1a). The second element is whether it is only or mainly used by non-residents or for transactions with non-residents (criterion 1b).

1a) Criterion 1a concerns the *de jure* application of the measure. The NID is applicable to companies in commercial form, cooperatives, public companies, and other legal entities governed by public or private law which are resident in Portugal, i.e., those with a head office or place of effective management in the Portuguese territory. However, the NID is not applicable to companies that:

- do not carry out as their main activity: a commercial, industrial, or agricultural activity;
- carry out activity in the financial or insurance sector;
- do not have organised accounts (i.e., taxpayers with simplified accounts cannot apply the NID);
- do not comply with the legal provisions in force for the respective sector of activity;
- have their taxable profit determined by indirect methods, e.g., a tonnage tax scheme where the tax base is determined on the basis of net tonnage (i.e. the size or carrying capacity of the shipping fleet) rather than taxable profits, or where it is not possible to directly and accurately quantify the taxable amount through the elements declared by the taxpayer, for example, in the case of the absence or insufficiency of accounting elements; or
- do not have their tax and social contributions situation regularised.

Permanent establishments of non-resident companies are not eligible for the NID.

On this basis, the measure does not only grant advantages to non-residents or in respect of

transactions with non-residents. Consequently, the measure is not *de jure* ring-fenced and it is proposed to mark this criterion with “X”.

1b) Criterion 1b is used to complement the assessment under criterion 1a which only looks at the literal interpretation of the measure. It takes account of the *de facto* effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents, e.g., foreign owned companies, the measure will not fulfil criterion 1b.

The NID entered into force in 2023 with amendments introduced in 2024 and, therefore, it is unlikely that any representative data be available at this stage to reflect the actual effects of the measure.

As the assessment is based on currently available information, it is suggested that the Group reserves the possibility of reassessing the effects of the measure when reliable data becomes available. It is, thus, proposed to mark this criterion with “?”.

#### **Criterion 2:**

“Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages”

In accordance with the established practice for the assessment of a measure against criterion 2, a measure is found harmful under this criterion if there are no specific requirements with regard to real economic activities, such as premises, employment and expenditure. The criteria aims at ensuring that the activities generating income are undertaken by the taxpayer benefitting from the preferential tax measure.

Notional interest regimes are different from other preferential tax measures in the sense that the tax benefits are not based on the generated income or the performed activities. A NID aims to tackling debt bias, which *per se* makes it difficult to establish a direct link between income-generating activities and benefits. A NID regime should, nonetheless, contain appropriate anti-abuse measures in order to prevent tax planning opportunities.

Based on specific guidance and/or paragraph L of the Code of Conduct which states that “anti-abuse provisions or countermeasures contained in tax laws and in double taxation conventions play a fundamental role in counteracting tax avoidance and evasion”, the Group has taken the existence of appropriate anti-abuse provisions or countermeasures into account when assessing various measures. The same structure and content will be used for the assessment of this NID (in accordance with the agreed NID Guidance).

For the assessment of the proportionality of existing limitations and anti-abuse measures, it

should be noted that the Portuguese NID is an incremental regime. This limits the windfall effects associated with a measure based on the stock of equity.

The Portuguese NID is subject to the following limitations of scope:

- the NID is calculated on the basis of new equity increases, i.e., only equity increases created in tax periods beginning on or after 1 January 2023 are eligible (Article 43-d(9)).
- own shares are excluded from the eligible equity increase as the calculation is based on accounting rules which determine that the value of own shares is deducted from the total equity value.
- participations in other companies are excluded as they are not covered by the definition of eligible equity increases in Article 43-d(6).
- the NID cannot result in tax losses. If the net equity increases result in a negative figure, the net equity increase is considered to be zero. If the NID exceeds the taxable profits for a given year, the excess amount may be carried forward to subsequent years, limited to 65% of the taxable profits in each tax period.
- contributions in kind which form an eligible equity increase are limited to the conversion of credits into capital. Therefore, the transfer of assets that are not necessary for conducting business, such as luxury goods, artworks etc., are excluded.
- contributions in cash which form an eligible equity increase can only be made by natural and legal persons which are resident in another EU/EEA Member State or in a state or jurisdiction with which Portugal exchanges information on the basis of any bilateral or multilateral agreement that foresees the exchange of information for tax purposes. (Article 43-d(8)(c)).
- the NID is not applicable in situations where capital has been allocated to a PE which is not taxable in Portugal as foreign PEs are excluded from the scope. Portuguese PEs cannot apply the NID as they have no equity.
- The NID is capped at EUR 4 million or 30% of EBITDA.

The following specific anti-abuse provisions apply to the NID:

- To avoid cascading effects, equity increases are excluded where they result from transactions, such as loans, between related parties which apply the NID or which have applied the NID within the previous 6 tax periods (Article 43-d(8)(b)).
- To avoid double-dipping structures, equity increases are excluded where they result from contributions made in cash financed by capital increases which are eligible for the NID in the sphere of another entity (Article 43-d(8)(a)).

The NID is also subject to a general anti-abuse provision:

- Any transaction which is not carried out for genuine reasons is disregarded for tax purposes, including for the NID, under the Portuguese GAAR (Article 38(2) of the Portuguese General Tax Law).

The limitations to the scope and the GAAR render specific anti-abuse provisions superfluous in situations where:

- participations are transferred.
- subsidiaries are created.
- businesses held by associated enterprises are acquired.

It would be recommended to include a specific anti-abuse provision to address situations where old equity is re-categorised as new equity through liquidations or for start-ups. It should be noted that this situation is partially addressed by the exclusion of participations from the scope of the NID. In addition, Portugal has informed that such a situation would be covered by the GAAR.

As a general recommendation in the NID Guidance, Member States having a NID regime should also ensure that the anti-abuse provisions also work in cross-border situations, e.g., to avoid double-dipping structures between two Member States with NID regimes.

Based on these findings, the limitations of scope and the (specific and general) anti-abuse provisions ensure that the application of the NID is sufficiently protected against tax planning practices. As a result, it is proposed to mark this criterion with “X”.

### **Criterion 3:**

“Whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD”

As a general rule, the NID excludes cash contributions by an entity with which the taxpayer was in a special relationship and that were financed through loans granted by the taxpayer itself or by another entity with which that entity and the taxpayer were in a special relationship. However, intra-group transactions may be accepted provided that the company can prove that the transactions are carried out for valid commercial reasons and do not lead to a duplication of the benefit within the Group. The general Portuguese Transfer Pricing rules apply to ensure that the transactions are priced in accordance with the arm’s length principle.

The NID does not depart from internationally accepted principles. It is, thus, proposed to mark this criterion with “X”.

**Criterion 4:**

“whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”

All preconditions necessary for the granting of a tax benefit should be clearly laid down in publicly available laws, decrees, regulations etc. before a measure can be considered transparent.

The NID is regulated by Article 43-d of the Portuguese Tax Benefits Statute (Estatuto dos Benefícios Fiscais) (EBF) which refers to Article 67(1)(b) of the Corporate Income Tax Code (IRC). All provisions are published in the Official Journal of the Republic of Portugal (O jornal oficial da República Portuguesa) which is available online at <https://diariodarepublica.pt/dr/home>. The Portuguese authorities have also issued administrative guidelines on the NID which is available online at [https://info.portaldasfinancas.gov.pt/pt/informacao\\_fiscal/legislacao/instrucoes\\_administrativas/Documents/Oficio\\_Circulado\\_20261\\_2023.pdf](https://info.portaldasfinancas.gov.pt/pt/informacao_fiscal/legislacao/instrucoes_administrativas/Documents/Oficio_Circulado_20261_2023.pdf).

The measure can, therefore, be considered transparent, and it is proposed to mark this criterion with “X”.

**3. Overall Assessment**

	1a	1b	2	3	4
PT019 – Tax Incentive Scheme for the Capitalisation of Companies	X	?	X	X	X

V = harmful

X = not harmful

Based on the assessment, the NID meets the requirements provided by criterion 1a, 2, 3, and 4, as interpreted by the NID Guidance.

With regard to criterion 1b, it cannot be determined whether the measure meets this criterion as there is no available data at this point. It is, thus, suggested that the Group reserves the possibility of reassessing the effects of the measure when reliable data becomes available.

In addition, the Group has agreed in its NID Guidance that NID regimes which have been subject to an assessment should be subject to monitoring. COM will launch a horizontal monitoring of all NID regimes assessed by the Group in due course.

#### 4. Follow-up

- The Group agreed that the measure should be considered not harmful.

---

