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## The Revamping of Public CbCR in Europe: much ado about nothing?

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The vexed question of whether country-by-country reports (CbCR) on multinational companies' tax affairs should be made public<sup>[1]</sup> has been a recurrent topic in the tax debates for years.

In Europe several attempts were made along the year to have public CbCR without success. Furthermore, the approach adopted by European countries with reference to public CbCR has not been homogeneous.<sup>[2]</sup> Recently, the work towards public CbCR received a new impulse and has again been on the agenda of the EU legislator. Public CbCR has been proposed as an amendment to the Accounting Directive 2013/34/EU<sup>[3]</sup>, hence requiring a qualified majority voting rather than the unanimity necessary for the harmonization of tax rules. The latest proposal could become a reality in Europe by June 2021 given the large support obtained during the initial negotiations.<sup>[4]</sup>

In the following paragraphs the authors explore the case for public CbCR in light of the revamping of the EU proposal, analyzing the different arguments in relation to this policy issue.

- **Confidentiality of data and unfair competition**

A pillar for the exchange of a CbCR is the confidentiality of the information. Hence, the disclosure of CbCR data (also through the adoption of public CbCR) could make commercially sensitive information – which, by definition, is confidential – available in the public domain, resulting in potential repercussions for a business in a significant infringement of taxpayer rights. This issue is particularly relevant in the context of the EU proposal, since it would also result in a discriminatory treatment towards MNEs located in the European Union. With public CbCR, competitors could exploit the information provided and obtain an unfair competitive advantage, which, in particular, could be the case for MNEs not located in the European Union and therefore not subject to mandatory publication of their data. Competitors that are not subject to the regulations will be able to use this information to their own advantage, without being obliged to publish comparable data themselves. For example, should the MNE group subject to public CbCR requirements conduct only one line of business in a particular country, competitors could easily determine the business line's profit margins, which are an important source of competitive information.

- **Public's control function**

The most well-established argument for publishing CBCRs is that providing more tax information to the public may put reputational pressure on the MNE which would thus reduce their appetite for (artificial) profit shifting. Reputational pressure, especially in light of the public CbCR proposal, may represent a powerful tool in the hands of tax administrations or other stakeholders to avoid MNEs' "misconduct".[5] However, tax planning and tax avoidance should not be addressed through "naming and shaming", since this approach could easily lead to a significant infringement of taxpayer rights.[6] In this respect the key question is whether using reputational pressure is a justified way to discourage aggressive tax planning and tax avoidance. Since the CbCR data cannot reveal per se whether the reporting company has actually engaged in profit shifting without any further investigations, the disclosed information could potentially be misinterpreted by the public (also due to their lack of expertise in interpreting the data, in particular, by NGOs) and used to argue that there is tax avoidance. Using public pressure undermines the cardinal rule of each tax system, i.e. taxes should be assessed solely on the basis of the law, in favor of a new underlying principle: MNE's tax strategies and tax governance should also be judged in the court of public opinion.[7]

- **Are CbCR data meaningful information to the general public?**

Action 13 introduced a three- tiered transfer pricing documentation, which includes the preparation of 1) Local File, 2) Master File and 3) CbCR. Hence, the CbCR represents transfer pricing-related documentation, even though it is doubtful whether meaningful transfer pricing insights can be extrapolated from an analysis of the CbCR data on a standalone basis. In fact, out of the 3 tables only the (Un)/Related Party Revenues indicator in Table 1 is directly connected to intercompany transactions.[8] Although it cannot be denied that the CbCR provides an unprecedented amount of information to be exploited when conducting high-level tax risk assessments, it should not be utilized as the sole basis for proposing changes to transfer prices or adjusting a taxpayer's income allocation using formulary apportionment approaches. Since the CbCR information does not contain the value chain analysis of the MNE or the functional analysis of a particular entity, its data may lead to ambiguous conclusions in an attempt to identify income-shifting. In fact, it has been recognized in the literature that the use of CbCRs for tax risk assessment may pose numerous challenges.[9] It is contended that the information contained should be used with caution by tax authorities and not be considered conclusive evidence to propose transfer pricing adjustments based on the formulary apportionment of income. Hence, the introduction of a public CbCR could have a potential negative impact on the MNEs' reputation, since it deeply relies on the ability of the general public to analyze the report correctly. It should not be given for granted that the public has the expertise or the technical knowledge for interpreting the CbCR data.

- **Voluntary public CbCR: an opportunity?**

On the other side of the spectrum, several multinational groups – including Vodafone and Shell – published the group's CbCR on a voluntary basis, considering public disclosure an opportunity to demonstrate their long-standing commitment to transparency. This approach seems to be in line with the B team principles too on Public Tax Reporting[10]. In fact, in acknowledging that the OECD does not require this information to be published Vodafone stated "*However, given the comprehensive nature of our public disclosures and the wider context of our Taxation and Total Economic Contribution Report, we have no hesitation in sharing this information publicly.*"[11] Today's trend towards transparency should be read also in light of the numerous cases of aggressive tax avoidance that came to light in the last decade. Hence, MNEs are now trying to differentiate themselves from "bad firms" before the eyes of their consumers, by showing a

commitment towards corporate social responsibility in taxation, since they realized that the positive impact of enhanced tax transparency outweighs the negative effect of higher tax payments. To this end, publishing CbCR data is an effective and workable way to increase trust among the public even though it implies an additional compliance burden for the taxpayers when preparing such reports. In fact, to ensure understandability and avoid ambiguity of the information provided, Vodafone's public CbCR is 89 pages, with 27 pages of introduction and explanation followed by 42 pages of country-related information, hence far beyond the information required to comply with Action 13 requirements.

- **Other EU initiatives and the GRI's Standards**

One argument for public CBCR is the existence of similar disclosure requirements in certain industries. The demand for public CbCR was already implemented in 2013 in the banking sector by way of EU Directive 2013/36[12]. A similar directive was implemented in the same year (i.e. Accounting Directive 2013/34/EU), to provide more transparency with respect to a public disclosure of payments to governments made by companies operating in the extractive industry sector (gas, oil, mining). The aim was respectively to increase the requirements for financial institutions especially after the financial crisis and to enhance public scrutiny of how governments manage natural resource revenues as a means to fight corruption. However, these specific rationales do not necessarily extend to MNEs in other sectors, hence the quest by several MNEs to not have a public CbCR requirement.

On a related note, the Global Reporting Initiative (GRI)[13] – which is an international standard-setting body that specifically focuses on sustainability reporting – launched a new global reporting standard — i.e. GRI 207[14] – effective for the reports published on or after 1 January 2021 – within their set of sustainability reporting standards. The standard requires companies that have voluntarily endorsed GRI Standards and identified tax as a material topic to disclose information on how they manage tax and exercise good tax governance. GRI 207 consists of four disclosures and the fourth introduces a CbCR reporting standard that requires companies to publicly disclose certain financial information (e.g. revenue, profit, employees, assets, corporate income taxes paid, etc.) on a per country basis. The GRI standards are already the world's most widely adopted framework for sustainability reporting, hence companies seeking to publish reports “in accordance” with the GRI would need comply with it and publish CBC data. It is worth mentioning that the GRI expands on existing CbCR based on Action 13 (for example, it requires a public disclosure of data and applies to company of any size, type, sector or geographic location that reports under GRI standards and identifies tax as a material topic). Since the GRI's standards are largely applied by many MNEs, 2021 CbCR data may be publicly available (on a voluntary basis but in relation to a larger audience) regardless of the introduction of public CbCR requirements at EU/OECD level.

## **Conclusion**

Enhanced transparency[15] should be considered a pivotal goal. The EU seems to move in this direction as in the Communication published by the European Commission on May 18, 2021 which describes the EU Tax Policy Agenda for the next years, the European legislator acknowledged the relevance of tax transparency especially in relation to the taxes paid by large economic players. In fact the Communication reads as follows *“The Commission will put forward a new proposal for the annual publication of the effective corporate tax rate of certain large companies with operations in the EU, using the methodology agreed for the Pillar 2*

*calculations.*”.

This said, there is no conclusive argument in favor of the introduction of public CbCR obligations. Therefore, given the current proliferation of initiatives in favor of corporate social responsibility and sustainability reporting paired with the decision of MNEs to publish their CbCR, the rush in Europe towards a public CbCR may be premature.

Before the European Union makes any definitive decision on the obligation to publish reports, it would be advisable to wait for the developments at the OECD level. Action 13, being a minimum standard, could potentially be subject to significant changes during the upcoming months. In fact, one of the potential modifications envisaged in the public consultation document<sup>[16]</sup> released in February 2020 by the OECD was the public disclosure of CbCR information. Furthermore, under the current proposal the CbCR's could undergo to significant changes in terms of design (e.g. potential inclusion of additional information, such as royalties, interests and service fees) and scope (e.g. the appropriateness of the existing revenue threshold is currently under discussion). Moreover, it seems uncertain at this stage if the Pillar I or Pillar II projects require a change to the existing CBCR standard for its implementation. If yes, then it would be difficult to imagine that MNEs would agree to make that information public (e.g. jurisdictions in which the MNE is booking residual profits as they would be surrender jurisdictions or the CBC safe harbour for ETR calculations).

[1] For recent academic work on this matter, see A. Oguttu, *Curtailing BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory*, World Tax Journal (2020), IBFD.

[2] For example, France in December 2016 the French Council of State ruled that public CbCR is unconstitutional, as it undermines the freedom of an enterprise by giving access to confidential information.

[3] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements,

consolidated financial statements, and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182

(2013).

[4] During the Competitiveness Council (COMPET) meeting held on February 25, 2021, a compromised text issued by the Council Presidency for a public CbCR in Europe was discussed and the proposal seemed to have a broad support by Member States. Following this breakthrough, the Council and the European Parliament approved on March 3 and March 4, 2021 respectively, mandates for their respective negotiating positions, with the aim to reach a potential agreement on the directive in the first half of 2021. For further details see also, European Council, Press release – Council approves greater corporate transparency for big multinationals, (3 March 2021), available

at

<https://www.consilium.europa.eu/en/press/press-releases/2021/03/03/council-approves-greater-corporate-transparency-for-big-multinationals/> (accessed 02 May 2021).

[5] M. Lagarden, Behavioural Transfer Pricing – Towards Enhanced Transparency and Compliance?, 26 Intl. Transfer Pricing J. 3 (2019), Journal Articles and Papers IBFD.

[6] X. Huang, Ensuring Taxpayer Rights in the Era of Automatic Exchange of Information: EU Data Protection Rules and Cases, 46 Intertax 3, p. 225 (2018). For a more comprehensive assessment on the level of compliance with the minimum standards and best practices on the practical protection of taxpayers' rights, see P. Baker, P. Pistone & C.E. Weffe, Observatory on the Protection of Taxpayers' Rights: 2018 General Report on the Protection of Taxpayers' Rights (IBFD 2019), available at <https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights> (accessed 29 April 2021).

[7] Martin Lagarden, Ulrich Schreiber, Dirk Simons, Caren Sureth-Sloane et al, "Country-by-Country Reporting Goes Public –

Cui Bono?", International Transfer Pricing Journal, 2020.

[8] The other elements included in Table 1 of the CbCR are the following: Profit/loss before income tax, Income tax paid, Income tax accrued, Stated capital, Accumulated earnings, Tangible assets (other than cash and cash equivalent), Number of employees; while Table 2 provides details regarding the main business activity(ies) of each Constituent Entity.

[9] S. Picariello, V. Chand, "The Use of Country-by-Country Reporting for Tax Risk Assessment: Challenges and Potential Solutions", International Tax Studies, IBFD, 1-2020.

[10] See <https://bteam.org/assets/reports/Public-Tax-Reporting-Learning-by-Doing-and-Through-Dialogue.pdf>

[11] Vodafone, Taxation and our total economic contribution to public finances 2018 (2019), available at [https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone\\_2018\\_tax.pdf](https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_2018_tax.pdf) (accessed 29 April 2021).

[12] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance, OJ L 176 (2013), Primary Sources IBFD

[13] GRI, The global standards for sustainability reporting, available at <https://www.globalreporting.org/standards> (accessed 02 May 2021).

[14] GRI, GRI 207: TAX 2019, available at <https://www.globalreporting.org/standards/media/2482/gri-207-tax-2019.pdf> (accessed 02 May 2021).

[15] For further details, see European Commission, Communication From The Commission To The European Parliament And The Council – Business Taxation for the 21st Century, COM(2021) 251 final, available at [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/communication\\_on\\_business\\_taxation\\_for\\_the\\_21st\\_century.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/communication_on_business_taxation_for_the_21st_century.pdf) (accessed 25 May 2021).

[16] OECD, Public consultation document: Review of Country-by-Country Reporting (BEPS Action 13), available at <http://www.oecd.org/tax/beps/public-consultation-document-review-country-by-country-reporting-beps-action-13-march-2020.pdf>, (accessed 02 May 2021).

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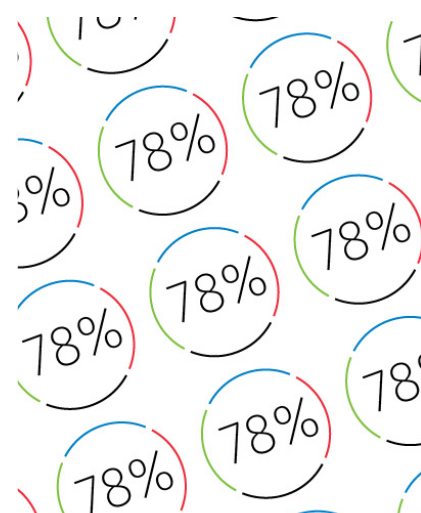
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