What is the cost of transparency? Does it outweigh the benefits obtained from greater transparency?

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Contents

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1. Introduction

Currently, the scope of tax transparency is increasing on a global level. Taxpayers and third parties have to provide more information to both tax authorities and the general public. An increasing scope of transparency in international taxation had already been advocated for a long time. In 1998, the Organisation for Economic Development and Co-operation (OECD) identified the lack of transparency and the lack of effective exchange of information as key characteristics of harmful tax regimes[1] and has since then put a focus on increasing transparency in international taxation.[2] After the Liechtenstein tax affair and the UBS scandal in 2007 and 2008 followed by the financial crisis with the bailouts of financial institutions in 2008, cooperation in tax matters and in particular exchange of information has been highly placed on the political agenda of many jurisdictions. Supported by the OECD and the G20 the Global Forum has been working on enhancing the scope and effectiveness of exchange of tax-related information and put political pressure on those jurisdictions that were more reluctant to implement a broad-scale automatic exchange of information for tax matters.[3] Subsequently, in 2013, automatic exchange of information has been announced by the G20 as the new global standard.[4] Even though at the beginning the focus was on the exchange of financial information as some jurisdictions previously had insisted on strict banking secrecy, the work on automatic exchange of information for tax purposes lead to a number of measures to increase transparency.

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[1] OECD (1998), *Harmful Tax Competition: An Emerging Global Issue*, OECD Publishing, Paris, p. 28 ff.

[2] OECD (2000), *Improving Access to Bank Information for Tax Purposes*, OECD Publishing, Paris; OECD (2001), *Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices*, OECD Publishing, Paris; OECD (2002), *The OECD's Project on Harmful Tax Practices: The 2001 Progress Report*, OECD Publishing, Paris; OECD (2003), *Improving Access to Bank Information for Tax Purposes: The 2003 Progress Report*, OECD Publishing, Paris; OECD (2006), *Tax Co-operation 2006: Towards a Level Playing Field*, OECD Publishing, Paris; OECD (2007), *Improving Access to Bank Information for Tax Purposes: The 2007 Progress Report*, OECD Publishing, Paris; OECD (2007), *Tax Co-operation 2007: Towards a Level Playing Field*, OECD Publishing, Paris; OECD (2008), *Tax Co-operation 2008: Towards a Level Playing*, OECD Publishing, Paris; OECD (2009), *Tax Co-operation 2009: Towards a Level Playing Field*, OECD Publishing, Paris; OECD (2010), *Tax Co-operation 2010: Towards a Level Playing Field*, OECD Publishing, Paris; OECD (2010), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, OECD Publishing, Paris; OECD (2011), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions, Second Edition*, OECD Publishing, Paris; OECD (2012), *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, OECD Publishing, Paris; OECD (2014), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance*, OECD Publishing, Paris.

[3] See e.g. X. Oberson, *International Exchange of Information on Tax Matters, Towards Global Transparency* (Edward Elgar 2015) p. 8 ff.

[4] See G20 St. Petersburg Summit Communique of September, 2013, available at https://g20.org/wp-content/uploads/2014/12/Saint_Petersburg_Declaration_ENG_0.pdf.

Increasing transparency should hamper both tax evasion and tax avoidance. Most countries tax the worldwide income of their residents.[5] Where the income is not subject to third-party reporting, residents usually have to self-assess their worldwide income and report it to the tax authorities in their residence state. This requires that the taxpayer reports its tax liabilities "*on the basis of legal positions that [he] reasonably and in good faith believes to be correct*".[6] Exchange of information and cooperation between tax authorities of different jurisdictions should provide the tools to identify taxpayers that are not compliant and commit a criminal offence by not disclosing all their worldwide income.[7]

Nevertheless, even though there is no obligation to pay more than the amount of tax required by the applicable tax laws,[8] transparency initiatives seem to also have the aim to hinder tax avoidance where a taxpayer tries to legally reduce his tax liabilities.[9] Triggered by the media reporting about EU state aid cases[10] and the revealing of LuxLeaks,[11] the Panama papers[12] and BahamaLeaks[13] the voices of tax activist groups demanding for more transparency in tax matters became louder as well.[14] Multinationals and high-net-worth individuals have been accused of not paying their 'fair share' of taxes. When paying low or no taxes in certain high-tax jurisdictions, multinationals are however not always acting illegally but are often exploiting gaps and loopholes in domestic and international tax legislation and inter alia also stem from

[5] K. Vogel & A. Rust, 'Introduction', in E. Reimer & A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions*, para. 2. The United States for example however additionally taxes the worldwide income of its citizens.

[6] M. Doran, *Tax Penalties and Tax Compliance*, 46 Harv. J. on Legis. (2009) p. 111, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1918&context=facpub, accessed 18 Jan. 2017.

[7] A. J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 Florida Tax Review 8 (2016) p. 483 (488).

[8] K. H. Datt, *Paying a fair share of tax and aggressive tax planning — A tale of two myths*, 12 eJournal of Tax Research 2 (2014) p. 410 (415).

[9] A. J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 Florida Tax Review 8 (2016) p. 489.

[10] European Commission, Commission Decision of 21.10.2015 on State Aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks, C(2015) 7143 final; European Commission, Commission Decision of 21.10.2015 on State Aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat, C(2015) 7152 final; European Commission, Commission Decision of 30.8.2016 on State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple, C(2016) 5605 final.

[11] More information is available at https://www.icij.org/project/luxembourg-leaks, accessed 28 Dec. 2016.

[12] On April 4, 2016, the International Consortium of Investigative Journalists announced their access to the "Panama Papers", 11.5 million documents comprising forty years of emails, bank accounts and client records from the Panamanian law firm Mossack Fonseca. More information is available at https://panamapapers.icij.org/, accessed 28 Dec. 2016.

[13] More information is available at https://www.icij.org/blog/2016/09/icij-publishes-leaked-bahamas-info-offshore-database, accessed 28 Dec. 2016.

[14] See e.g. Tax Justice Network, Tax Us If You Can[2] (2012), available at http://www.taxjustice.net/cms/upload/pdf/TUIYC_2012_FINAL.pdf, accessed 28 Dec. 2016; CONCORD, The Role of the EU in ensuring Global Tax Justice (2015), available at http://www.actionaid.org/sites/files/actionaid/concord-pcd-tax-ffd-.pdf, accessed 28 Dec. 2016.

the fact that the domestic tax systems are different and not always aligned to one another.[15] In order to increase the competitiveness of 'their MNEs' or to attract foreign direct investment, some jurisdictions intentionally implement tax legislation that leads to double-non taxation of a part of the MNE's income or ignore the apparent exploitation of specific provisions for aggressive tax planning purposes.[16] The perception that some taxpayers are getting too easily away with considerably lower effective tax rates has also led to an increasing interest in tax issues by the general public. These circumstances and concerns have not only resulted in the introduction or strengthening of general and specific anti-avoidance provisions[17] but also in new tax transparency initiatives that have been or are now being implemented globally.

The OECD's project against Base Erosion and Profit Shifting (BEPS) has the aim of addressing such tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. The current focus on transparency becomes also apparent when looking at the BEPS project[18]: one of the three key pillars of the Action Plan is "*improving transparency as well as certainty*".[19] Three of the 15 Actions suggest measures to increase transparency in international taxation.[20] In addition, within the last ten years, even before the start of the BEPS project, the scope of exchange of information has been broadened considerably.

In the area of transfer pricing, the documentation requirements continue to evolve and extend. Whereas the OECD Transfer Pricing Guidelines of 2010 stated only some general

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[15] See also M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 1, available at SSRN: https://ssrn.com/abstract=2394035 or http://dx.doi.org/10.2139/ssrn.2394035, accessed 29 Dec. 2016.
[16] See e.g. on the US practices A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 56 ff and on Ireland on p. 54.
[17] See e.g. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, 24 Nov. 2016; Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive, ATAD) (OJ 2016, L 193/1).
[18] OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris.
[19] OECD (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD Publishing, Paris, p. 3.
[20] OECD (2015), *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report*, OECD Publishing, Paris; OECD (2015), *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD Publishing, Paris; OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD Publishing, Paris.

guidelines,[21] the EU recommended already in 2006 transfer pricing documentation requirements in its Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (EU TPD).[22] The two-tier system in the EU TPD consists of a local file and a master file. This concept is also being used in BEPS Action 13 where an extended three-layered TP documentation, consisting of a master file, a local file and a Country-by-Country Report (CbCR) has been introduced which replaces the existing provisions of Chapter V of the OECD Transfer Pricing Guidelines (OECD Guidelines).[23] The OECD advocates a framework where the tax administrations receive CbCR under the provisions for automatic exchange of information. Therefore, usually only the tax administrations – and not also the public – will have access to the data. Non-profit organizations have however demanded more transparency that would also allow the public to have access to the CbCR.[24] Increasing obligations to disclose tax-related information to the public such as public CbCR have already been implemented by some jurisdictions domestically and are currently also discussed within the EU.[25]

In addition, in the area of exchange of information, the international standard has developed within the last decade from exchange of information on request to automatic exchange of information for more and more types of income. Automatic exchange of financial information has been suggested under the Common Reporting Standard[26] and is currently being implemented on a global basis. Furthermore, mandatory spontaneous exchange of tax rulings is part of BEPS Action 5.[27] As a part of the minimum standard, the signatories of the BEPS

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[21] OECD (2010), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010*, OECD Publishing.

[22] Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union, 2006/C 176/01.

[23] OECD (2015), *Action 13 - 2015 Final Report*.

[24] See e.g. Eurodad, Exposing the lost billions. How financial transparency by multinationals on a country-by-country basis can aid development (2011), available at http://eurodad.org/files/pdf/4720-exposing-the-lost-billions-how-financial-transparency-by-multinationals-on-a-country-by-country-basis-can-aid-development-.pdf, accessed 28 Dec. 2016; Richard Murphy and the Tax Justice Network, *Country-by-Country Reporting: Accounting for globalisation locally* (2012), available at http://www.taxresearch.org.uk/Documents/CBC2012.pdf, accessed 28 Dec. 2016.

[25] European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Proposal for an Amendment of the Accounting Directive)*, COM/2016/198 final, 12 April 2016.

[26] OECD (2014), *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, OECD Publishing, Paris.

[27] OECD (2015), *Action 5 - 2015 Final Report*.

Action Plan have committed to implement a standardized and regular exchange of information on tax rulings and APAs.[28]

Another transparency initiative suggested in the BEPS Action Plan is the adoption of Mandatory Disclosure Rules (MDRs).[29] In contrast to the other measures mentioned, MDRs should be implemented on a purely domestic basis only and would require the taxpayers and/or their tax advisors to disclose certain tax planning schemes to the tax authorities. As this proposal is not part of the minimum standard that all OECD and G20 countries have committed to implement but is just a recommendation, it remains to be seen how many jurisdictions will introduce such MDRs.

The support for some transparency initiatives has a broad basis. The OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, an international body with the task to ensure the implementation of the internationally agreed standards of transparency and exchange of information in the tax area, has already 147 member countries.[30] By conducting peer reviews where not only the members of the Global Forum but also countries that have not joined the Global Forum are evaluated in respect to the level of implementation of transparency initiatives, secrecy jurisdictions should be discouraged and a level playing field should be established. Besides the OECD and its Global Forum also the G20 supports transparency in international taxation. The G20 has stressed at the G20 summit 2016 in Hangzhou, China, that they will continue to support international tax cooperation and in particular an effective and widespread implementation of the internationally agreed standards on tax transparency.[31] Furthermore, the United Nations Committee of Experts on International Cooperation in Tax Matters, a 25-member subsidiary body of the Economic and Social Council, has a UN code of conduct on cooperation in combating international tax evasion on its agenda.[32]

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[28] See OECD, *OECD releases peer review documents for assessment of BEPS minimum standards (Actions 5 and 13)*, 1 Feb. 2017, available at http://www.oecd.org/tax/beps/oecd-releases-peer-review-documents-for-assessment-of-beps-minimum-standards-actions-5-and-13.htm.

[29] OECD (2015), *Action 12 - 2015 Final Report*.

[30] More information on the Global Forum and its work is available at http://www.oecd.org/tax/transparency/about-the-global-forum/, accessed 18 Nov. 2017.

[31] G20, G20 Leaders' Communique Hangzhou Summit, 4-5 September 2016, para. 19, available at http://www.g20chn.com/xwzxEnglish/sum_ann/201609/t20160906_3397.html, accessed 28 Dec. 2016.

[32] United Nations Committee of Experts on International Cooperation in Tax Matters, Report on the fifth session (19-23 October 2009), E/2009/45 (SUPP) E/C.18/2009/6 (SUPP), paras 48 et seq. and Annex I; A. Binder, L. Turcan & V. Wöhrer, *The United Nations' Recent Work in International Taxation*, 81 Tax Notes Intl. 7 (2016) p. 612.

The tax transparency initiatives should contribute to providing tax administrations with useful information for assessing tax risks and specifically targeting those issues in an audit.[33] Greater transparency does however not only contribute to the combat against tax avoidance and tax evasion but also involves an increased degree of data gathering, reporting and information exchange either from taxpayers to tax authorities or between tax authorities. This is a challenge for both the tax administrations and the taxpayers as they have to cope with handling an ever increasing amount of data. Focusing on the proposals in BEPS Action 13, this contribution aims to assess the possible advantages and disadvantages that come with the increasing data traffic for tax purposes. In addition, the benefits arising from greater transparency will be assessed so that the costs and benefits can be compared with one another. In order to supplement the existing literature, interviews have been conducted with a number of tax experts in Singapore.

This contribution begins with a detailed analysis of the documentation requirements under BEPS Action 13. This part explores the master file, the local file, the CbCR and the proposal for public CbCR in the EU. Except for public CbCR, this contribution shall not deal with the implementation of the BEPS measures within the EU or in specific countries. Instead, it will focus only on the BEPS proposals. The technical analysis of the transparency initiatives will serve as the basis for the critical evaluation of the practical consequences. The analysis of the documentation and reporting requirements is followed by an evaluation of the costs and benefits from a taxpayer's perspective. It explores the benefit of a greater harmonization of documentation requirements as well as the compliance costs, the reputational risks, the risk of more disputes and the risk of disclosure of confidential information that could arise from transparency initiatives. Subsequently, the costs and benefits are evaluated from a government's perspective. This part discusses the benefits of the additional data available to the tax administrations, the deterrent effect of increasing transparency on tax planning of MNEs and the possible positive changes to the tax landscape due to the increasing information that will be available to the tax administrations and – under the proposed public CbCR – possibly also to the general public. Furthermore, the costs of implementing the system for a broad-scope automatic exchange of information as well as possible implications on the competitiveness of a jurisdiction's tax system will be addressed.

[33] OECD (2015), *Action 13 - 2015 Final Report*, p. 13.

2. Selected Transparency Initiatives

2.1. BEPS Action 13: Master File

In October 2015, the OECD released the Final Report of Action 13 as part of its BEPS project. The OECD put forward a proposal for extended transfer pricing documentation and provided a clear template for providing information via a master file, local files and a CbCR.[34] One of the three components of the new TP documentation concept in BEPS Action 13 is the master file which should be prepared by multinational enterprises (MNEs) and be updated on a frequent basis. The master file is intended to provide a high-level overview of the MNE group business and contains information about the overall MNE group such as its global business operations, its general transfer pricing policies, and its global allocation of income and economic activity. The master file shall "*assist tax administrations in evaluating the presence of significant transfer pricing risk*" by placing "*the MNE group's transfer pricing practices in their global economic, legal, financial and tax context*".[35]

BEPS Action 13 recommends implementing a requirement for MNEs to prepare and file a master file domestically. A lot of countries have already implemented this recommendation. Other than the CbCR, the master file has to be filed directly to the tax administrations in each country where the MNE is doing business. Therefore, for submitting the master file the domestically applicable laws in all those countries are relevant.[36] BEPS Action 13 recommends a set of data that should be included in the master file but leaves the detailed implementation mainly to the discretion of the jurisdictions implementing the master file documentation. In particular, unlike for the CbCR, no model legislation has been suggested. Furthermore, BEPS Action 13 does not suggest a threshold that determines which MNEs would fall under the requirement to file a master file. As a consequence, the thresholds for MNE to be covered by the obligation to file a master file vary considerably between different jurisdictions.[37]

[34] OECD (2015), *Action 13 - 2015 Final Report*, p. 22.
[35] OECD (2015), *Action 13 - 2015 Final Report*, p. 14 f.
[36] OECD (2015), *Action 13 - 2015 Final Report*, p. 20.
[37] For example in Spain companies with worldwide revenue of EUR 45 million must prepare a master file, while in France the threshold is EUR 400 million. In Japan the threshold is EUR 800 million. R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 452, Journals IBFD.

The proposed master file is not a new concept but is based on the transfer pricing documentation requirements in the EU TPD.[38] The master file according to the EU TPD provides information on transfer pricing policies applied by MNEs for their EU operations. The document typically includes an industry analysis, a company background, a functional analysis, a selection of methods and economic analyses. The functional analysis describes the functions performed, risks assumed and assets used. In addition, a selection of the transfer pricing methods and the subsequent economic analyses relevant to multiple members of the MNE group in different jurisdictions are included. The master file should essentially explain the arm's length nature of the company's transfer prices to the tax authorities.

Even though the documentation requirements under BEPS Action 13 are based on the EU TPD, BEPS Action 13 goes beyond of what is required under the EU TPD as it obliges MNEs to provide information in a more "formalistic" and standardized manner.[39] The master file requires a disclosure of "*indicators of where and how an MNE's business operations are conducted globally*".[40] In order to achieve that goal, the master file must include information on five categories: (1) the company's organizational structure, (2) a description of the MNE's business(es), (3) the MNE's intangibles, (4) the MNE's intercompany financial activities and (5) the MNE's financial and tax positions.

The part on the company's organizational structure requires an illustration of the MNE's legal and ownership structure and the geographical location of operating entities. This requirement to disclose the legal and ownership structure of the entities of a MNE on a global basis should provide the tax authorities with a better understanding of the taxpayer's business. Whereas the legal and ownership structure has to be disclosed, the organization of the company from a functional perspective is not required and has to be provided only as far as it is required in other parts of the master file.[41]

[38] OECD, Public Consultation, White Paper on Transfer Pricing Documentation, 30 July 2013, p. 21, para. 74; S.T.Y. Sim, *A Different Take on Transfer Pricing in Asia*, 22 Asia-Pac. Tax Bull. 4 (2016), Journals IBFD.

[39] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 448, Journals IBFD.

[40] J.S. Wilkie, *Master File, Local File and Country-by-Country Reporting: A Canadian Perspective*, 23 Intl. Transfer Pricing J. 2 (2016), p. 118, Journals IBFD.

[41] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 450, Journals IBFD.

The part on the description of MNE's business(es) shall provide a high-level analysis of the MNE's core business on a global scale. This part has to include the important drivers of business profit, a description of the supply chain and the main geographic markets for the group's five largest products and/or service offerings by turnover. In addition, information on the value chain and the main geographical markets of other products/services that account for more than 5% of the group's turnover has to be included. Under the EU TPD, the supply chain is not required. Nevertheless, it has been typically included in the master file.[42] The value-chain analysis is the key figure in the master file. It should provide the tax authorities with a better understanding of the business and allow an assessment on where the residual profit will be taxed. The description of the supply chain should give the tax authorities information about the functions performed by members of the MNE group in other countries in respect of intra-group services and other transactions. This information provides tax authorities with a basis to examine whether some of this profit should be allocated to their country without just applying formulary apportionment. BEPS Action 13 does not provide further guidance on which information has to be provided on the main geographical markets. In addition to an overview of regions or countries where largest products and/or services are offered, the description could include details such as market revenue, market share, main competitors and/or market trends.[43]

Similar as under the EU TPD, the master file under BEPS Action 13 has to include also a functional analysis. Under the EU TPD, the functional analysis was however quite detailed and was the main part of the master file documentation.[44] Under BEPS Action 13 this detailed functional analysis is moved to the local file. The functional analysis in the master file can be brief and should describe only the "*principal contributions to value creation by individual entities within the group, i.e. key functions performed, important risks assumed, and important assets used*". The changes as compared to the previous tax year will be documented in the description of important business restructuring transactions, acquisitions and divestitures.

[42] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 450, Journals IBFD.
[43] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 450, Journals IBFD.
[44] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 450, Journals IBFD.

When comparing the guidelines in BEPS Action 13 with the EU TPD, the importance that has been attached to intangibles and intercompany financial activities becomes apparent. Whereas the EU TPD just generally requires detailed documentation on all intra-group transactions (including transactions relating to intangibles and intercompany financial activities), the master file under BEPS Action 13 requires a detailed analysis of transfer pricing relevant information on intangibles and intercompany financial activities in two separate parts. The requirement to describe other important intra-group service arrangements can still be found under the category for the description of the MNE's business. In this respect it is important to note that not all intra-group service arrangements have to be included in the master file but only the ones that are "significant" for the business.

The documentation on intangibles in the master file does not only consist of a list of the MNE's intangibles important for transfer pricing purposes and information about the legal owners but also requires MNEs to outline their overall strategy for the development, ownership and exploitation of intangibles that are important for transfer pricing purposes. The documentation on intangibles in the master file has to also include the location of principal R&D facilities and of R&D management. This focus on intangibles is in line with other proposals in the BEPS Action Plan. In transfer pricing, intangibles have been identified as an area that is particularly involved in tax planning schemes.[45] Under the notion of intangibles adopted by the OECD, the allocation of profits from intangibles should no longer be limited to merely determining the legal ownership of intangibles. Instead, the entitlement to intangible-related returns should follow a new concept: the analysis of functions related to the development, maintenance, enhancement, protection and exploitation (DEMPE functions) of the intangibles.[46] For analyzing the DEMPE functions and consequently allocating the profits from exploiting the intangibles accordingly, the additional information about the overall strategy for the development, ownership and exploitation of intangibles that has to be reported in this part is relevant and useful information.

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[45] OECD (2015), *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports*, OECD Publishing, Paris.

[46] OECD (2015), *Actions 8-10 - 2015 Final Reports*, p. 73; R. Petruzzi & V. Wöhrer, "Business Profits, Permanent Establishments and Associated Enterprises", in: M. Lang, P. Pistone, A. Rust, J. Schuch, C. Staringer (eds.), *The UN Model Convention and its Relevance for the Global Tax Treaty Network* (Linde 2016), forthcoming.

With regard to the MNE's intercompany financial activities, a description of how the group is financed and information on members of the MNE group that provide a central financing function for the group has to be provided in addition to the MNE's general transfer pricing policies related to intra-group financing arrangements.[47] The description of how the group is financed has to include important financing arrangements with unrelated lenders. This requirement under the heading of intra-company financial agreements could be relevant because BEPS Action 4 identifies BEPS risks in areas where (i) MNEs place high levels of third-party debt in high-tax countries, (ii) MNE use intra-group loans to generate interest deductions in excess of the group's actual third-party interest expense and (iii) MNEs using financing to fund the generation of tax-exempt income.[48] Therefore, the information about financing arrangements with unrelated lenders could be used by tax authorities to challenge interest rate deductibility.[49]

The MNE's financial and tax positions also form part of the master file and must contain a list and description of the MNE's existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries. In addition, an annual consolidated financial statement for the fiscal year concerned must be included if such a consolidated statement had already been prepared for other purposes.[50]

As compared to the BEPS requirements for the master file, the master file in the EU TPD is more flexible as it often merely requires a general description of the relevant issues. In contrast, the master file under BEPS Action 13 requires many lists, e.g. of important intra-group service agreements, of intangibles, of important intra-group agreements related to intangibles and of the MNE group's tax rulings. Regarding the level of detail, BEPS Action 13 however still provides for some flexibility by stating that "*taxpayers should use prudent business judgment in determining the appropriate level of detail for the information supplied*".[51]

[47] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 447 (450), Journals IBFD.
[48] OECD (2015), *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report*, p. 11, OECD Publishing, Paris.
[49] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 451, Journals IBFD.
[50] OECD (2015), *Action 13 - 2015 Final Report*, p. 25 f.
[51] OECD (2015), *Action 13 - 2015 Final Report*, p. 15.

2.2. BEPS Action 13: Local File

The local file supplements the information in the master file and provides more detailed information relating to specific intercompany transactions. The local file has the purpose of providing relevant information for transfer pricing analysis of transactions between a local country affiliate and associated enterprises in other countries which are material in the context of the local country's tax system. Just like the master file, also the local file in BEPS Action 13 is based on the provision already found in the EU TPD. However, in some aspects, BEPS Action 13 has considerably extended the scope of information that has to be provided.

The local file has to be prepared separately for each entity and must be provided directly to the local tax administration.[52] For each country where a MNE is doing business a local file has to be prepared that includes information on (1) the local entity, (2) controlled transactions and (3) financial information.[53] In general, a local file should be prepared for each jurisdiction where the MNE has either a subsidiary or a permanent establishment.

The data that has to be provided in the local file about controlled transactions is more detailed as compared to the EU TPD. Essentially, the local file asks for specific information about intra-group transactions in which a local country affiliate of an MNE has participated, including the identity of transaction parties; the terms and context of the transactions; a suitable functional analysis; an explanation of the transfer pricing methodology adopted by the taxpayer to establish the pricing and related transaction terms; and related financial information. This kind of documentation usually would have to be prepared also independent from the requirements in BEPS Action 13 as it is similar to the TP documentation that previously already had to be prepared for the tax authorities of many countries.[54] The local file under BEPS Action 13 however has to not only describe and explain country-specific controlled transactions and provide information about the comparability analysis and the selection of the appropriate method but has to also break the analysis of the controlled transactions down to different categories and list the information separately for each tax jurisdictions where the foreign payor or recipient of an amount of transaction flow is resident. The local file does however not have to include detailed information about all controlled transactions, but should

[52] OECD (2015), *Action 13 - 2015 Final Report*, p. 20.
[53] OECD (2015), *Action 13 - 2015 Final Report*, p. 27.
[54] J.S. Wilkie, *Master File, Local File and Country-by-Country Reporting: A Canadian Perspective*, 23 Intl. Transfer Pricing J. 2 (2016), p. 118, Journals IBFD.

concentrate on 'material controlled transactions'. BEPS Action 13 does not propose a common specific materiality threshold, but instead, recommends that jurisdictions should adopt their own thresholds which should consider the size and the nature of the local economy, the importance of the MNE group in that economy, the size and nature of local operating entities, and the overall size and nature of the MNE.[55] This limitation aims to provide tax administrations with the relevant information without overwhelming the taxpayers with documentation requirements.[56]

Furthermore, BEPS Action 13 requires inter alia including copies of all material intercompany agreements and of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local tax jurisdiction is not a party and which are related to material controlled transactions that are analyzed in the local file. What is more is that the local file has to also lay down financial information about the local entity: it's financial statements, how financial data has been used in applying the TP method and a schedule of financial data used for comparables.

2.3. BEPS Action 13: Country-by-Country Report

The aim of BEPS Action 13 was to develop rules that require MNEs to provide "*all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template*".[57] The CbCR, together with the master file and the local file should give all tax authorities a clear view of an entity as a whole and the relationship of its various parts.[58] The CbCR is supposed to provide deeper insight into how a MNE functions as one unitary enterprise in an economic sense and how the functions, profits and assets are allocated to the different entities in the MNE.[59]

The CbCR shall provide tax administrations of all countries where a MNE is involved in business activities information about the global allocation of income and taxes paid and should furthermore allow the tax administrations to assess where the economic activities of a MNE take place. Both, the master file and the CbCR are supposed to be made available to the tax

[55] OECD (2015), *Action 13 - 2015 Final Report*, p. 17.
[56] OECD (2015), *Action 13 - 2015 Final Report*, p. 17.
[57] OECD (2015), *Action 13 - 2015 Final Report*, p. 9.
[58] S. Picciotto, *International Taxation and Economic Substance*, 70 Bull. Intl. Taxn. 12 (2016), p. 752 (754), Journals IBFD.
[59] J.S. Wilkie, *Master File, Local File and Country-by-Country Reporting: A Canadian Perspective*, 23 Intl. Transfer Pricing J. 2 (2016), p. 119, Journals IBFD.

authorities of all jurisdictions where the MNE has a subsidiary or a PE. The contents of the master file and the CbCR serve however different purposes. Whereas the master file should provide the tax authority with information on the MNE as a whole, without specifically requiring data on the separate jurisdictions where the MNE operates, the CbCR focuses on providing basic information and key figures on every single country. Thereby, the CbCR shall make it easier for tax administrations to identify transfer pricing risks and specifically target those issues in an audit.[60] Other than the master file and the local file which have already been part of transfer pricing documentation under the EU TPD, the CbCR is a new instrument. Only for industries of extractive industries[61] and financial institutions[62] some jurisdictions have already implemented CbCR to a certain extent earlier.

In addition to the master file and the local files MNEs with an annual consolidated group revenue equal to or exceeding EUR 750 million also have to prepare a CbCR.[63] In general, the 'ultimate parent entity' of the MNE has to prepare and file a CbCR with the tax authorities of the jurisdiction where the ultimate parent entity of the MNE group is tax resident. Other than the master file and the local file, the CbCR does not have to be provided directly to all local tax administrations where the MNE is doing business. Instead, only the ultimate parent entity or the surrogate parent entity is required to provide a CbCR to the tax administration of its residence state. The tax administration of this country should subsequently transmit the CbCR on an automatic basis to each jurisdiction where the MNE group has a subsidiary or a PE through applicable exchange-of-information provisions.[64]

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[60] OECD (2015), *Action 13 - 2015 Final Report*, p. 9.
[61] See e.g. the Extractive Industries Transparency Initiative (EITI). This is an international standard to which countries can sign up voluntarily. See also Congress of the United States of America, Sec. 1504 Dodd-Frank Wall Street Reform and Customer Protection Act (2010). The Dodd-Frank Act requires companies in the extractive sector listed in the US to publish payments made to governments on a country-by-country basis. Similar requirements apply to EU companies in the extractive and forestry sector under the 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 Text with EEA relevance (OJ 2013, L 182/19).
[62] See e.g. Directive 2013/36/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 2013, L 176/338).
[63] OECD (2015), *Action 13 - 2015 Final Report*, p. 21.
[64] OECD (2015), *Action 13 - 2015 Final Report*, p. 23.

To determine the ultimate parent company, consolidation principles apply. Where the MNE is required to prepare consolidated financial statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange, it also has to prepare a CbCR.[65] All entities included in the consolidated statement should also be included in the CbCR.[66]

Even though the primary reporting obligation is placed on the ultimate parent entity and the CbCR generally has to be filed only in the ultimate parent entity's residence state, there are some situations where a CbCR has to be filed in a different jurisdiction. This is the case where the ultimate parent entity does not have to file a CbCR in its residence jurisdiction because this jurisdiction does not take part in the CbCR framework as agreed on under BEPS Action 13 and consequently does not implement domestic legislation requiring the reporting of CbCR. Furthermore, a secondary reporting obligation arises where the resident state of the ultimate parent entity does not automatically exchange the CbCR with the jurisdictions where the MNE group is doing business, either because the necessary competent authority agreement is missing or due to a systematic failure.[67] In these cases a surrogate parent entity can be appointed by the MNE group which files the CbCR on behalf of the ultimate parent entity. If no such surrogate parent entity is appointed, all entities in the MNE group are supposed to be obliged to file a CbCR.[68]

The implementation of CbCR involves both domestic legislation requiring the ultimate parent of a MNE to file a CbCR and competent authority agreements providing for automatic exchange of CbCR between the contracting states.[69] BEPS Action 13 offers templates both for domestic legislation and for bi- and multilateral competent authority agreements. BEPS Action 13 requires an implementation of CbCR and its automatic exchange for fiscal years beginning on or after 1 January 2016.[70]

The CbCR as it is proposed under BEPS Action 13 basically consists of three separate tables. In the first table, all tax jurisdictions where the MNE operates have to be listed and certain

[65] OECD (2015), *Action 13 - 2015 Final Report*, p. 39.
[66] OECD (2016), *Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, p. 5.
[67] OECD (2015), *Action 13 - 2015 Final Report*, p. 41.
[68] Art. 2 Model CbCR legislation, OECD (2015), *Action 13 - 2015 Final Report*, p. 40; Section 2 Annex 3 DAC.
[69] OECD (2015), *Action 13 - 2015 Final Report*, p. 23.
[70] OECD (2015), *Action 13 - 2015 Final Report*, p. 10.

information has to be provided separately for each jurisdiction. In this table, the revenues from intra-group transactions and from transactions with independent parties as well as the sum thereof, the profit or loss before income tax, the income tax paid, the income tax accrued, the stated capital, the accumulated earnings, the number of employees and the value of all tangible assets other than cash have to be stated.[71] The information relating to PEs has to be allocated to the jurisdiction where the PE is situated. BEPS Action 13 allows for flexibility as regards the source of the required data. The MNE can choose whether to use data from its consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts. A reconciliation of the revenue, profit and tax reporting in CbCR to the consolidated financial statements is not required. The MNE should however use the same source every year.[72]

In the second table, a list of all entities and permanent establishments (PEs) and their place of organization or incorporation (if it is different from their residence) has to be drawn up. An overview of all operating entities has to be included already in the master file. The chart in the master file focuses, however, on the legal and ownership structure of the MNE and does not have to list the PEs. The table that has to be part of the CbCR, has to disclose the main business activity(ies) of each entity and each PE. It can be chosen from 'Research and Development', 'Holding or Managing Intellectual Property', 'Purchasing or Procurement', 'Manufacturing or Production', 'Sales, Marketing or Distribution', 'Administrative, Management or Support Service', 'Provision of Services to Unrelated Parties', 'Internal Group Finance', 'Regulated Financial Services', 'Insurance', 'Holding Shares or Other Equity instruments', 'Dormant' and 'Other'.[73]

The third table provides the MNE with some space to provide further information or explanation of the data in the CbCR. The MNE for example has to provide information on the business activities of those entities where 'Other' has been chosen as business activity. In addition, the MNE could also provide information on tax transparent partnerships. If a partnership is not tax resident in any jurisdiction, its income should be reported as stateless income to the extent it is not attributable to a PE. In such a situation, the third table could include information on the partnership structure and on whether the stateless income is

[71] OECD (2015), *Action 13 - 2015 Final Report*, p. 29.
[72] OECD (2015), *Action 13 - 2015 Final Report*, p. 32.
[73] OECD (2015), *Action 13 - 2015 Final Report*, p. 30.

taxable in a partner jurisdiction.[74] Furthermore, the information on the data source and explanations of possible deviation between the master file, the local file and the CbCR could be provided in this table.[75]

2.4. Public Country-by-Country Report

Even though OECD BEPS Action 13 only proposes automatic exchange of CbCR between the tax administrations of the participating member states, recent developments indicate that CbCR might not stay confidential but, instead, could eventually become available to the public. Already during the drafting of BEPS Action 13, some non-profit organizations have been demanding public CbCR.[76] The OECD working group responsible for drafting BEPS Action 13 has however rejected public CbCR.[77] Nevertheless, there are ongoing discussions, especially within the EU about going beyond the BEPS proposals by requiring MNEs not only to provide CbCR to the tax administration but to also make the CbCR available to the public. In addition to sharing CbCR between tax authorities, the European Commission has proposed an amendment to the Accounting Directive which would require public disclosure of key information by large multinationals. [78] This proposal had been discussed by the Working Party on Company Law during the Netherlands and Slovak Presidencies. In December 2016, the Presidency has presented a compromise proposal which is still under general scrutiny reservation of all delegations and under parliamentary scrutiny reservation of Denmark, France, Lithuania, Sweden and the UK.[79] In February 2017, the European Parliament Committee on Economic and Monetary Affairs has however published a draft report presenting a more comprehensive version for mandatory public country-by-country reporting

[74] OECD (2016), *Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, p. 7.
[75] OECD (2015), *Action 13 - 2015 Final Report*, p. 32.
[76] See e.g. the Tax Justice Network: http://www.taxjustice.net/topics/corporate-tax/country-by-country/; ICRICT, Evaluation of the Independent Commission for the Reform of International Corporate Taxation for the Base Erosion and Profit-Shifting Project of the G20 and OECD, October 2015, available at http://www.icrict.org/wp-content/uploads/2015/10/ICRICT_BEPS-Briefing_EN_web-version-1.pdf.
[77] N. Roller, *Dokumentation von konzerninternen Verrechnungspreisen – neue Standards*, 25 SWI 7 (2015) p. 326 (327).
[78] European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (Proposal for an Amendment of the Accounting Directive)*, COM/2016/198 final, 12 April 2016.
[79] Presidency/General Secretariat of the Council, *Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CbCR) – State of play*, 2016/0107 (COD), 19 December 2016.

for multinational groups.[80] On 21 June 2017, the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs published a joint report suggesting improvements of the Commission's proposal, in particular a broadening of the scope of public CbCR.[81] The amended proposal was approved by the European Parliament in first reading.[82] It remains to be seen whether the Council approves this proposal.

The proposal for public CbCR has been criticized by the OECD and other jurisdictions as the EU representatives were involved in drafting BEPS Action 13 and have supported the decision for automatic exchange of CbCR as the new framework. *Pascal Saint-Amans*, director of the OECD's Centre for Tax Policy and Administration argued that public CbCR was "*not the deal that was reached*" by the OECD and G-20.[83] Similarly, Robert Stack from the US Treasury expressed his concerns about the EU proposal to make CbCR public: "*The Treasury department was most disappointed when the EU member states agreed in the BEPS Project to country-by-country reporting among tax authorities and then proposed to make it public. The ink wasn't dry on the BEPS recommendations before certain elements at the EU proposed walking away from the multinational agreement to suggest that this should be done on a public basis.*"[84]

Public CbCR is however not a completely new concept. Certain sectors are already obliged to disclose a CbCR to the public. Within the EU, companies in the extractive and forestry sectors already have to disclose payments to governments on a CbC-basis as part of their annual

[80] European Parliament Committee on Economic and Monetary Affairs, Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, 2016/0107(COD), February 2017, available at http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-597.646&format=PDF&language=EN&secondRef%02.

[81] European Parliament Committee on Economic and Monetary Affairs and Committee on Legal Affairs, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016)0198 – C8-0146/2016 – 2016/0107(COD)), 21 June 2017, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0227+0+DOC+XML+V0//EN, accessed 18 Nov. 2017.

[82] European Parliament, Amendments adopted by the European Parliament on 4 July 2017 on the proposal for a directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016)0198 – C8-0146/2016 – 2016/0107(COD)), 4 July 2017, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0284+0+DOC+XML+V0//EN, accessed 18 Nov. 2017.

[83] S. Gibson, *Miles to Go on Tax Transparency*, 84 Tax Notes International 12 (2016) p. 1031.

[84] International Tax Review, Global Tax 50: Robert Stack, 13 Dec. 2016, available at: http://www.internationaltaxreview.com/Article/3646673/Global-Tax-50-2016-Robert-Stack.html, accessed 12 Jan. 2017.

financial statements.[85] Furthermore, banks and investment funds are obliged to prepare a CbCR and to publish it together with their annual report.[86] Public CbCR for banking groups is however different from the recently proposed public CbCR for MNE of all branches and requires only a more limited set of information. Credit institutions and investment firms have to annually disclose the name and nature of activities undertaken by an entity, their turnover, number of full time employees, profit or loss before tax, tax on profit or loss, and any public subsidies received. The data has to be provided aggregated by country and by institution.

Whereas the already existing EU requirements for the extractive sector only require the disclosure of payments to governments, the provision for the banking sector as well as the recently proposed amendment of the Accounting Directive to implement CbCR in the EU require the publication of the taxes due and taxes paid of a multinational as well as some key economic indicators. The scope of the set of data that has to be disclosed is however more limited than the data that has to be reported under BEPS Action 13.

If the proposal to amend the Accounting Directive is successful public CbCR would have to be implemented in all member states of the EU. All MNEs with their headquarter, a subsidiary or a PE in the EU that do not operate in only one tax jurisdiction[87] would be required to publish a CbCR with a business register in the EU and online on their company website for at least five consecutive years.[88] In general, the ultimate parent entity will be obliged to publish the CbCR if it is governed by the national laws of one of the EU member states. Public CbCR does not only cover MNEs headquartered in the EU, but also MNEs based outside the EU. In such a case, the subsidiary will be required to publish a CbCR. If the subsidiary does not have the necessary information for preparing the CbCR available and cannot obtain all required information it has to explain why this is the case. Furthermore, a CbCR containing information to the extent that the data is available to the subsidiary has to be published. Similar reporting requirements apply to EU branches of undertakings not governed by the law of one of the EU member

[85] Article 41 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 2013, L 182/19).
[86] Article 89 Directive 2013/36/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 (OJ 2013, L 176/338).
[87] Art. 48b Proposal for an Amendment of the Accounting Directive.
[88] Art. 48d Proposal for an Amendment of the Accounting Directive.

states.[89] Credit institutions and investment firms will be exempt from the CbCR under the amendment of the Accounting Directive because they have to publish a CbCR under the EU Capital Requirements Directive IV (CRD IV)[90].

Under the Commission's proposal, the turnover threshold for public CbCR is the same as for CbCR to national tax authorities. The proposed changes to the Accounting Directive are addressed to MNEs with an annual consolidated net turnover exceeding EUR 750 million.[91] In contrast, the draft report of the European Parliament Committee on Economic and Monetary Affairs suggest using existing definitions of large undertakings and large groups in the Accounting Directive. As a result, the threshold requirements under the Parliament's proposal are already fulfilled if an undertaking or a group on a consolidated basis exceeds at least two of three criteria: a balance sheet total of EUR 20 million, a net turnover of EUR 40 million and an average number of employees during the financial year of 250.[92] If this lower threshold would become applicable, a substantially higher number of MNE would be affected.[93]

According the Commission's proposal, the CbC report has to disclose information on the nature of the activities, the number of employees, the total net turnover, profit or loss before income tax, the amount of income tax accrued in the relevant year, the amount of income tax paid during the relevant year, and accumulated earnings. The proposal approved by the European Parliament in first reading requires in addition that also the other elements of a CbC report under the DAC are included: the name of the ultimate undertaking and, where applicable, a list of all its subsidiaries, the fixed assets other than cash or cash equivalents, the stated capital and the net turnover separately for the turnover made with related parties and the turnover made with unrelated parties. Furthermore, the European Parliament's proposal would even extent the scope of public CbC reporting beyond the reporting requirements under BEPS Action 13. It would require to report also details of public subsidies received and

[89] Art. 48b Proposal for an Amendment of the Accounting Directive.
[90] See Article 89 Directive 2013/36/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 (OJ 2013, L 176/338).
[91] Art. 48d Proposal for an Amendment of the Accounting Directive.
[92] Amendment 9 of the European Parliamentary Draft Report.
[93] An impact assessment of the European Commission has estimated that instead of at least 1,900 EU groups that would be covered under the 750 Mio threshold, the use of the definition of large EU MNE groups would cover at least 20,000 EU groups. These estimations do however only cover MNE groups, and not also separate undertakings. European Commission, Impact Assessment assessing the potential for further transparency on income tax information, SWD(2016) 117 final, 12 April 2016, p. 22.

donations made to politicians, political organisations or political foundations and whether undertakings, subsidiaries or branches benefit from preferential tax treatment, from a patent box or equivalent regimes.

The European Commission proposed that the information in the CbC report shoud be stated separately for each EU member state. In this context, the data relating to PEs has to be allocated to the jurisdiction where the PE is situated. Information on activities outside the EU would have to be provided on an aggregated basis for other tax jurisdictions. Only for certain jurisdictions listed in a common EU list of non-compliant tax jurisdictions the information would have to be provided separately as well.[94] In contrast, according to the European Parliament's proposal, also the data in the CbC report has to be provided separately for each jurisdiction, including not only EU member states but also third states. The European Parliament considered the limitation of the scope which only requires separate reporting of information related to EU Member States and tax havens as inappropriate and recommended that multinational corporations should disclose relevant information for all countries worldwide in which they operate.

The proposal adopted by European Parliament allows omitting the disclosure of parts of the data where the nature of the information would be seriously prejudicial to an undertaking's commercial position. In such a case, the CbCR must disclose that the reported information is not comprehensive.[95] Furthermore, it must be explained why the disclosure would be seriously prejudicial to the commercial position of the undertaking. According to the proposal adopted by the European Parliament, omissions would be subject to prior authorization of the national competent authority and would have to be notified to the European Commission. This provision was not included in the original Commission's proposal.

Even though the discussions about implementing public CbCR in the EU are still ongoing, some countries have already started to implement the proposal. The UK and France have already adopted provisions dealing with public CbCR domestically. In September 2016, the United Kingdom has amended its Finance Bill to give the HR Treasury the power to adopt regulations for a public disclosure of CbCR.[96] The amendment allows, but does not oblige, the HM Treasury

[94] Art. 48g of the Proposal to change the Accounting Directive.
[95] Art. 48c (3a) – (3c) of the Proposal to change the Accounting Directive.
[96] Schedule 19, part 2, para. 17 Finance Act 2016 c.24, available at http://www.legislation.gov.uk/ukpga/2016/24/schedule/19/paragraph/17/enacted.

to bring forward regulations to require groups to include a country-by country report in their published group tax strategy.

France adopted public CbCR domestically on 8 November 2016 as a part of its "*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*" (Law on transparency, the fight against corruption and the modernization of the economy).[97] Similarly as the EU proposal for public CbCR, the French provision for public CbCR would have required multinationals with a turnover of at least EUR 750 million to publish information about the nature of activities, the number of employees, the net sales, the income before tax, the income tax due for the current year, the tax paid and the retained earnings. The attempt to implement public CbCR in France was however not successful. The French Constitutional Court held that public CbCR interferes disproportionally with the freedom of enterprise („*liberté d'entreprendre*") and declared public CbCR unconstitutional.[98]

Nevertheless, at least in the EU, it seems that tax policy makers are in favour of increasing transparency and providing the public with more information on the tax situations of multinational entities. Therefore, it would not be surprising if automatic exchange of CbCR between tax administrations is just an interim solution and that the global standards are further developing towards public CbCR.[99]

3. Costs and Benefits from a Taxpayer's Perspective

3.1. Harmonization of Documentation Requirements

In a White Paper on Transfer Pricing Documentation of 2013, the OECD has acknowledged the necessity to simplify or streamline transfer pricing documentation requirements because more and more countries had started the preparation of transfer pricing documentation.[100] Whereas many countries had introduced specific transfer pricing documentation requirements, the nature and detail of the respective domestic provisions varied

[97] Law No. 830 on transparency, the fight against corruption and the modernization of the economy, 8 November 2016, available at http://www.assemblee-nationale.fr/14/ta/ta0830.asp.
[98] Conseil Constitutionnel, 8. Dec. 2016, 2016-741, para. 103.
[99] The EY 2014-15 Tax risk and controversy survey revealed that 94 % of the largest companies expect that global disclosure and transparency requirements will continue to grow. See EY, A new mountain to climb: Tax reputation risk, growing transparency demands and the importance of data readiness, 2014-15 Tax risk and controversy survey series, p. 20, available at http://www.ey.com/Publication/vwLUAssets/EY-a-new-mountain-to-climb/$FILE/EY-a-new-mountain-to-climb.pdf, accessed 23 Feb. 2017.
[100] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, available at http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf.

considerably.[101] Different domestic requirements lead to situations where MNE were for example often required to comply with two or more sets of transfer pricing documentation for one single cross-border controlled transaction.[102] Consequently, for taxpayers the new guidelines for the local file and the master file could be a positive development in the sense that uniform rules on the expectations have been introduced.

Until BEPS Action 13, the OECD did not provide clear standardized guidance on transfer pricing documentation.[103] In contrast, the EU TPD has the aim to standardize the documentation that MNEs doing business in Europe must provide to tax authorities. The use of the EU TPD – which was optional for MNE within the EU – enabled MNEs to use the same documentation in all EU Member States.[104] The master file concept in the EU TPD had the aim of lowering the compliance burden for MNEs by allowing the use of one master file for many jurisdictions.[105] As it is more efficient to use one master file instead of a separate documentation for every single jurisdiction, many MNEs have prepared not only an EU master file but also an Asian master file, an EMEA master file or an African master file.[106] However, due to the lack of harmonized transfer pricing documentation guidelines that were accepted by all jurisdictions, the transfer pricing documentation, including the master file which provided information relevant for a broader geographical area, often had to be adapted to domestic guidelines. Therefore, the different entities of a MNE often had to prepare not only their own local file but also information on the overall group, which was at best duplicated from a common template prepared by the ultimate parent entity. Whereas the EU TPD introduced documentation guidelines that lead – at least to a certain extent – to a harmonization of the documentation requirements in the EU, the focus of the master file concept under the EU TPD was still on a regional level. Furthermore, the EU TPD was an optional concept and numerous MNE in the EU had elected not to fully implement the EU TPD guidance, inter alia due to a lack of clarity as to its acceptability. Furthermore, taxpayers were concerned about the implementation of the EU TPD because it would have increased the scope of information that

[101] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 14.
[102] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 10.
[103] See OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 20.
[104] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 22.
[105] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 447, Journals IBFD; OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 22.
[106] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 447, Journals IBFD.

has to be provided, including all APAs and rulings, and would have led to a wider dissemination of European-wide information to all relevant EU tax authorities.[107]

The common framework introduced by BEPS Action 13 should address this issue that different datasets had to be prepared for different countries. The expectation under the new TP guidelines in BEPS Action 13 is that, instead of preparing self-explanatory, self-fully contained transfer pricing documentation for every single entity, the task to prepare the master file can be assigned to one entity. The master file concept in BEPS Action 13 has the aim to provide a common template for those parts of the TP documentation that concern the whole group.[108] Globally standardized guidelines can increase the efficiency for multinationals in preparing the TP documentation because common guidelines allow the preparation of one set of information that can subsequently be used in all jurisdictions where the MNE operates. This standardization lowers the compliance burden for taxpayers as compared to diverging domestic requirements in many jurisdictions where the MNE operates. Due to BEPS Action 13, the domestic transfer pricing documentation requirements can be expected to become closer aligned to each other. Especially for the information included in the master file that concern the group as a whole, the requirement to follow different domestic documentation provisions in different countries and to provide the information in different languages could cease. Even though BEPS Action 13 does not suggest that transfer pricing documentation prepared in English should in any case be accepted under the local requirements, "*countries are encouraged to permit filing of transfer pricing documentation in commonly used languages where it will not compromise the usefulness of the documents*".[109]

Whether the new master file concept will allow using only one common master file in all countries where the MNE operates will however depend on the domestic implementation of BEPS Action 13. Other than the CbCR which based on BEPS Action 13 has to be prepared by the ultimate parent entity and only be provided to the tax administration in the jurisdiction of the ultimate parent, the master file has to be filed locally in every jurisdiction according to the domestic requirements.[110] Given that there is not much divergence in the domestic

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[107] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 28.
[108] A.J. Casley, K. Norton & M. Krhoda, *The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation*, 22 Intl. Transfer Pricing J. 1 (2015), p. 4, Journals IBFD.
[109] OECD (2015), *Action 13 - 2015 Final Report*, para. 39.
[110] Some countries require additional elements. For example Poland and Spain require an operating structure to be disclosed in addition to the legal and ownership structure. Also, Italy introduced a specific table of contents

implementation of the master file concept, the preparation of TP documentation could become more efficient. However, the master file in BEPS Action 13 is not part of the BEPS minimum standard but is just a recommendation. There might still be many jurisdictions that will either decide not to implement the master file concept at all or to require not only the master file according to the BEPS requirements but also additional elements.

3.2. Compliance Costs

3.2.1. Master File & Local File

BEPS Action 13 increases the compliance burden for MNEs by demanding a comprehensive transfer pricing documentation consisting of a master file, a local file and a CbCR.[111] The information required under the local file concept of BEPS Action 13 is in many jurisdictions similar to the TP documentation that previously already had to be prepared for the tax authorities.[112] Where local legislation on transfer pricing documentation was in place, usually information on controlled transaction had to be provided.[113] Depending on the requirements that a MNE had to fulfil previously according to the domestic legislation, the requirements for the local file recommended under BEPS Action 13 might however in some aspects extend the scope of information to be provided. Especially the information that has to be provided under the heading 'financial information' which includes inter alia copies of all material intercompany agreements and of existing unilateral and bilateral/multilateral APAs and other tax rulings in many cases goes beyond of what has been required under previous transfer pricing documentation requirements.[114]

The effect of the master file concept in BEPS Action 13 on the compliance costs of MNEs will depend on the requirements that a MNE had to fulfil previously according to the domestic legislation in the countries where it operates. An OECD study revealed that the domestic transfer pricing documentation requirements mostly focused on a national perspective and only a few countries asked for information on the global business of the MNE group.[115] In

that must be complied with. R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 452, Journals IBFD.

[111] See EY, In the spotlight: A new era of transparency and risk, 2016 Transfer Pricing Survey Series, p. 4, available at http://www.ey.com/Publication/vwLUAssets/EY-2016-transfer-pricing-survey-series/$FILE/EY-2016-transfer-pricing-survey-series.pdf, accessed 23 Feb. 2017.

[112] J.S. Wilkie, *Master File, Local File and Country-by-Country Reporting: A Canadian Perspective*, 23 Intl. Transfer Pricing J. 2 (2016), p. 118, Journals IBFD.

[113] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 36 f.

[114] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 13 ff.

[115] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, para. 8 ff.

these countries where information on the overall MNE group was not required or where the required scope of such information was limited, the new master file adds another compliance layer and increases the compliance costs. For MNEs with well-organized global transfer pricing policies, the required information will however usually be relatively easy to compile as it is either readily available in existing documentation or is relatively easy to access.[116] For MNEs where transfer pricing is less organized, the preparation of the new master file may be more cumbersome and may require some additional effort to ensure the master file provides more understanding than it raises questions.[117] However, also in these cases the additional compliance burden will mainly affect the first year of reporting when the MNE has to adapt to the new requirements. Furthermore, many parts of the master file will not substantially change from one year to the next, therefore, additional compliance costs are mainly one-off costs.

BEPS Action 13 requires a broad range of details to be provided which goes beyond what had to be included in the master file according to the EU TPD. Compared to the master file that has to be provided under the EU TPD, the master file concept in BEPS Action 13 requires the reporting of more detailed and of additional information. The master file in BEPS Action 13 is generally broader in scope and now includes detailed focus on areas such as intangibles, financing and one-off transactions. In addition, the framework is formalistic and requires that many lists, e.g. of important agreements, intangibles and transactions, are provided. However, not all items have to be mentioned in these lists, as BEPS Action 13 only requires listing of important items. This provides some flexibility in respect to the scope of reporting. When assessing the importance of listing specific items, BEPS Action 13 requires that the taxpayers uses "*prudent business judgment in determining the appropriate level of detail for the information supplied, keeping in mind the objective of the master file to provide tax administrations a high-level overview of the MNE's global operations and policies. […] Information is considered important if its omission would affect the reliability of the transfer pricing outcomes*."[118] As BEPS Action 13 requires the MNE to decide on the importance of specific items, the scope of reporting depends on how the appropriate level of detail is

[116] A.J. Casley, K. Norton & M. Krhoda, *The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation*, 22 Intl. Transfer Pricing J. 1 (2015), p. 4, Journals IBFD.
[117] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 453, Journals IBFD.
[118] OECD (2015), *Action 13 - 2015 Final Report*, para. 19.

determined. The decision on the appropriate level of detail is not always easy. If the scope is broader, the master file will have to be updated more frequently. A narrow scope might however raise questions from tax authorities as to why certain transactions are not covered in the master file.[119]

3.2.2. Country-by-Country Report

In BEPS Action 13 it is explicitly stated that the taxpayers should not be faced with disproportionally high costs and burdens in producing documentation.[120] The aim was to draft guidelines for transfer pricing documentation that "*balance the usefulness of the data to tax administrations*" with "*any increased compliance burdens placed on the taxpayer*".[121] Furthermore, *Pascal Saint-Amans*, Director of the OECD's Centre for Tax Policy and Administration has testified that the "*need to provide certainty and limit the cost of compliance to businesses while providing useful instruments to countries is at the core of the [OECD's] work and has been fully taken into consideration*".[122]

However, with the CbCR a completely new set of information has to be prepared. This involves additional compliance costs for the taxpayers. The costs of implementation are difficult to estimate as only limited data is available in this respect. Nevertheless, for illustrative purposes, some existing estimations shall be listed here. Both annually recurring costs as well as implementation costs in the first year will occur due to CbCR.

The costs in the first year were for example estimated in a quantitative survey focusing on technology, media and entertainment, and telecoms companies study undertaken by EY. Among the 51 responses, the cost estimate for complying with BEPS Action 13 in the first year was US$ 305,000.[123] In contrast, the UK expected only "*negligible one-off cost in the first year*"

[119] R. Veldhuizen & L. Teneketzis, *The OECD Master File: Past and Future*, 23 Intl. Transfer Pricing J. 6 (2016), p. 448, Journals IBFD.
[120] OECD (2015), *Action 13 - 2015 Final Report*, p. 16.
[121] OECD (2015), *Action 13 - 2015 Final Report*, p. 11.
[122] Testimony of Pascal Saint-Amans, Director, Centre for Tax Policy and Administration, Organisation for Economic Co-operation and Development (OECD), before the United States Senate Committee on Finance, 22 July 2014, available at http://www.finance.senate.gov/imo/media/doc/Testimony%20of%20Pascal%20Saint-Amans.pdf, accessed 28 Dec. 2016.
[123] S. Kuhn, *Counting the costs of transparency compliance*, 83 ASA 11/12 (2014/2015) p. 793 (804).

for businesses to familiarize themselves with the new requirements, to gather relevant information and to provide training to staff.[124]

The annual recurring costs of CbCR were calculated by the European Commission when it made an impact assessment for public CbCR and provided in this context an estimation for the costs that would arise if the CbCR requirement would also be extended to large MNEs currently not covered by the requirement to file a CbCR under BEPS Action 13. For those MNEs (that are however smaller than the MNEs covered under BEPS Action 13), the European Commission estimated the annual costs of CbCR to be on average around EUR 100,000 for one large MNE group.[125] The Austrian Ministry of Finance has for example estimated the costs of implementing CbCR with EUR 200,000 per multinational group that has to report in Austria.[126] In contrast, the German Ministry of Finance estimates the total annual costs of effected MNEs with EUR 536,000.[127] Estimations of the compliance burden for MNE from different sources do not show a uniform picture.

The required information will usually be available for the MNE, either in existing documentation or in relatively easy-to-access information. Resources are however necessary to set up or configure the systems to process the required data. *Murphy* who is one of strongest opponents for CbCR has argued that multinationals will already have procedures and system in place to allocate data on a geographical basis.[128] The different estimations above illustrate however that it is generally difficult to estimate the costs of implementation; also because the costs depend on different factors, e.g. whether the taxpayer was already previously required to report similar information, or which IT system the taxpayer has been

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[124] HM Revenue & Customs, Policy paper: Country by country reporting – updated, 26 February 2016, available at https://www.gov.uk/government/publications/country-by-country-reporting-updated/country-by-country-reporting-updated#background-to-the-measure, accessed 29 Dec. 2016.

[125] European Commission, Impact Assessment assessing the potential fo further transparency on income tax information, SWD (216) 117 final, 12.4.2016, p. 42.

[126] EU-Abgabenänderungsgesetz 2016 – EU-AbgÄG 2016, Vorblatt und wirkungsorientierte Folgenabschätzung, available at https://www.bmf.gv.at/steuern/Vorblatt_EU-AbgAeG_2016.pdf?5i7z9a, accessed 29 Dec. 2016

[127] Bundesministerium der Finanzen, Entwurf eines Gesetzes zur Umsetzung der Änderungen der EU-Amtshilferichtlinie und von weiteren Maßnahmen gegen Gewinnkürzungen und –verlagerungen, 13 July 2016, p. 2, available at http://www.bundesfinanzministerium.de/Content/DE/Downloads/Gesetze/2016-07-13-G-Umsetzung-EU-Amtshilferichtlinie-Massnahmen-Gewinnkuerzungen-verlagerungen.pdf?__blob=publicationFile&v=4, accessed 29 Dec. 2016

[128] R. Murphy, *Country-by-Country Reporting: Holding multinational corporations to account wherever they are*, Task Force on Financial Integrity and Economic Development, June 2009, available at http://www.financialtransparency.org/wp-content/uploads/2015/04/Final_CbyC_Report_Published.pdf, accessed 30 Dec. 2016.

using until the implementation of CbCR. There will also be situations where a MNE had recent mergers and acquisitions and therefore different entities within the group use different accounting systems, e.g. one entity is using SAP, and the other one is using JD Edwards. In these circumstances, it is necessary to agree and implement a global system based on a common standard.[129]

Not only software engineers but also lawyers, advisors, accountants and tax consultants are usually involved in the process of setting up, handling and maintaining the new system because some of the definitions raise questions. It is for example not always straightforward where the headquarter is located and which entities are in or outside the group. One issue that is being discussed is for example whether an investment fund could be considered as being the ultimate parent entity. An investment fund could literally be covered by the definition of an ultimate parent entity. However, if an investment fund is considered as the ultimate parent, this could have the consequence that the data of many MNE groups involved in a number of different business activities has to be aggregated in one single CbCR. In such a situation it is questionable whether the information would still be useful. The OECD has published some guidance on whether investment funds may be ultimate parent entities. According to these guidelines an investment fund will be the ultimate parent only, if the investment fund has to consolidate with investee companies based on the accounting rules that govern the investment entity. If the accounting rules do not require consolidation, the investee rather than the investment fund should prepare the CbCR, even if the investment entity has a controlling interest in the investee company.[130]

Similarly, also the secondary reporting obligation has raised some concerns as the CbCR requirements do not come into place at the same time in all countries. The timing issue is especially relevant for MNEs that have their ultimate parents in a jurisdiction where CbCR is only required for 2017 and other entities in jurisdictions that require CbCR already for 2016. Such a company structure could result in an obligation to file a CbCR for 2016 by a surrogate parent entity. After the CbCR comes in place one year later in the residence state of the ultimate parent entity, the person who has to report and the tax authority to which the CbCR

[129] A. Storck et al., *Global Transfer Pricing Conference "Transfer Pricing in a Post-BEPS World"*, 23 Intl. Transfer Pricing J. 3 (2016), p. 216 (222), Journals IBFD.
[130] OECD (2016), *Guidance on the Implementation of Country-by-Country Reporting – BEPS Action 13*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, p. 5.

has to be provided changes. In general, that should not raise huge issues as all countries should use the same general guidance and template that is provided in BEPS Action 13. Double cost for the taxpayer can however be the result of such timing differences in adopting the rules if local specific guidance and requirements for the CbCR, e.g. on what should or should not be included in the revenues, are not exactly the same in all relevant jurisdictions. As a solution for this issue the OECD has suggested that countries that do not require CbCR for periods commencing from 1 January 2016 may adopt voluntary filing for ultimate parent entities resident in their jurisdiction. By voluntarily filing a CbCR in the residence state of the ultimate parent entity, the MNE group can avoid having to follow local filing obligations of another jurisdiction.[131]

The EUR 750 million-threshold has the aim of balancing the reporting burden with the benefit of providing additional information about the global allocation of profits within a MNE to the tax administrations.[132] This threshold excludes businesses with a revenue level that is so low that CbCR would be a massive compliance cost as compared to the size of their business. Worldwide there are about 10,000 standalone MNEs and 6,500 MNE groups with a turnover exceeding EUR 750 million that will be affected by the new requirements to prepare a CbCR.[133] The OECD has estimated that the EUR 750 million-threshold would cover only 10-15% of MNEs, these MNEs would however in total represent around 90% of corporate revenues.[134] However, even though the CbCR in BEPS Action 13 provides for the threshold of EUR 750 million and most countries are implementing the threshold accordingly, if tax administrations find the information in the CbCR useful, the threshold could be reduced in the future. Tax activist groups like ICRICT and the Tax Justice Network have argued that CbCR does not go far enough as it covers only MNEs exceeding the threshold as opposed to all companies.[135] The

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[131] OECD (2016), *Guidance on the Implementation of Country-by-Country Reporting*, p. 3 ff.
[132] OECD (2015), *Action 13 - 2015 Final Report*, p. 21.
[133] European Commission, Impact Assessment assessing the potential fo further transparency on income tax information, SWD (216) 117 final, 12.4.2016, 131 f.
[134] OECD (2015), *Action 13 - 2015 Final Report*, p. 21.
[135] See e.g. A. Cobham, J. Gray & R. Murphy, What Do They Pay? Towards a Public Database to Account for the Economic Activities and Tax Contributions of Multinational Corporations, February 2017, available at http://datafortaxjustice.net/what-do-they-pay/?utm_content=buffer69698&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer, accessed 22 Feb. 2017; ICRICT, Evaluation of the Independent Commission for the Reform of International Corporate Taxation for the Base Erosion and Profit-Shifting Project of the G20 and OECD, October 2015, available at http://www.icrict.org/wp-content/uploads/2015/10/ICRICT_BEPS-Briefing_EN_web-version-1.pdf, accessed 7 Feb. 2017.

OECD has envisioned that the appropriateness of the revenue threshold will be considered in the 2020 review of implementation of the CbCR standard.[136] Furthermore, the European Commission has considered the consequences of a lower threshold for CbCR in an impact assessment for public CbCR.[137] Whereas the Commission's proposal for public CbCR suggests to implement the threshold of EUR 750 million, the draft report of the European Parliament proposes to adopt a broader scope by using the existing definitions of large groups and large undertakings in the Accounting Directive, lowering the necessary turnover threshold to EUR 40 million.

One issue that could raise questions for MNEs with revenues close to the EUR 750 million-threshold is that different countries implement different thresholds based on their own currency. Domestic legislation determines the circumstances in which the ultimate parent of a MNE or a surrogate parent entity has to file a CbCR. Even though BEPS Action 13 lays down a threshold of EUR 750 million, domestic legislation implementing BEPS Action 13 usually converts that threshold in the local currency. For example, the obligation for US MNE to file a CbCR starts only with an annual revenue of USD 850 million (approx. EUR 800 million) or more. In China, the relevant threshold is an annual revenue of RMB 5.5 billion (approx. EUR 751 million) and in Singapore the threshold is SGD 1.125 billion (approx. EUR 737 million). Due to the slightly different thresholds and changes of the exchange rates, circumstances where MNEs are within the threshold in one country, but outside the threshold in other countries are possible. Where the ultimate parent is not subject to CbCR as it is below the threshold in its country of resident, a slightly different threshold in another country could give rise to a secondary reporting obligation. The OECD suggests however in its Guidance that those different thresholds due to currency fluctuations should not lead to secondary reporting requirements.[138]

136 OECD (2015), *Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, p. 4.

137 European Commission, Impact Assessment assessing the potential fo further transparency on income tax information, SWD (216) 117 final, 12.4.2016, p. 22 f.

138 OECD (2016), *Guidance on the Implementation of Country-by-Country Reporting*, p. 7.

3.3. Reputational Damages

3.3.1. Public Country-by-Country Report

Currently, tax planning structures of multinationals are heavily criticized in the media. There is a fear that public CbCR has a negative impact on the reputation of businesses.[139] A recent survey revealed that 91 % of chief financial officers and tax finance directors across Europe, Asia, and the Americas feel that media scrutiny of tax planning activities has a negative impact on their company's reputation.[140] Furthermore, 75 % said they were concerned around the potential exposure of tax planning information under CbCR and almost a third of respondents said that increasing tax scrutiny had made them change their corporate growth strategy in specific countries.[141]

The media reporting about companies that did not pay enough taxes, dealing with tax planning structures of Apple, Starbucks and Google have attracted the interest of the public.[142] Politicians have taken up this issue and have accused multinationals of "immoral" behaviour.[143] However, in the public debate illegal tax evasion and legal tax planning structures are often mixed up and discussed in the same context.[144] Multinationals should not

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[139] A. Evers & J. Hundsdoerfer, *Country-by-Country Reporting: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 17.

[140] This number can be compared to 51 % in 2011 and 77 % in 2015. Taxand, *2016 Global Survey*, 12 Dec. 2016, p. 7, available at http://www.taxand.com/sites/default/files/taxand/documents/taxand_global_survey_2016.pdf, accessed 21 Dec. 2016. EY's 2014-15 Tax risk and controversy survey revealed an even higher concern: 98 % of the largest global companies surveyed were concerned about the news media coverage on tax issues: EY, *A new mountain to climb: Tax reputation risk, growing transparency demands and the importance of data readiness*, 2014-15 Tax risk and controversy survey series, p. 3, available at http://www.ey.com/Publication/vwLUAssets/EY-a-new-mountain-to-climb/$FILE/EY-a-new-mountain-to-climb.pdf, accessed 23 Feb. 2017.

[141] Ibid, p. 8.

[142] See e.g. E. D. Kleinbard, *Stateless Income's Challenge to Tax Policy*, Tax Notes, 5 Sep. 2011, available at http://www.taxhistory.org/www/features.nsf/Articles/67BEF665EC348BE985257E1A0062230D?OpenDocument, accessed 21 Dec 2016; V. Barford & G. Holt, *Google, Amazon, Starbucks: The rise of 'tax shaming'*, BBC News Magazine, 21 May 2013, available at http://www.bbc.com/news/magazine-20560359, accessed 21 Dec. 2016; T. Bergin, *UK Committees to Examine Starbucks Tax Strategies*, Reuters, 17 Oct. 2012, available at http://www.reuters.com/article/us-britain-starbucks-tax-uk-idUSBRE89G0D920121017; accessed 21 Dec. 2016; ActionAid, *Calling Time: Why SABMiller Should Stop Dodging Taxes in Africa*, Apr. 2012, available at http://www.actionaid.org.uk/doc_lib/calling_time_on_tax_avoidance.pdf, accessed 21 Dec. 2016; ActionAid, *Sweet Nothings: The Human Cost of a British Sugar Giant Avoiding Taxes in Southern Africa*, Feb. 2013, available at http://www.actionaid.org.uk/sites/default/files/publications/sweet_nothings.pdf, accessed 21 Dec. 2016.

[143] E.g. UK: House of Commons, Committee of Public Accounts, HM Revenue & Customs: Annual Report and Accounts 2011-12. Nineteenth Report of Session 2012-13 Report, together with formal minutes, oral and written evidence (The Stationery Office Limited 2012), Q 485, at Ev 40, available at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/716.pdf, accessed 21 Dec. 2016.

[144] J.L.M. Gribnau, A-G. Jallai & A.J. Bakker, *Good Tax Governance and Transparency: A Matter of Reputation or Ethical Motivation?*, 18 Derivs. & Fin. Instrums. 1 (2016), Journals IBFD.

only be prevented from tax evasion, but also from legal possibilities to structure their activities in order to reduce their overall tax liability.[145] This approach has been taken up by the European Commission that argued that "*there are increasing calls on companies to take responsibility for their impact on society and the contribution that businesses make in the form of taxation is increasingly seen as part of corporate social responsibility. This has increased demand for more transparency in the tax affairs of large enterprises in particular where they have significant cross-border activities*".[146]

The public's scepticism about tax affairs of multinationals is high and an entity's reputation may be harmed if it is perceived as not paying its fair share of taxes. If a fast-moving consumer-goods company gets on the first page of a newspaper as a potential tax cheater, it will negatively affect its sales. The increasing attention of the public for the tax affairs of multinationals has led to a situation where not only the company's tax professionals are involved in reporting taxes but, instead, also the C-suite executives.[147] Increasing transparency towards the general public forces MNEs to consider for their tax strategy not only what is required and permissible under the applicable tax legislation but instead, to also take into account the reputational risk of disclosure of the results of that strategy.[148] In order to avoid their firm to get to the centre of public attention and the negative impact of media scrutiny on their reputation, top executives could become more cautions, value the impact on the firm's reputation higher and thereby put less emphasis on achieving a lower effective tax rate. In addition, reporting for tax purposes is increasingly double-checked not only on its compliance with the law but also from a PR-perspective on its possible impact on the public opinion. As good explanations for the business setup are required, some multinationals might reconsider their setup if it gives rise to low taxes being paid or if the CbCR gives the impression that the activities are not carried out where the taxes are paid. Increasing the "tax moral" of MNE by increasing the public scrutiny is the policy objective of public CbCR. MNEs should

[145] European Commission, Recommendation on Aggressive Tax Planning, C(2012) 8806 final, 6 Dec. 2012, at 2.
[146] European Commission, Report from the Commission to the European Parliament and the Council: General assessment of economic consequences of country-by-country disclosure requirements set out in Article 89 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013, COM/2014/0676 final.
[147] See EY, In the spotlight: A new era of transparency and risk, 2016 Transfer Pricing Survey Series, p. 4, available at http://www.ey.com/Publication/vwLUAssets/EY-2016-transfer-pricing-survey-series/$FILE/EY-2016-transfer-pricing-survey-series.pdf, accessed 23 Feb. 2017.
[148] See EY, A new mountain to climb: Tax reputation risk, growing transparency demands and the importance of data readiness, 2014-15 Tax risk and controversy survey series, p. 18, available at http://www.ey.com/Publication/vwLUAssets/EY-a-new-mountain-to-climb/$FILE/EY-a-new-mountain-to-climb.pdf, accessed 23 Feb. 2017.

respect the spirit and letter of the law, responsibly pay taxes as a part of their corporate responsibility and refrain from exploiting existing tax planning opportunities.[149]

However, the CbCR only provides very limited information which does not allow assessing whether an entity was engaged in tax evasion, aggressive tax planning or whether there are good reasons for a lower amount of taxes in a certain year.[150] Further information, as it is contained in the master file and in the local file, would be required to assess whether a multinational can legitimately be accused of aggressive tax planning. However, under the proposed requirements public reporting is only required for the CbCR. Because of the concern that disclosure of only a limited amount of information could easily lead to misunderstandings and in order to stress their image as a 'good citizen', some multinationals are moving ahead and are voluntarily disclosing more information to the public.[151] However, even where a MNE goes beyond the legal requirements and discloses more tax information than required by law, it is not always received favourably. For example, the CbCR that has been published voluntarily by Vodafone has been criticized by tax activists as being "*broad-brushed*" and "*meaningless*".[152] Even though proactive explanations about items in the CbCR that could raise media scrutiny could mitigate the risk of reputational damages, it also involves the risk of "*waiving a red flag*" at issues that would otherwise not have became a major issue.[153] Furthermore, even if more relevant information would be provided, it is questionable whether the public would draw the right conclusions from the information. International tax law is

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[149] European Commission, Impact Assessment assessing the potential fo further transparency on income tax information, SWD (216) 117 final, 12.4.2016, p. 19.

[150] R. Murphy, Country-by-Country Reporting, in T. Pogge & K. Mehta (eds.) *Global Tax Fairness* (Oxford 2016) p. 108.

[151] See e.g. Barclay, available at https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Reports-Publications/CountrySnapshot.pdf, accessed 23 Feb. 2017; Vodafone, available at http://www.vodafone.com/content/dam/vodafone-images/sustainability/downloads/vodafone_2015_tax.pdf, accessed 23 Feb. 2017; PwC, The Total Tax Contribution Framework: Over a decade of development, 2016, available at http://www.pwc.com/gx/en/tax/pdf/the-total-tax-contribution-framework.pdf, accessed 21 Dec. 2016; EY, In the spotlight: A new era of transparency and risk, 2016 Transfer Pricing Survey Series, p. 4, available at http://www.ey.com/Publication/vwLUAssets/EY-2016-transfer-pricing-survey-series/$FILE/EY-2016-transfer-pricing-survey-series.pdf, accessed 23 Feb. 2017.

[152] See Tax Research UK, Vodafone has a long way to go before it is doing country-by-country reporting, available at http://www.taxresearch.org.uk/Blog/2015/12/21/vodafone-has-a-long-way-to-go-before-it-is-doing-country-by-country-reporting, accessed 23 Feb. 2017; A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 70.

[153] See EY, A new mountain to climb: Tax reputation risk, growing transparency demands and the importance of data readiness, 2014-15 Tax risk and controversy survey series, p. 19, available at http://www.ey.com/Publication/vwLUAssets/EY-a-new-mountain-to-climb/$FILE/EY-a-new-mountain-to-climb.pdf, accessed 23 Feb. 2017.

complex and the reported figures are not always easy to interpret. Therefore laypersons could easily misunderstand or misinterpret the numbers.[154] Furthermore, MNEs are concerned that the media is mainly looking for stories to sell and will try to find suspicious aspects in the CbCR without reflecting whether there could be a valid reason for a certain structure.[155] This concern is also reflected in the BEPS report which emphasized that complex tax issues have sometimes been addressed "*in a simplistic manner*" by the civil society and NGOs.[156]

In addition, if the prevailing aim is to avoid 'aggressive' tax planning and to promote that multinationals pay 'their fair share of taxes', there is a need to make a distinction between 'acceptable' and 'aggressive' tax planning. Some argue that even tax planning that is not covered by anti-avoidance rules should be condemned where it prevents the states to cover necessary expenses. It is however not easy to draw a line where aggressive tax planning starts. In this respect, the discussion becomes very emotional. The benchmark is the subjective impression of individuals rather than an objective scale which could determine the legality. Therefore, the opponents of public CbCR argue that tax payments should only be based on legal obligations (taking into account the spirit and letter of the law) and not on a vague concept like "fair taxation".[157]

Whereas empirical studies have given some evidence of profit shifting of multinationals,[158] such practices are often in line with the legal requirements. This raises the question whether taxes should be a gesture of the goodwill of taxpayers or rather strictly required by law. Paying taxes as it is required by law is an obligation; additional contributions to a country's budget beyond the legal obligation could however be considered as a donation. The public scrutiny has the power of encouraging a MNE to contribute to a countries budget: After being accused

[154] K. Datt, *To shame or not to shame: That is the question*, 14 eJournal of Tax Research 2 (2016) p. 486; C. Staringer& E. Hickl, *Steuerdaten: EU droht Unternehmen mit Pranger*, Die Presse, 1 May 2016, available at http://diepresse.com/home/recht/rechtallgemein/4979794/Steuerdaten_EU-droht-Unternehmen-mit-Pranger, accessed 21 Dec. 2016.
[155] See EY, *A new mountain to climb: Tax reputation risk, growing transparency demands and the importance of data readiness*, 2014-15 Tax risk and controversy survey series, p. 3, available at http://www.ey.com/Publication/vwLUAssets/EY-a-new-mountain-to-climb/$FILE/EY-a-new-mountain-to-climb.pdf, accessed 23 Feb. 2017.
[156] OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, Paris, p. 13.
[157] K. H. Datt, *Paying a fair share of tax and aggressive tax planning — A tale of two myths*, 12 eJournal of Tax Research 2 (2014) p. 410 (415); K. Datt, *To shame or not to shame: That is the question*, 14 eJournal of Tax Research 2 (2016) p. 486; A. Evers & J. Hundsdoerfer, *Country-by-Country Reporting: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 18.
[158] H. Huizinga & L. Laeven, *International profit shifting within multinationals: A multi-country perspective*, Journal of Public Economics 92 (2008) 1164 (1172 ff).

of tax avoidance, Starbucks “voluntarily” paid GBP 20 Mio. to the UK tax authorities. Relying on public scrutiny in order to combat tax avoidance rather than trying to fix loopholes in the existing legislation might however not be the right path to be followed. As *Ting* has observed, “*the “voluntary” tax payments may raise even more concerns about the corporate tax system in the eyes of the public. Unlike charitable donation, taxation should not be discretionary. It is an insult to the tax system when taxpayers can decide if they want to pay some tax, and if so, when and how much to pay.*”[159]

Furthermore, public scrutiny would not affect all MNEs to the same extent. Whereas well-known companies that depend on their reputation in the general public could be strongly affected by a critical evaluation of their tax situations by the media, this is not true for all MNEs. Due to public CbCR well-known consumer goods companies depending on their reputation could be more reluctant to report a low tax burden in specific jurisdictions if public CbCR is implemented. Furthermore, they could feel the pressure to provide further explanation to the information reported in their CbCR where it reveals irregularities. In contrast, corporations in the B2B sector might not be as concerned about public CbCR as investors and business partners will in many cases be more concerned about the costs of the goods and services and the profit that the MNE can achieve than about their business partner’s tax payments.[160]

Instead of accusing multinationals of being immoral, the politics should focus on improving the international tax system to make it less vulnerable to tax avoidance. In many cases loopholes that allow MNEs to arrange their structure in order to achieve an overall low effective tax rate are well-known but have nonetheless not been closed for many years. On the one hand, it is politically difficult to remove a tax regime that is beneficial to businesses. On the other hand, jurisdictions decide intentionally to “support” their own MNEs.[161] Public CbCR has the aim to address harmful tax competition that makes use of loopholes only indirectly by offering the media and the general public to name and shame undesired behaviour of MNEs without addressing the underlying issues facilitating aggressive tax

[159] A. Ting, *iTax—Apple’s International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 56 ff and on Ireland on p. 68.
[160] See TNS BMRB, *Exploring Large Business Tax Strategy Behaviour*, HMRC Research Report 363, July 2015.
[161] A. Ting, *iTax—Apple’s International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 48 and p. 56.

planning. The main reason for international profit shifting are different tax rates in different jurisdictions and the use of separate, national bookkeeping and tax bases that allow profit shifting between different jurisdictions. Apple has for example used a relatively simple structure to achieve a low overall effective tax rate by exploiting diverging definitions of corporate residence in Ireland and the US, in combination with transfer pricing rules on intangibles, the controlled foreign corporation regime in the US, the check-the-box regime in the US as well as a low-tax jurisdictions.[162] An overall low effective tax rate is often the result of incentives that are offered by certain jurisdictions intentionally in order to attract investments in economically underdeveloped regions.[163] Consequently, it is questionable whether the private sector should be held responsible for tax competition between different jurisdictions.[164]

Whereas public CbCR could serve as a deterrent for aggressive tax planning,[165] disclosure obligation without accompanying substantive changes could result in greater public scrutiny and reputational damages for some MNEs, especially for well-known MNEs in the consumer goods sector. In contrast, the effect on other MNEs could be minor. Nevertheless, an increasing transparency and therefore the visible action against tax planning could however have a positive impact on the tax morale of the public. A prevailing impression that certain persons do not have to pay taxes or can easily reduce their tax liability to a minimum could lead to increasing tax evasion as nobody wants to be the only one who contributes. However, as compared to a mere implementation of public CbCR, a combination with substantive measures, e.g. the introduction of a common tax base for multinational firms seems to be a more effective tool to eliminate potential for international profit shifting.[166]

3.3.2. Experience with Public Reporting in Australia

Even though Australia has not yet implemented public CbCR, it took a leading role in requiring public reporting of tax information. Before the introduction of this transparency initiative,

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162 See A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 56 ff and on Ireland on p. 46.
163 See e.g. D. Barboza, *How China Built 'iPhone City' With Billions in Perks for Apple's Partner*, The New York Times, 29 Dec. 2016, available at http://www.nytimes.com/2016/12/29/technology/apple-iphone-china-foxconn.html?_r=0, accessed 30 Dec. 2016.
164 European Commission, Factual Summary of the responses to the public consultation on assessing the potential for further transparency on corporate income taxes, January 2016, p. 13.
165 See below Chapter 4.2.
166 H. Huizinga & L. Laeven, *International profit shifting within multinationals: A multi-country perspective*, Journal of Public Economics 92 (2008) 1181.

similar concerns on possible reputational damages were raised as in the discussion on public CbCR that is currently going on. Therefore, the experiences with public reporting of corporate tax information in Australia shall briefly be analysed. Since 2013, the Australian Commissioner of Taxation publishes the total income, the taxable income, the tax payable and the Australian Business Number of all corporate tax entities with a total income of AUD 200 million or more. If the corporate tax entity is not an Australian resident private company with 50 % or more Australian resident shareholders, the disclosure is already triggered by a total income of AUD 100 million or more.[167] The Australian provision aims at discouraging large corporate tax entities from aggressive tax planning and shall provide information for a public debate on tax policy.[168]

The public disclosure in Australia – an easily accessible excel file where the data is searchable and sortable – revealed that about a 36 % of the entities covered by public disclosure did not pay taxes at all.[169] The Australian Tax Office (ATO) did however not only publish the bare figures but provided some context to the information. The Commissioner of Taxation stated that "*no tax paid does not necessarily mean tax avoidance*".[170] Statistics published along with the excel-file revealed for example that out of 36 % of entities not paying taxes 22 % had a current year loss, 7 % had a prior year loss and 7 % utilized franking credits and offsets.[171] The media coverage of the figures was quite moderate, not accusing companies bluntly for tax avoidance but taking into account the lack of comprehensive information. Nevertheless, the media was critical, published lists of top 'no-tax'-taxpayers and thereby stressed the large gap between the revenues and the taxable base.[172] Furthermore, the public disclosure of the tax

[167] The dataset 'Report of Entity Tax Information for 2013-14' can be downloaded here: https://www.data.gov.au/dataset/corporate-transparency. See C. Marston, *Trends in tax transparency: The story so far…* (2016) p. 7, available at https://assets.kpmg.com/content/dam/kpmg/pdf/2016/06/tax-institute-australia-tax-transparency-marston-june-2016.pdf.
[168] See C. Marston, *Trends in tax transparency: The story so far…* (2016) p. 8.
[169] The dataset is available at: https://www.data.gov.au/dataset/corporate-transparency.
[170] See https://www.ato.gov.au/Media-centre/Media-releases/Statement-by-Commissioner-of-Taxation,-Chris-Jordan-AO-on-corporate-tax-transparency-March-2016/.
[171] See https://www.ato.gov.au/Business/Large-business/In-detail/Tax-transparency/Corporate-tax-transparency-report-for-the-2013-14-income-year/.
[172] See e.g. N. Chenoweth, P. Riordan & E. Tadros, *Tax Office bares all: the good, the bad and the ugly*, Australian Financial Review, 17 Dec. 2015, available at http://www.afr.com/business/tax-office-bares-all-the-good-the-bad-and-the-ugly-20151217-glq2u8; ABC News, How do a third of the top Australian companies pay no tax?, 18 Dec. 2015, available at http://www.abc.net.au/triplej/programs/hack/a-third-of-top-australian-companies-pay-no-tax-ato-figures-show/7038232; H. Aston, N. Khadem & C. Butt, Tax transparency: Coalition urged to target biggest companies for billions, The Sydney Morning Herald, 17 Dec. 2015, available at http://www.smh.com.au/federal-politics/political-news/tax-transparency-coalition-urged-to-target-biggest-companies-for-billions-20151217-glq823.html.

relevant information has encouraged some entities to publish additional information to explain why their tax payable in relation to the total income is lower than the tax rate. In Australia, such additional reports explaining the disclosed information have been published by Rio Tinto,[173] AMP,[174] BHP Billiton,[175] and Cochlear.[176]

The reported data on Australian companies is not only limited, but has also been criticized for the possibility of being wrong as the ATO does not make amendments to the published list once companies have amended assessments.[177] Furthermore, for Australian resident private companies with 50 % or more Australian resident shareholders the corporate tax payments are imputed onto the Australian resident natural person shareholders and therefore cannot give information about the ultimate tax paid.[178] Moreover, for companies it is sometimes not difficult to avoid disclosure by using a trust instead of a corporate structure or by separating a company's business into multiple non-tax consolidated companies.[179]

Even though the Australian experience with publication of corporate taxpayer information can give an indication about how the media, NGOs and the MNEs concerned would react to public CbCR, there are some differences that have to be borne in mind. First, the manner in which the tax data is published is different. Whereas in Australia the ATO publishes one simple Excel file containing the tax payments of all relevant companies, public CbCR as proposed in the EU would require the MNEs to publish their CbCR with a business register in the EU and online on their company website. Accessing a CbCR of one MNE would therefore be quite simple but as there is not database containing all public CbCR unlike in Australia – where the data is combined in one excel file – it will not be as easy to compare the tax payments of all MNEs required to publish such reports. As no common database exists (yet),[180] it is unlikely that those companies with the lowest overall tax burden will be identified.

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173 See Rio Tinto, Taxes paid in 2014, available at http://www.riotinto.com/documents/RT_taxes_paid_in_2014.pdf.
174 See AMP, 2014 tax report – addendum – tax transparency, available at file:///C:/Users/vwohrer/Downloads/AMP%202014%20tax%20report%20addendum%20FINAL%20(1).pdf.
175 See BHP Billiton, Economic contribution and payments to governments Report 2015, available at http://www.bhpbilliton.com/~/media/12d7d9572f1042a4b6cdb0bd7abe5c09.ashx.
176 See Cochelar Limited, 2016 Tax Contribution Report, available at http://www.asx.com.au/asxpdf/20160809/pdf/4395mrdqsycwr3.pdf.
177 See C. Marston, *Trends in tax transparency: The story so far…* (2016) p. 14.
178 See C. Marston, *Trends in tax transparency: The story so far…* (2016) p. 15.
179 See C. Marston, *Trends in tax transparency: The story so far…* (2016) p. 15..
180 Tax Activist Groups have started to work on a Public Database for CbCR. See A. Cobham, J. Gray & R. Murphy, What Do They Pay? Towards a Public Database to Account for the Economic Activities and Tax Contributions of

3.4. An Increasing Number of Disputes

BEPS Action 13 explicitly states that the CbCR should not be used for transfer pricing adjustments based on a global formulary apportionment of income.[181] The value of some information – especially for applying the arm's length principle – is however controversial. There are some elements of the CbCR where it is not clear how they are relevant under the arm's length standard. CbCR have a strong link to "sales" (revenue), "payroll" (number of employees) and "capital" (tangible assets), the TP analysis under BEPS Actions 8 – 10 should however focus on the functions performed, assets used, and risks assumed. Whereas the assets are to some extent reflected in the CbCR, the link to risk bearing and functions is missing.

The revised OECD Transfer Pricing Guidelines still focus on control functions and allow treating affiliates that are not controlling the key functions of managing risk or intangibles as adding little value, even if they have substantial activities.[182] The number of employees is therefore of limited use for the TP assessment. For example, having 20 people in Country A, doing headquarter senior regional management functions and 500 people in a service centre in Country B does not necessarily mean that the key value drivers and consequently the technical substance from a transfer pricing perspective is in Country B. Nevertheless, the taxpayers fear that the tax administrations of the country were the vast amount of workforce is located could use the concise information that has to be provided under the CbC template not just as a risk assessment tool but also to adjust profits by applying some form of global apportionment of an MNE's profit.[183] *Evers* and *Hundsdoerfer* expressed the concern that some tax authorities will mainly focus on those entities that have high profits but not so many people without conducting a thorough review whether the application of the arm's length standard is

Multinational Corporations, February 2017, available at http://datafortaxjustice.net/what-do-they-pay/?utm_content=buffer69698&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer, accessed 22 Feb. 2017.

[181] See OECD (2015), *Action 13 - 2015 Final Report*, p. 16, para. 25; Art. 6 Model CbCR legislation, OECD (2015), *Action 13 - 2015 Final Report*, p. 42; Section 5 (2) MCAA CbCR.

[182] S. Picciotto, *International Taxation and Economic Substance*, 70 Bull. Intl. Taxn. 12 (2016), p. 755, Journals IBFD.

[183] See CFE Fiscal Committee, Comments to the OECD "Discussion Draft on Transfer Pricing Documentation and Country-by Country Reporting", Opinion Statement FC 2/2014 of the CFE, March 2014, p. 14.

reasonable or not.[184] A higher number of tax audits as well as more rigorous tax audits are expected.[185]

Because not all countries have the same tax policy and the same interest the tax authorities of different countries might consequently not easily agree on who is allowed to tax which parts of a profit. This could lead to more conflicting claims to tax, more cases of double taxation and higher effective tax rates even in situations where taxpayers did not act illegally or aggressive. A MAP would subsequently often be necessary to avoid double taxation.[186]

The increasing transparency as well as the higher number of disputes in the beginning could however involve positive aspects in the long run. If not only the number of disputes increases but, in addition, arising disputes can be resolved more effectively as envisaged under BEPS Action 14,[187] there is a potential for increasing certainty in international tax matters. Ideally, the increasing transparency should make it easier for the taxpayer to determine which different structures are still allowed and what will no longer be accepted by the authorities. Where open questions on how to treat specific cross-border business structures are not only considered unilaterally by one tax administration but are discussed in the course of a MAP, under a bi- or multilateral APA or in a joint audit procedure, the taxpayer would have more certainty on what to expect in the future. Where disputes arise, the combination of a MAP and an APA in one single negotiation can be of advantage for the taxpayer as it leads not only to a solution for the past but also for the future.[188]

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[184] See A. Evers & J. Hundsdoerfer, *Country-by-Country Reportin: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 23.

[185] See D. Litsky, S. Kumar & E. Lesprit, *Strategic considerations for tax controversy risk management and double taxation avoidance*, International Tax Review, 22 Mar 2016, available at http://www.internationaltaxreview.com/Article/3539707/Strategic-considerations-for-tax-controversy-risk-management-and-double-taxation-avoidance.html, accessed 23 Feb. 2017.

[186] See D. Litsky, S. Kumar & E. Lesprit, *Strategic considerations for tax controversy risk management and double taxation avoidance*, International Tax Review, 22 Mar 2016, available at http://www.internationaltaxreview.com/Article/3539707/Strategic-considerations-for-tax-controversy-risk-management-and-double-taxation-avoidance.html, accessed 23 Feb. 2017.

[187] OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD Publishing, Paris.

[188] See D. Litsky, S. Kumar & E. Lesprit, *Strategic considerations for tax controversy risk management and double taxation avoidance*, International Tax Review, 22 Mar 2016, available at http://www.internationaltaxreview.com/Article/3539707/Strategic-considerations-for-tax-controversy-risk-management-and-double-taxation-avoidance.html, accessed 23 Feb. 2017.

3.5. Disclosure of Confidential Information

3.5.1. Master File

The information requirements for the master file as stated in BEPS Action 13 are formulated rather general. As the information is only provided to the tax authorities and not to the public, it does not raise major concerns in respect of confidentiality. For cutting-edge technology companies the information requirements in respect to intangibles could however be sensitive. The general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles has to include also the location of principal R&D facilities and the location of R&D management. Even though the information is basic, in small, highly competitive markets the information on where intangibles are developed could already give competitors interesting points of reference.

3.5.2. Country-by Country Report

The new framework for CbCR requires the reporting and exchange of a greater amount of data with an increasing number of tax administrations. This increases also the risk that the confidentiality is not preserved and that the data becomes public. BEPS Action 13 requires all MNEs whose annual consolidated group revenue equals or exceeds EUR 750 million to prepare a CbCR and does not provide for exceptions for certain industries that could be particularly sensitive. Even industries where the data in the CbCR will not be necessary for tax purposes are included in the reporting framework, e.g. shipping and aviation where usually only the state of the place of effective management may tax the profits. Also sovereign wealth funds and state-owned enterprises are not excluded from CbCR.

Under BEPS Action 13 the OECD recommends to ensure "*that there is no public disclosure of confidential information […] and other commercially sensitive information contained in the documentation package (master file, local file and Country-by-Country Report)*".[189] Where disclosure is necessary, e.g. in public court proceedings, information should only be disclosed to the extent needed.[190] The OECD explicitly stressed the importance of the confidentiality by stating that the local file, the master file and the CbCR shall remain confidential. For automatic exchange of CbCR under BEPS Action 13 the OECD requires that participating jurisdictions do not only have legal provisions for confidentiality in place but also enforce these provisions

[189] OECD (2015) BEPS Action 13, Final Report p. 19.
[190] See OECD (2015), *Action 13 - 2015 Final Report*, p. 19, para. 44.

effectively in practice.[191] This indicates that the information should only be exchanged with tax administrations of those jurisdictions that can ensure that the information will be protected. Furthermore, in order to ensure the protection of confidential taxpayer data, BEPS Action 13 suggests that CbCR shall only be exchanged with jurisdictions which have also adopted the standard for information security known as the "ISO/IEC 27000-series" or have an equivalent information security framework.[192] Furthermore, domestic law must impose penalties or sanctions for improper disclosure or use of taxpayer data.[193] Therefore, confidentiality should not be an issue under CbCR as proposed in BEPS Action 13 because CbCR are only exchanged between tax authorities and supposed to not be made available to the public.

Nevertheless, the exchange of information about certain business activities, e.g. dealings with the Iran or with North Korea, could have implications beyond a tax-footprint. Consequently, for example the US tax authorities have addressed national security concerns in their final regulations. Even though the information collected for CbCR is not generally considered as posing a national security concern, the US tax authorities indicate that they are willing to consider national security implications on a case-by-case basis.[194] Similarly, *Sim* suggests that due to their political influence, exceptions could also be granted on a case-by-case basis to giant state-owned enterprises as they are prevalent in many Asian countries.[195] It is however questionable whether such limitations would be in line with BEPS Action 13 because the OECD explicitly states that "*no exemptions from filing the Country-by-Country Report should be adopted [...] no special industry exemptions should be provided, no general exemption for investment funds should be provided, and no exemption for non-corporate entities or non-public corporate entities should be provided*".[196]

3.5.3. Public Country-by-Country Report

The proposal for public CbCR attempts to increase transparency in taxation of multinationals without disclosing business-sensitive information. The MNEs which are covered by public

[191] See OECD (2015), *Action 13 - 2015 Final Report*, p. 22, para. 57.
[192] See OECD (2015), *Action 13 - 2015 Final Report*, p. 53.
[193] See OECD (2015), *Action 13 - 2015 Final Report*, p. 57.
[194] Internal Revenue Bulletin 2016-29, Country-by-Country Reporting, T.D. 9773, 18 July 2016, available at https://www.irs.gov/irb/2016-29_IRB/ar05.html, accessed 28 Dec. 2016.
[195] S.T.Y. Sim, *A Different Take on Transfer Pricing in Asia*, 22 Asia-Pac. Tax Bull. 4 (2016), Journals IBFD.
[196] See OECD (2015), *Action 13 - 2015 Final Report*, p. 21.

CbCR however argue that public CbCR would lead to the disclosure of commercially sensitive information.[197] This issue has also been addressed by the Commission who addressed the possible interference with business secrets in its assessment of the impact of public CbCR. The concern is that competitors and business partners could get insight in essential business figures.[198] Especially where PEs or subsidiaries are set up in another country only for one project, e.g. for a construction, the figures in the CbCR basically represent the numbers of the construction side. Hence, the CbCR would allow conclusions about the profitability or other key indicators regarding this one project as industrial insiders usually know that there is just one project in this country. This could be a disadvantage for further negotiations with customers and could put a burden on the existing project as the customer might feel screwed if the profitability of another project, for whatever reason, would be lower. Even if there is a good reason for the difference in profitability, the CbCR could put a pressure on the company.

Within the EU, banks and investment funds are obliged to prepare a CbCR and to publish it together with their annual report.[199] In this CbCR, the name and nature of activities undertaken by an entity, their turnover, number of full time employees, profit or loss before tax, tax on profit or loss, and any public subsidies received has to be provided aggregated by country and by institution. However, in order to assess the possible negative consequences of publishing this information, until 2014 country-specific data on profits/losses and tax payments had to be reported only confidentially to the Commission. On the basis of this confidential CbCR, the Commission evaluated the impact of requiring MNEs to publish CbCR in October 2014.[200] On the basis of a study[201] and several consultations with stakeholders the Commission concluded that public CbCR according to the EU CRD IV "*is not expected to have*

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[197] See ICC Commission on Taxation, *ICC responds to the European Commission's latest proposal for public disclosure of tax data*, 14 April 2016, available at http://www.iccwbo.be/icc-responds-to-the-european-commissions-latest-proposal-for-public-disclosure-of-tax-data/, accessed 19 Jan. 2017.

[198] European Commission, Impact Assessment assessing the potential fo further transparency on income tax information, SWD (216) 117 final, 12.4.2016, p. 76.

[199] Article 89 Directive 2013/36/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 (OJ 2013, L 176/338).

[200] European Commission, *General assessment of economic consequences of country-by-country disclosure requirements set out in Article 89 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013*, COM/2014/676 final, 30 October 2014.

[201] Study prepared by PwC for European Commission DG Markt following the contract 2014/S 102-177729, General assessment of potential economic consequences of country-by-country reporting under CRD IV, September 2014, http://ec.europa.eu/internal_market/company/docs/modern/141030-cbcr-report-exec-summary_en.pdf.

significant negative economic impact, in particular on competitiveness, investment, credit availability or the stability of the financial system". In its assessment, the Commission inter alia did not consider the information that is disclosed under CbCR as commercially confidential as it is "*not sufficient for interested parties to get a detailed understanding of the commercial strategies of the reporting institutions*".[202] Therefore, the Commission did not see any reason for making use of its possibility to further defer the publishing of CbCR for banking groups. This assessment concerns however only the obligation to publish a (more limited) CbCR for the financial sector and did not deal with the consequences that public CbCR might have for MNEs in other sectors.

In contrast, in France, where provisions dealing with public CbCR had already been adopted domestically, the Constitutional Court acknowledged the negative implications that public CbCR could have. The French Constitutional Court has therefore held that public CbCR would require MNEs to provide too much information to the public and declared the provision for public CbCR unconstitutional.[203] The court stated that public CbCR would require MNEs to reveal essential parts of their business strategy to the public.[204] Whereas the French Constitutional Court acknowledged the legitimacy of the aim to fight fraud and tax evasion,[205] it nevertheless held that public CbCR is a non-proportionate interference with the freedom of enterprise.[206]

The proposal adopted by European Parliament, however, allows omitting the disclosure of parts of the data where the nature of the information would be seriously prejudicial to an undertaking's commercial position. As an example where this limitation could apply, the proposal mentions the situation "*when only a single affiliated undertaking operates in a tax jurisdiction which is not listed in the EU list of non-cooperative jurisdictions for tax*

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[202] European Commission, *General assessment of economic consequences of country-by-country disclosure requirements set out in Article 89 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013*, COM/2014/676 final, 30 October 2014, p. 5.
[203] Conseil Constitutionnel, 8 Dec. 2016, 2016-741, para. 103.
[204] Conseil Constitutionnel, 8 Dec. 2016, 2016-741, para. 103: *„l'obligation faite à certaines sociétés de rendre publics des indicateurs économiques et fiscaux correspondant à leur activité pays par pays, est de nature à permettre à l'ensemble des opérateurs qui interviennent sur les marchés où s'exercent ces activités, et en particulier à leurs concurrents, d'identifier des éléments essentiels de leur stratégie industrielle et commerciale"*.
[205] Conseil Constitutionnel, 8 Dec. 2016, 2016-741, para. 102: *„le législateur a entendu, par une mesure de transparence, éviter la délocalisation des bases taxables afin de lutter contre la fraude et l'évasion fiscales. Il a ainsi poursuivi un objectif de valeur constitutionnelle"*.
[206] Conseil Constitutionnel, 8 Dec. 12. 2016, 2016-741, para. 103: *„Une telle obligation porte dès lors à la liberté d'entreprendre une atteinte manifestement disproportionnée au regard de l'objectif poursuivi"*.

purposes".[207] The exception from the reporting obligation could contribute to overcoming the concerns in respect to confidentiality and seems to be a response to the decision of the French Constitutional Court.

4. Costs and Benefits from a Government's Perspective

4.1. Availability of Additional Data

4.1.1. Master File

The master file should provide an auditor with a clear overview of the global footprint of an entire group and thereby help the tax administration to understand the business and to evaluate transfer pricing risks. BEPS Action 13 aims at a consistent implementation of the same or similar documentation requirements in all countries.[208] The clear and structured requirements aim to contribute towards an efficient use of the data by the tax authorities. The obligation to provide many lists, e.g. of important intra-group service agreements, of intangibles, of important intra-group agreements related to intangibles and of the MNE group's tax rulings, instead of merely requiring general descriptions that is imposed on MNEs provides the tax administrations with better structured and consequently easily to assess information.

Furthermore, for the cross-border cooperation between tax administrations of different jurisdictions, the common template for the master file has the effect that it is easier for tax authorities of different jurisdictions to work together because the TP documentation that is provided by different entities within the same group to the tax authorities contains the same master file. A common "big picture" view of the MNE group's transfer pricing practices and its results instead of separate domestic transfer pricing documentation requirements focusing merely on the domestic tax treatment of the cross-border controlled transactions facilitates the cooperation between tax administration.[209] Having an equivalent level of information in the beginning of transfer pricing discussions, e.g. on a MAP or an APA, increases the efficiency and could reduce the length of negotiations.

[207] Art. 48c (3a) of the Proposal to change the Accounting Directive.
[208] OECD (2015), *Action 13 - 2015 Final Report*, p. 11; OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, p. 12, available at http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf.
[209] OECD, White Paper on Transfer Pricing Documentation, 30 July 2013, p. 12, available at http://www.oecd.org/ctp/transfer-pricing/white-paper-transfer-pricing-documentation.pdf.

As regards the focus on intangibles and intercompany financial activities in the master file concept under BEPS Action 13, it has already been pointed out earlier that this additional information (as compared to the EU TPD) is relevant for other proposals in the BEPS project. For intangibles, the additional information about the overall strategy for the development, ownership and exploitation is relevant because the allocation of profits from intangibles should no longer be limited to merely determining the legal ownership of intangibles but, instead, follow the analysis of functions related to the development, maintenance, enhancement, protection and exploitation of the intangibles.

4.1.2. Country-by-Country Report

The data included in CbCR should give the tax authorities an indication about where the economic activities of a MNE take place and thereby provide the tax administrations with a valuable tool for assessing the transfer pricing risks. The CbCR should help tax authorities to detect significant instances of distortive transfer pricing and other base eroding practices.[210] *Ting* has assessed CbCR as being "*a critical ingredient in assisting tax authorities to focus their limited resources on the right targets*".[211]

Some information that is included in the CbCR might already be partly assessable for the tax authorities, e.g. due to the disclosure requirements for annual accounts of capital companies.[212] However, the consolidated statements do not provide segregation per country and the statements prepared in accordance with local accounting principles are not easy to collect for the tax administrations as financial accounts do not have to be published in all countries. Under the CbCR concept in BEPS Action 13, information has to be reported for each jurisdiction and the CbCR will therefore provide also information about economic activities in countries where companies are not required to publish financial accounts.[213] In addition, the requirement to report a standardized set of data should make it easier for tax authorities to evaluate the information. Even where the information is already available to the tax

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[210] See M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 12.
[211] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 66.
[212] See M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 16.
[213] R. Murphy, Country-by-Country Reporting, in T. Pogge & K. Mehta (eds.) Global Tax Fairness (Oxford 2016) p. 96 (99).

administration outside the CbCR, the tax administration cannot access the data in the concentrated and systematic way as it should be possible due to CbCR.

The tax administrations could use the data exchanged under CbCR for a screening on an automatic basis to identify high-risk cases which are subsequently audited.[214] The tax authorities could calculate the profit margins of MNEs in the different jurisdictions and compare it either with the margin in all other countries or with the margin in countries where the MNE is exercising the same main business activity. If the margin is considerably lower, it could start a detailed audit. Another possibility to use the data of the CbCR would be to calculate the profit/loss per employee and compare it with the figures in other jurisdictions.[215] CbCR could therefore make the risk reviews of tax administrations more systematic and efficient. It has been anticipated that this could make it on the overall cheaper to collect additional taxes.[216] CbCR could serve as a tool to identify high-risk cases and are therefore useful for tax authorities to decide whether audits should be conducted.[217]

Whereas the main purpose of the CbCR is to identify cases of base erosion for audits, the CbCR could also direct the course of the audit. As BEPS Action 13 acknowledges, the CbCR together with the master file and the local file can "*provide information to commence and target audit enquiries*".[218] The CbCR can provide the tax administrations with a starting point to quickly review where a MNE is present and allows assessing at first glance where the MNE has low economic substance but still considerable profits.[219] This information could subsequently be used e.g. to specifically examine intra-company agreements with entities it those countries.

The comparability of CbCR of different MNEs as well as the usefulness of the data to tax administrations is however unclear. The data included in the CbCR is not particularly remarkable as it is rather simple. Only aggregated data per country has to be reported, even if a multinational group is operating different business units or if a MNE has different entities

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[214] A. J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 Florida Tax Review 8 (2016) p. 500; R. Murphy, Country-by-Country Reporting, in T. Pogge & K. Mehta (eds.) Global Tax Fairness (Oxford 2016) p. 105.
[215] S.K. Bilaney, *Interplay between Ratio Analysis Techniques and Transfer Pricing*, 23 Intl. Transfer Pricing J. 6 (2016), p. 477 (482) Journals IBFD.
[216] M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 2.
[217] J.S. Wilkie, *Master File, Local File and Country-by-Country Reporting: A Canadian Perspective*, 23 Intl. Transfer Pricing J. 2 (2016), p. 116, Journals IBFD.
[218] OECD (2015), *Action 13 - 2015 Final Report*, p. 9.
[219] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 67.

in one jurisdiction. If a group has for example five different entities in one jurisdiction, it has to state the main business activities of each entity but the number of employees, the profit and the turnover has to be provided only on an aggregated basis for the whole country. Furthermore, no reconciliation with the consolidated financial statements is required and BEPS Action 13 allows for flexibility in respect to the source of the data. BEPS Action 13 allows the MNE to choose whether to use data from their consolidation reporting packages, from separate entity statutory financial statements, regulatory financial statements, or internal management accounts. Depending on the data source, the CbCR may however show a different picture of the MNE's tax structure. Consequently, CbCR of different MNEs are of only limited comparability.[220] *Evers*, *Meier* and *Spengel* consider neither consolidated nor individual financial accounts as appropriate to provide country-specific information.[221]

Furthermore, CbCR follows the concept of formulary apportionment which has been proposed as an alternative to separate tax accounting. For auditing whether MNEs have correctly applied the arm's length principle, the CbCR might however be of limited use. *Hines* has demonstrated in a study on European company accounts that employment, property and sales explains less than 22 percent of the variation in profits between firms.[222] A company's profits are also influenced by a number of other factors, including the infrastructure, the environment and managerial inputs.[223] Furthermore, to some extent the economic activity of a MNE cannot reasonably be located. Examples are the profits of mobile intangibles as well as of the economies of integration. The profit of an integrated group is usually higher than the aggregate profit that would have been earned by the single members of the group. The allocation of such profit generated on a group level through the economies of integration will always be to a certain extent arbitrary.[224]

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[220] See A. Evers & J. Hundsdoerfer, *Country-by-Country Reportin: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 13.
[221] M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 8 ff.
[222] J. R. Hines, *Income misattribution under formula apportionment*, 54 European Economic Review 1 (2010) p. 108 ff.
[223] See A. Evers & J. Hundsdoerfer, *Country-by-Country Reportin: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 23..
[224] M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 13.

As the CbCR allows only rather simple analysis, it can be expected that tax authorities in some countries will focus their attention on high profits in countries with low tax rates and little presence. However, where MNEs are not acting illegal but are exploiting gaps and loopholes in domestic and international tax law, the combination of low economic substance and high profits alone should not lead to TP adjustments. The OECD stresses in BEPS Action 13 that the data in the CbCR does not constitute conclusive evidence and that TP adjustments shall not be based on the CbCR. Such structures could be covered by specific or general anti-avoidance provisions; in general, the taxpayer is however not prevented from structuring his business in a way to achieve a low overall level of taxation.[225] Even though especially NGOs often criticize such behaviour as 'not acceptable', tax administrations cannot rely on CbCR to fight against this behaviour.

The data in the CbCR allows the tax authorities an assessment of the MNEs as one economic unit and the global allocation of its functions, assets and profits. The substantial tax laws however follow a different approach. Related entities are treated as separate taxpayers and transactions between associated entities have to be assessed according to the 'arm's length principle'. Under this principle, profits deriving from transactions between associated enterprises should be in line with the profits, which would have occurred if the enterprises were not associated (i.e., if they were 'independent enterprises'). Therefore, BEPS Action 13 stresses that a CbCR cannot be itself the basis of tax assessments on a "formulary" basis.

Nevertheless, even though the information might be of limited use for a comprehensive TP assessment, the CbCR can be useful for tax authorities because all tax authorities concerned with a specific transaction will have access to the same basic set of information. This could help the tax administrations to identify the specific jurisdictions and specific provisions which provide tax planning opportunities. These jurisdictions and/or provisions could subsequently be targeted by a closer examination of the transfer price and the method used.

[225] A. Evers & J. Hundsdoerfer, *Country-by-Country Reportin: Eine neue Rechnungslegung über länderspezifische Wertschöpfung und Ertragsteuern?*, September 2014, p. 17, available at http://edocs.fu-berlin.de/docs/servlets/MCRFileNodeServlet/FUDOCS_derivate_000000003922/discpaper2014_20.pdf?hosts=, accessed 30 Dec. 2016.

4.2. Increasing (Voluntary Over-) Compliance

4.2.1. Country-by-Country Report

The most fundamental change due to the new reporting requirements under the CbCR will be the impact that the obligation to provide CbCR will have on the taxpayer. It is the first time that taxpayers are required to disclose information on the global allocation of their profits in a systematic manner. In this respect, CbCR could have a deterrent effect. The taxpayers will not only set up the template but will also strategically review how the information will be perceived by the tax authorities. If a MNE knows about the obligation to disclose a CbCR to the tax authorities "*it may have less incentive to undertake aggressive BEPS*".[226] It can be expected that those positions which cannot be defended or which would be difficult and costly to defend will already be restructured before the first CbCR is provided to the tax authorities. MNEs might avoid disclosing proportionally low effective tax contributions in certain jurisdictions as they can reasonably expect that disclosing a CbCR that indicates aggressive tax planning triggers tax investigations and audits.[227]

However, a consultation by the European Commission collecting views from more than 400 respondents representing business, industry associations, NGOs, citizens and think tanks, revealed that the business sector is not expecting significant changes in their business structures as a result of more transparency towards tax authorities, stating that the businesses are already complying with national laws. In contrast, more than half of the individuals responding to the survey believe that greater transparency towards the authorities would increase tax compliance by firms and reduce the exploitation of tax gaps, mismatches and loopholes designed to minimize tax payments.[228] Nevertheless, some MNEs might revaluate their tax behaviour not because the previous structure was illegal but in order to address the increasing attention for the tax situation of multinational entities by the general public and the media. In addition to the company's tax professionals the top-level management of MNEs might play a stricter role and could consider the tax liability of the group not only as a cost factor of the business anymore but also a factor that can influence the reputation of a MNE.

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[226] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 67.
[227] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 67.
[228] European Commission, Factual Summary of the responses to the public consultation on assessing the potential for further transparency on corporate income taxes, January 2016, p. 12, available at http://ec.europa.eu/finance/consultations/2015/further-corporate-tax-transparency/docs/summary-of-responses_en.pdf, accessed 3 Jan. 2017.

4.2.2. Public Country-by-Country Report

Whereas already CbCR according to BEPS 13 could have a deterrent effect to tax planning, such an effect is likely to be more powerful for public CbCR.[229] One argument for public CbCR is that it is an effective instrument to fight against tax avoidance. In the preamble to the proposed amendment of the Accounting Directive, it is stated that "*public scrutiny can help to ensure that profits are effectively taxed where they are generated*".[230] CbCR provides the civil society with an overview over the amount of taxes that multinational entities pay in every jurisdiction. The non-profit organizations lobbying for the implementation of CbCR argue that this information could allow an assessment on whether the MNE as a whole has paid enough taxes and which countries mainly benefited from the taxes paid. Especially MNEs in the B2C sector could be subject to the pressure of their customers to pay "a fair amount of taxes".[231] The fact that the information has to be published could prevent multinationals to engage in tax planning schemes that would result in a low effective tax rate as it could have a negative impact on its reputation and consequently also on its sales if the CbCR shows that a MNE did not pay a lot of taxes.[232]

Public scrutiny could be an effective tool to increase the effective tax rate of multinationals. Previous research revealed that individual top executives play a significant role in determining a firm's level of tax avoidance.[233] The executives' effect on the level of effective tax rate is however not due to their direct involvement in tax avoidance but more likely due to the "tone at the top".[234] A recent survey revealed that 75 % of chief financial officers and tax finance directors were concerned about the potential exposure of tax planning information under CbCR.[235] In order to avoid their firm to get to the centre of public attention and the negative

[229] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 67.
[230] Preamble of the Proposal for an Amendment of the Accounting Directive.
[231] See also M. T. Evers, I. Meier & C. Spengel, *Transparency in Financial Reporting: Is Country-by-Country Reporting Suitable to Combat International Profit Shifting?*, 1 February 2014, ZEW - Centre for European Economic Research Discussion Paper No. 14-015, p. 12.
[232] See already Chapter 3.3.1.
[233] S. D. Dyreng, M. Hanlon & E. L. Maydew, *The Effects of Executives on Corporate Tax Avoidance*, 85 The Accounting Review 4 (2010), p. 1163; TNS BMRB, *Exploring Large Business Tax Strategy Behaviour*, HMRC Research Report 363, July 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444898/HMRC_Research_Report_363_-_Exploring_Large_Business_Tax_Behaviours.pdf, accessed 11 Jan. 2017.
[234] S. D. Dyreng, M. Hanlon & E. L. Maydew, *The Effects of Executives on Corporate Tax Avoidance*, 85 The Accounting Review 4 (2010), p. 1185.
[235] Taxand, *2016 Global Survey*, 12 Dec. 2016, p. 8, available at http://www.taxand.com/sites/default/files/taxand/documents/taxand_global_survey_2016.pdf, accessed 21 Dec. 2016.

impact of media scrutiny on their reputation, top executives could become more cautions, value the impact on the firm's reputation higher and thereby put less emphasis on achieving a lower effective tax rate. Such a change in the "tone at the top" can subsequently be expected to have an impact on the multinational's effective tax rate.

Dyreng, *Hoopes* and *Wilde* showed that public pressure may directly affect a company's tax strategy.[236] They compared the tax receipts of certain firms that have been investigated by ActionAid International before and after it was revealed that the firms were not complying with rules requiring the disclose of the location of subsidiaries. The scrutinized firm's tax expenses increased which led the authors to the conclusion that "*public pressure related to subsidiary disclosure can impose significant political and reputational costs on and affect the tax avoidance activities and subsidiary location decisions of large, publicly traded firms*".[237] However, the effect of public scrutiny might be dependent on the risk that a multinational is prepared to take. Public pressure has more impact on risk-averse businesses that are more concerned about their reputation, e.g. because they are publically well-known enterprises and are consumer-facing businesses.[238] The results of a study of *Austin* and *Wilson* show that firms with valuable consumer brands report higher effective tax rates and are less likely to report effective tax rates below salient cut-off points (30, 25, 20 and 10 percent).[239]

A similar result is possible under public CbCR. Especially well-known companies could be reluctant to report very low tax burden in specific jurisdictions or would be forced to provide an explanation for their CbCR. In contrast, corporations in the B2B sector might not be as dependent on their reputation in the general public and therefore less concerned about publishing a public CbCR that indicates a low overall effective tax burden. Investors and business partners will in many cases be more concerned about the costs of the goods and services and the profit that the MNE can achieve than about their business partner's tax payments.[240]

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[236] S. D. Dyreng, J. L. Hoopes & J. H. Wilde, *Public Pressure and Corporate Tax Behavior*, 54 Journal of Accounting Research 1 (2016), p. 147.
[237] S. D. Dyreng, J. L. Hoopes & J. H. Wilde, *Public Pressure and Corporate Tax Behavior*, 54 Journal of Accounting Research 1 (2016), p. 181.
[238] TNS BMRB, *Exploring Large Business Tax Strategy Behaviour*, HMRC Research Report 363, July 2015.
[239] C. R. Austin & R. J. Wilson, *Are Reputational Costs a Determinant of Tax Avoidance?*, 9 January 2015, 2013 American Taxation Association Midyear Meeting: Tax Avoidance in an International Setting, available at SSRN: https://ssrn.com/abstract=2216879.
[240] See TNS BMRB, *Exploring Large Business Tax Strategy Behaviour*, HMRC Research Report 363, July 2015.

4.3. Fairer Tax Landscape

Avi-Yonah and *Xu* argue that the domestic legislatures and tax authorities will be more diligent and competent in tackling the BEPS issues under public scrutiny and support.[241] Furthermore, the ICRICT has suggested that public CbCR would provide data for public evaluation of the effectiveness of BEPS.[242] Many loopholes in international tax law have not been closed because governments have an interest in protecting the competitiveness of their tax system.[243] The public interest in how multinationals are taxed does not only stem from the desire of the public to control tax assessments and to make sure that every company pays the right amount of taxes. When public CbCR was first proposed, the primary goal was not to ensure that multinationals pay enough taxes. Instead, the campaign 'Publish What You Pay', a coalition of civil society organizations, was an anti-corruption measure that should prevent politicians to use the wealth from the extractive industries in their private interest. Therefore, the 'Publish What You Pay' campaign focused on introducing a framework which would allow citizens of resource-rich countries to hold their governments accountable for the management of revenues from the extractive industries.[244] Entities in the extractives sector should be required to disclose the payments that they made in each country and additional information in order to make it possible to assess the scale of the entity's operations in their financial reports. This information should provide the public with information on the contribution of the entity to the government's budget. The increasing transparency was aimed at guaranteeing the government's accountability for public expenditure. In a similar manner, public CbCR could provide the civil society an instrument to assess the effects of a country's tax system. In this respect, public scrutiny could not only directly affect the MNEs but also tax policymakers.

[241] R. S. Avi-Yonah & H. Xu, *Evaluating BEPS*, 15 Jan. 2016, U of Michigan Public Law Research Paper No. 493, p. 47, available at SSRN: https://ssrn.com/abstract=2716125.

[242] ICRICT, Evaluation of the Independent Commission for the Reform of International Corporate Taxation for the Base Erosion and Profit-Shifting Project of the G20 and OECD, October 2015, available at http://www.icrict.org/wp-content/uploads/2015/10/ICRICT_BEPS-Briefing_EN_web-version-1.pdf.

[243] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 71.

[244] More information about the 'Publish What You Pay' campaign is available at http://www.publishwhatyoupay.org/about/, accessed 3 Jan. 2017; International Accounting Standards Board (IASB), Discussion Paper DP/2010/1: Extractive Activities, 6 April 2010, available at: http://www.ifrs.org/Current-Projects/IASB-Projects/Extractive-Activities/DPAp10/Documents/DPExtractiveActivitiesApr10.pdf.

In addition, NGOs and the civil society have the perception that tax authorities in numerous countries make unfair secret tax deals with large companies.[245] Some argue that even where the tax rulings as such do not become public, the figures published in CbCR could reveal such practices and act as a deterrent for tax authorities to provide beneficial rulings. Irrespective of whether the public disclosure would have an effect on the practices of tax administrations or not, public CbCR could increase the trust of the civil society in tax administrations and also in tax policy. Furthermore, public CbCR could also give the public more information about the effect of tax laws not only for individual and SME taxpayers but also on MNE. The European Commission argues that public CbCR should "*promote a better informed debate on potential shortcomings in tax laws*".[246]

4.4. Decreasing Competitiveness of the Tax System

If transparency is not increased at the same level in all relevant jurisdictions, the first-movers may face a negative impact on the competitiveness of their tax system. The possible negative impact depends however on the design of the specific provision.

If public CbCR is introduced in a certain country or in a certain geographical region it could either only be applicable to MNEs headquartered in that jurisdiction or also cover MNEs that have their headquarter outside the jurisdiction(s) covered by public CbCR. Where MNEs do not have their headquarter – but only subsidiaries or PEs – in the relevant jurisdiction(s) and these MNEs would not be covered by public CbCR, this could lead to a distortion of the level-playing field.[247]

Furthermore, the data that has to be published matters. Public CbCR as proposed by the Commission would include the relevant figures separately for each EU Member State and on an aggregated basis for other tax jurisdictions. Only for certain jurisdictions listed in a common EU list of non-compliant tax jurisdictions the information has to be provided separately as well.[248] This draft has been criticized for putting EU multinationals at a comparative

[245] European Commission, Factual Summary of the responses to the public consultation on assessing the potential for further transparency on corporate income taxes, Jan. 2016, p. 7.
[246] Preamble of the Proposal for an Amendment of the Accounting Directive.
[247] Study prepared by PwC for European Commission DG Markt following the contract 2014/S 102-177729, General assessment of potential economic consequences of country-by-country reporting under CRD IV, September 2014, p. 102, available at https://publications.europa.eu/en/publication-detail/-/publication/0a178acc-d60a-11e5-a4b5-01aa75ed71a1/language-en, accessed 22 Feb 2017.
[248] Art. 48g of the Proposal to change the Accounting Directive.

disadvantage. *Christian Kaeser*, Global Head of Tax at Siemens and Chairman of the ICC Commission on Taxation, responded to the Commmission's proposal for public CbCR by pointing out that public CbCR as it was proposed "*risks exposing commercially sensitive information that would place companies operating within the EU at a competitive disadvantage for global investment, without any additional benefit to public finances*".[249] The suggested amendment would require detailed information about the allocation of profits within the EU, but besides for tax havens only aggregate data for third countries. Therefore, public CbCR as it is suggested within the EU will reveal the use of favourable tax regimes within the EU, e.g. Luxembourg, Ireland and the Netherlands, but will not provide detailed information on the allocation of profits outside the EU. This can create an incentive to use non-EU jurisdictions with favourable tax regimes instead of EU ones and could thereby jeopardize the EU's competitiveness. This argument does however not apply to the concept of public CbCR in general but is owed to the special characteristics of the EU proposal which does not cover activities outside the EU in the same way as activities within the EU.

5. Conclusion

The objectives of the BEPS project are summarized in the G20 Leader's Declaration of the St. Petersburg Summit in September 2013: "*Profits should be taxed where economic activities deriving the profits are performed and where value is created. In order to minimize BEPS, we call on member countries to examine how our own domestic laws contribute to BEPS and to ensure that international and our own tax rules do not allow or encourage multinational enterprises to reduce overall taxes paid by artificially shifting profits to low-tax jurisdictions. We acknowledge that effective taxation of mobile income is one of the key challenges.*"[250] The transparency initiatives in BEPS Action 13 that are discussed in this contribution should contribute to this policy goal. The arm's length principle allows MNEs to design their group structure, to set up intra-group contracts and to thereby allocate functions, assets, and risks within the MNE.[251] The additional information that has to be reported due to BEPS Action 13

[249] See ICC Commission on Taxation, *ICC responds to the European Commission's latest proposal for public disclosure of tax data*, 14 April 2016, available at http://www.iccwbo.be/icc-responds-to-the-european-commissions-latest-proposal-for-public-disclosure-of-tax-data/, accessed 19 Jan. 2017.
[250] G 20, Leaders' Declaration, Saint Petersburg Summit, 5-6 September 2013, para. 50, available at https://www.oecd.org/g20/summits/saint-petersburg/Saint-Petersburg-Declaration.pdf, accessed 21 Feb. 2017.
[251] See e.g. A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 40 (p. 49).

aims at providing the tax authorities with a better understanding of the implications of the MNE's set-up on the overall tax outcome. Increasing transparency should decrease the information asymmetry between MNEs, tax authorities and to a certain extent also the general public. Especially in Europe one can witness a movement towards increasing transparency of corporate tax data to the public. Whereas automatic exchange of CbCR is still in the process of being implemented, a proposal for public CbCR is already under discussion.

Three main benefits of increasing transparency can be identified from a government's perspective. Firstly, more information on the taxpayers supports the tax authorities in efficiently identifying specific taxpayers and structures where tax has been avoided or evaded. Compared to the requirements in the EU TPD, the master file and the local file under BEPS Action 13 require more structured data and put a focus on intangibles and intercompany financing. Taking into account the changes to the TP guidelines in BEPS Actions 8-10, the information in the master file and in the local file will be necessary for the TP assessment. Even though many lists have to be prepared, some flexibility is left to the taxpayers as detailed information has to be provided only for material transactions. Whereas the value of local files and the master file is clear, CbCR is controversially discussed. The proponents praise the CbCR as an instrument which will improve the efficiency of audits as it allows the tax authorities a broad risk assessment by identifying where the MNE has low economic substance but still considerable profits. In contrast, opponents question whether the information in the CbCR will be appropriately used. The value of CbCR for TP assessments according to the arm's length principle beyond this broad risk assessment is doubtful because the reportable data follows the concept of formulary apportionment.[252]

Secondly, the increasing transparency could have a positive impact on the tax landscape as a whole. CbCR could assist the governments to identify those structures that are frequently being used for tax planning of MNEs and result in a low effective tax rate. The additional data from increased transparency in international taxation can serve as a starting point for changes in the tax legislations that specifically target those practices of MNE. Furthermore, public CbCR is a visible action against tax avoidance practices and could also stimulate the discussion about the 'fairness' of international tax practices. Under public CbCR, the expected public scrutiny

[252] See e.g. M. Herrington & C.H. Lowell, *The Evolving World of Global Tax Planning: Part I*, 24 Intl. Transfer Pricing J. 1 (2017), Journals IBFD.

could have a positive impact on the efforts of the government and the tax administration to tackle tax evasion and tax avoidance.

Thirdly, the increasing reporting requirements are expected to not only serve as a tool for tax administrations and tax legislators to combat tax avoidance and tax evasion but are expected to be measures that act as a deterrent to aggressive tax planning. Instead of reporting information that could trigger special attention by the tax authorities, MNE's are likely to adapt their tax strategy and opt for a less aggressive tax planning structure as "*the potential tax benefit may be outweighed by the increased risk of tax investigations and audits*".[253] The deterrent effect to tax planning is likely to be even more powerful for public CbCR.

From the perspective of the taxpayer, BEPS Action 13 could have the benefit of a harmonization of reporting requirements. On the long run, the master file concept in BEPS Action 13 will be an advantage for the taxpayers as a uniform set of rules for documentation requirements has been introduced. If there is not much divergence in the domestic implementation of the master file concept, one common master file could be used in all countries where the MNE operates and consequently, the preparation of TP documentation could become more efficient. Due to the new reporting requirements, the taxpayers are however also faced with some challenges. Four main issues can be identified.

First, under BEPS Action 13, the new transfer pricing documentation requirements have considerably extended the amount of information that has to be provided by the taxpayers to the tax administrations. Both additional and more detailed documentation is required which increases the administrative burden for the taxpayer. Especially the CbCR is at the centre of attention as it goes clearly beyond of what has previously been required under appropriate TP documentation. Whether the requirements stemming from BEPS Action 13 will significantly increase the compliance burden for the MNEs will depend on where the MNE is doing business and on the documentation requirements that the MNE had to fulfil prior to the implementation of the BEPS Action 13 package.

Secondly, public CbCR could have a negative impact on the reputation of a MNE. The public scrutiny could lead to a higher effective tax rate of well-known, consumer-facing companies as these companies will be concerned about their reputation. In contrast, it is doubtful,

[253] A. Ting, *iTax—Apple's International Tax Structure and the Double Non-Taxation Issue*, BTR 1 (2014) p. 67.

whether public CbCR can also have a significant impact on those companies that are not well-known to the public and therefore would not have to fear negative consequences to the same extent. However, it has to be kept in mind that tax incentives are often offered by certain jurisdictions intentionally in order to attract investments in economically underdeveloped regions. Tax competition between different jurisdictions, different tax rates combined with the use of separate, national bookkeeping and tax bases enable tax planning and a lower overall effective tax rate. Public CbCR may put MNEs under public scrutiny if the global allocation shows that the tax payment in certain jurisdictions was rather low. The reputational risk may force MNEs to distinguish between behaviour that is 'acceptable' and 'aggressive' tax planning.

Thirdly, CbCR could lead to an increasing number of disputes. The value of some information – especially for applying the arm's length principle – is controversial. The OECD addressed the concern that tax authorities could use CbCR to apply some elements of formulary apportionment in their tax assessments by explicitly stating that the CbCR should not be used for transfer pricing adjustments based on a global formulary apportionment of income.[254] Nevertheless, taxpayers expect a higher number as well as more rigorous tax audits and more disputes on which jurisdiction is allowed to tax which parts of a profit.

Fourthly, increasing transparency could lead to a disclosure of commercially sensitive information. Whereas under BEPS Action 13 the information contained in a CbCR has to remain strictly confidential and can only be disclosed to the tax authorities, public CbCR is currently also discussed. A public disclosure of CbCR is however disputed. Because of the concern that public CbCR would require MNEs to reveal essential parts of their business strategy to the public, the French Constitutional Court has declared public CbCR unconstitutional.[255]

[254] See OECD (2015), *Action 13 - 2015 Final Report*, p. 16, para. 25; Art. 6 Model CbCR legislation, OECD (2015), *Action 13 - 2015 Final Report*, p. 42; Section 5 (2) MCAA CbCR.
[255] Conseil Constitutionnel, 8 Dec. 2016, 2016-741, para. 103.