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Contents

Summary of main results V

A. Objective 1

B. Current status of country-by-country reporting 3

I. Motives and fundamentals of country-by-country reporting 3

II. Sector-specific developments 3

1. Developments in the extractive industries 3

a) Extractive Industries Transparency Initiative (EITI) 4

b) Dodd-Frank Wall Street Reform and Consumer Protection Act (section 1504) 4

c) EU Accounting Directive (Chapter 10, 2013/34/EU) and EU Transparency Directive (2013/50/EU) 5

2. Developments in the banking sector 5

III. Cross-sector developments 6

1. Mandatory CbCR 6

a) OECD BEPS Action 13 6

b) The EU's draft Accounting Directive 9

c) Comparison of OECD and EU initiatives 12

2. Voluntary CbCR 14

C. Analysis of the fundamental concept behind country-by-country reporting, and of its costs and benefits 17

I. Analysis of underlying concepts 17

II. Analysis of costs 18

1. Direct costs 18

2. Implicit costs 19

a) Reputational risks 19

b) Erosion of tax confidentiality 20

c) Risk of double taxation 21

d) Competitive and locational disadvantages 21

III. Analysis of benefits ... 24

1. Benefits for the tax authorities ... 24

2. Benefits for legislators ... 25

3. Benefits for investors and analysts ... 26

4. Benefits for the public and consumers ... 28

5. Potential converse effects ... 29

IV. Results of cost-benefit analysis ... 30

D. Scientific evidence based on the CbCR regimes already in place ... 33

I. Information content of CbCR data ... 33

II. Impact of the CbCR obligation on the affected companies ... 37

III. Effects of the CbCR obligation on individual stakeholders ... 39

1. Tax authorities and legislators ... 39

2. Investors and analysts ... 40

3. The public and consumers ... 41

IV. Summary of findings thus far ... 42

E. Selected aspects and unresolved questions regarding the EU's legislative initiative for cross-sector public CbCR ... 45

I. Size-related scaling of CbCR obligation ... 45

II. Exemptions to avoid competitive disadvantages ... 47

III. Breaches of reporting obligations and the significance of enforcement ... 48

IV. Public CbCR on a voluntary basis only ... 51

F. Conclusions and alternatives ... 53

Bibliography ... 57

Summary of main results

Multinational companies make lawful use of differences in rates and systems between different tax jurisdictions in order to transfer a portion of their profits to low-tax countries and thus reduce their overall tax burden. A demand for greater transparency has emerged as a central measure in the political efforts of the OECD, G20 and EU member states to achieve more tax justice. One such transparency measure is what is known as country-by-country reporting (CbCR), which obliges companies of a particular size or that operate in certain industries to publish operational and tax data for each country in which they do business.

The Extractive Industries Transparency Initiative, the Dodd-Frank Wall Street Reform and Consumer Protection Act, and amendments to the EU's Accounting and Transparency Directives constitute CbCR initiatives that were enacted mainly to combat corruption in the extractive industries. CbCR as quoted in Article 89 of the EU's Capital Requirements Directive, however, arose from the need for enhanced transparency and tighter regulation of financial institutions in the wake of the global financial crisis.

The present study focuses mainly on the CbCR concepts described in the OECD's BEPS Action 13 and on the latest compromise proposal discussed by the Council of the European Union. These were developed in an effort to achieve more tax justice and thwart tax-planning activities deemed to be aggressive. They affect (multinational) enterprises with annual revenues of at least EUR 750 million and apply across different industries. Whereas the CbCR agreed by the OECD provides only for the confidential disclosure of data to the relevant tax office and the subsequent sharing of that information with participating countries, the EU is now discussing public CbCR. In this case, CbCR would not only help tax administrators perform more efficient tax audits, by exerting public pressure it would encourage companies to voluntarily pay their fair share of tax in the countries in which they operate. The EU's proposal goes significantly further than the OECD's. The mandatory CbCR initiatives of the OECD and EU contrast with the recently adopted CbCR standard of the Global Reporting Initiative (GRI),[1] which relies on voluntary disclosure by companies in the context of their sustainability reports.

On closer examination, however, the basic idea behind CbCR – according to which corporate profits are to be divided between the countries in which a company operates using arbitrarily selected variables and then assessed to see whether they are appropriate – is a questionable one. CbCR cannot resolve the innate problem of taxing multinational enterprises (MNEs), namely how to allocate profits within the group.

A conceptual analysis of the implications of CbCR suggests that the costs to companies of public reporting could exceed the posited overall benefits. It is not so much the direct costs of first-time implementation

1 The GRI is an independent international organisation that has developed widely recognised standards for sustainability reporting (see section B.III.2).

and ongoing reporting that are critical, but the potential implicit costs. These include not only unwarranted damage to a company's reputation, compromised tax confidentiality and a higher risk of double taxation; above all, there is the threat of competitive disadvantages resulting from the fact that the CbCR publication obligations apply only to companies of a certain size and domiciled in particular countries. The companies subject to the regulations must publish sensitive corporate data that was previously undisclosed. Competitors that are not subject to the regulations will be able to use this information to their own advantage without being obliged to publish comparable data themselves.

The additional information the CbCR data offers tax authorities and legislators is of a limited nature; the data cannot reveal which individual channels and instruments a company uses to shift its profits, nor does it allow conclusions to be drawn as to whether the tax-planning measures taken are lawful or where legislative reforms may be needed. In any case, the majority of the tax-planning measures adopted are within the law and already public knowledge. It is difficult to predict how CbCR data will benefit capital markets: investors and analysts already have a surfeit of information as a result of increasing disclosure obligations and can no longer process all the information at their disposal. The main argument put forward by proponents of public CbCR is the public's control function. Quite apart from the public's lack of expertise in interpreting the relevant data, there is another fundamental question: whether generating public pressure is an adequate way of reining in tax planning. Such pressure undermines the rule of law because it means taxes will no longer be assessed solely on the basis of the law, but also in the court of public opinion.

Initial studies of the CbCR rules already implemented indeed demonstrate that, when compared with other sources of data, the reports provide new insights into the worldwide activities of the relevant companies due to their better geographical coverage. But the studies also underscore the considerable amount of leeway granted in preparing the reports, which severely limits the comparability and meaningfulness of the data. According to empirical examinations, companies have responded to the introduction of CbCR by adapting the way they plan their taxes. There is no clear evidence, however, that this will lead to an overall reduction in tax avoidance – at least as regards CbCR for EU financial institutions. What is more, there *is* evidence of undesired economic side effects in the shape of the re-allocation of capital expenditure and employment to low-tax countries, and of a potential reduction in revenues in order to circumvent the reporting obligation. Thus far, there has been no examination of the extent to which tax authorities, legislators, investors, analysts and the public actually utilise the reported CbCR data or base their decisions on it. Studies of other measures and forms of enhanced tax transparency show that, although information on tax avoidance has a negative impact on how the companies in question are viewed by consumers and the general public, there is hardly any evidence that this also leads to changes in buying behaviour. In this respect, it is doubtful whether the intended mechanism of public pressure will really have a long-term impact in reducing tax avoidance.

On the whole, the scientific findings thus far cast doubt on the effectiveness and efficiency of CbCR. In particular, it appears questionable whether a public cross-sector CbCR obligation is needed, given that the introduction of confidential CbCR already seems to have resulted in certain adjustments to tax planning. Against this backdrop, the EU should limit itself to implementing the OECD's concept and refrain from introducing a general obligation to publish CbCR data. This would, in particular, prevent the competitive disadvantages that public CbCR could bring, as well as any negative side effects that the introduction of reporting obligations within the EU could trigger with respect to the sharing of information with third countries participating in the OECD's CbCR regime.

If, despite all the reservations that exist, the EU should decide to implement an obligation to publish CbCR data, it cannot be ignored that small-scale, family-run enterprises – and not publicly traded companies – will bear a disproportionate burden in terms of the costs of such a regime. Disadvantages of this kind could be mitigated by scaling the CbCR disclosure obligations to the size of a company. Beyond that, targeted exemptions appear to be a sensible method for avoiding the competitive disadvantages caused by the publication of sensitive information. To this end, the corresponding wording in the EU's compromise proposal would need to be made more specific. In addition, it is worth considering limiting the public CbCR obligation to publicly traded companies, as public disclosure plays a much bigger role for the latter. Otherwise, capital market-oriented companies could decide to delay publication of their CbC reports, even at the risk of incurring fines. Finally, the notable differences in the cost-benefit ratio for different types of companies and the difficulty of adequate differentiation would suggest waiving mandatory public CbCR and opting for voluntary publication instead. The CbCR envisaged in the GRI 207 standard could represent a suitable solution.

As the majority of instruments used to minimise tax are lawful and already public knowledge, an alternative approach to enhancing tax transparency would be to focus on amending material rules – such as introducing stricter standards for transfer pricing and harmonising such rules internationally as well as rolling out standardised thin capitalisation rules. It should be noted, however, that the actual extent of international profit-shifting is highly controversial – despite the large number of empirical studies conducted on the subject. The results vary substantially depending on the methodology applied and the underlying data used. The latest meta-studies show that, on average, the amount of profit-shifting proven is relatively minor. Rather, there is a perception that a few known cases of such practices by US companies are being instrumentalised to fuel the ongoing debate surrounding tax planning by multinationals. In their efforts to limit companies in shifting profits to low-tax jurisdictions, legislators should not lose sight of the fact that such measures can lead to a noticeable reduction in investment levels in some industrialised countries. In view of this, the EU would be well advised to take a measured approach. There is no need to introduce CbCR across the board nor, more particularly, to prescribe public CbCR.

A. Objective

In the course of the debate surrounding profit shifting by MNEs, calls for country-by-country reporting (CbCR) on operating and tax data have increased. Whereas OECD countries have already agreed that multinationals should be obliged to submit such reports to the tax authorities in their respective countries of domicile, the EU initiatives to combat aggressive tax planning are still in the development phase. According to the latest compromise proposal presented by the Finnish Presidency of the Council of the European Union on 15 November 2019, large European companies are to be obliged to make public their business activities and profits on a country-by-country basis as well as the corresponding taxes paid on those profits. The publication of sensitive data of this kind can result in considerable costs for the companies involved, and large family businesses, in particular, could suffer competitive disadvantages as a result. The aim of the present study is to describe current developments in CbCR and to examine the potential costs and benefits of public country-by-country reporting. The study will also deal with empirical findings from research on existing CbCR initiatives.

The study is structured as follows: first, we take a look at the latest status of CbCR initiatives. Proceeding from the motives behind CbCR, we describe not only sector-specific developments in the extractive industries and banking sector, but also the cross-industry CbCR initiatives, broken down into mandatory standards (OECD, EU) and voluntary standards (Global Reporting Initiative). We then analyse the underlying conceptual framework as well as the costs and benefits of CbCR for those involved, focusing mainly on the public CbCR regime put forward in the latest compromise proposal[2] discussed by the Council of the European Union. We examine the costs, particularly from the point of view of the affected companies, and the benefits from the standpoint of major stakeholders, including national governments. After this theoretical discussion of the pros and cons of public CbCR, we summarise current empirical findings on the effects of CbCR. We then move on to examine selected aspects and unresolved issues with respect to the EU's legislative initiative for cross-sector public CbCR. In the final section we highlight possible alternatives to CbCR that could achieve the same political aims, namely enhancing tax justice and combating aggressive tax-planning activities.

2 Council of the European Union (2019a).

B. Current status of country-by-country reporting

I. Motives and fundamentals of country-by-country reporting

Multinational companies make lawful use of differences in rates and systems between different tax jurisdictions in order to transfer parts of their profits to low-tax countries and thus reduce their overall tax burden. These practices have increasingly come to the attention of both the general public and policymakers. As a result, numerous initiatives at OECD, G20 and EU level have focused on the political measures that can be taken to combat this trend and ensure that companies pay their fair share of taxes in the countries in which they operate. A demand for greater transparency has emerged as a central tool in the political efforts to achieve more tax justice. One such transparency measure is what is known as country-by-country reporting. It obliges companies that are of a particular size or that operate in certain industries to publish operational and tax data for each country in which they do business. There are two ways this information is intended to curb profit-shifting through tax planning. Firstly, the data could help the tax authorities to identify companies with especially aggressive tax-planning strategies and to perform tax audits in a more targeted manner.[3] Secondly, proponents of public reporting of company data hope that, as a result of the pressure from the general public triggered by the publication of sensitive data, companies will voluntarily reduce the extent of their tax avoidance.[4] Owing to a lack of empirical data, very little is known of the actual costs and benefits of public CbCR, and this study seeks to take a closer look at these.

The history of CbCR dates from 2003, when Richard Murphy, a British auditor who had co-founded the Tax Justice Network in 2002, called for MNEs to be obliged to disclose certain operational and tax data broken down by country.[5] Although there is as yet no globally binding requirement to implement this, it has since found its way onto the agenda of various initiatives. The current state of play as regards CbCR is described in detail in the following sections. Whereas some of these initiatives relate to certain branches of industry only, e.g. the extractive industries or the banking sector, others span more than one sector.

II. Sector-specific developments

1. Developments in the extractive industries

The primary aim of the initiatives described below is to combat corruption in the extractive industries by enhancing transparency. They thus differ from the CbCR initiatives driven by the problem of profit shifting by multinationals, which is the primary focus of the present study. We will nevertheless touch on them here, because they paved the way for later initiatives.

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3 See Evers/Meier/Spengel (2017), p. 12.

4 See Schreiber/Voget (2017), p. 149; Grotherr (2016a), p. 856.

5 Murphy (2003).

a) Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative was one of the first initiatives relating to the country-specific disclosure of corporate data. Launched in June 2003, the EITI standard has been constantly adapted and was most recently revised in 2019.[6] The initiative is based on voluntary cooperation between the countries involved. Thus far, 52 countries have implemented the standard,[7] which applies only to companies active in those countries' extractive industries. The EITI provides a framework within which governments disclose certain payments they have received and companies certain payments they have made. Actual implementation in each country is entrusted to a multi-stakeholder group and can thus vary from country to country. The companies are expected to disclose to the authorities the following payments they make to government agencies: taxes on profits; production entitlements; royalties; dividends; signature, discovery and production bonuses; licence, rental and entry fees; and other significant payments. This data is to appear in a public report alongside data on the payments received by the governments. However, as every country prepares and publishes its own report, in the case of MNEs it would be necessary to analyse several such reports simultaneously to get an overview of the payments made in each country in which an enterprise operates.[8]

b) Dodd-Frank Wall Street Reform and Consumer Protection Act (section 1504)

The Dodd-Frank Wall Street Reform and Consumer Protection Act – or Dodd-Frank Act for short – was signed into law in 2010 as part of a comprehensive reform of the US financial sector. While the act as a whole is primarily aimed at regulating the financial sector, section 1504 of it provides for the public disclosure of payments by companies in the resource extraction industry that are registered with the Securities and Exchange Commission (SEC). Section 1504 of the Dodd-Frank Act supplements section 13(q) of the Securities and Exchange Act, which calls on the SEC to specify the disclosure obligation. After the original rules issued by the SEC in 2012 were repealed by court ruling a short time later, updated rules were passed in 2016; these, in turn, were rejected in 2017 by a joint resolution of Congress. Against this backdrop, the SEC proposed a third version of the rules in December 2019.[9] According to its proposal, the companies in question are to publish the amount and nature of the payments they make to government agencies,[10] broken down by project and country, in Form SD. Similar to the EITI standard, the payments concerned include: taxes on profits, income or production; royalties; fees (e.g. licence, rental and entry fees); production entitlements; bonuses (e.g. signature, discovery and production

6 EITI International Secretariat (2019).

7 See EITI International Secretariat (2019), p. 4.

8 See Hardeck/Wittenstein/Yoganathan (2015), p. 402.

9 Securities and Exchange Commission (2019). For further background information on the legislative process, see Securities and Exchange Commission (2019), pp. 5–7.

10 This applies only to payments exceeding USD 150,000 and made in connection with projects whose aggregate payments are in excess of USD 750,000.

bonuses); dividends; payments made to improve infrastructure; and payments in connection with certain communal or social projects.

c) EU Accounting Directive (Chapter 10, 2013/34/EU) and EU Transparency Directive (2013/50/EU)

Influenced by trends in the United States, since 2010 the EU has discussed the disclosure of certain payments by companies in the extractive industries. In 2013, the Accounting Directive (2013/34/EU)[11] was amended. Chapter 10 of that directive stipulates that large European companies (referred to as "undertakings" by the EU) and all public-interest entities active in the extractive industry or the logging of primary forests are required to disclose, in accordance with the applicable regulations in their respective member states, all payments exceeding EUR 100,000 that they make to governments, broken down by project and country. These include the same types of payments mentioned in the EITI standard.[12] A few months after the amended Accounting Directive was passed, the Transparency Directive (2013/50/EU)[13] was also amended to include a reporting obligation for companies whose securities are admitted to trading on a regulated market in the EU and that are active in the extractive industry or the logging of primary forests. First-time disclosure was scheduled for accounting periods beginning on or after 1 January 2016.

2. Developments in the banking sector

Following the global financial crisis, the need for greater transparency and stricter regulation of financial institutions became pressing. The EU consequently passed its Capital Requirements Directive (2013/36 EU) in June 2013.[14] Article 89 of this directive states that European credit and financial institutions are required to adopt CbCR. According to its provisions, for every country in which they operate, companies must provide information on their entities, the nature of their activities and geographical location, revenue, number of employees (full-time equivalents or FTEs), profit or loss before tax, tax on profit or loss, as well as public subsidies received. After an external audit, this information is to be published as

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11 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ. L 182, 29 June 2013, pp. 19–76.

12 See section B.II.1.a). In addition, payments made to improve infrastructure are to be published.

13 Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, OJ L 294, 6 November 2013, pp. 13–27.

14 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 L 176, 27 June 2013, pp. 338–436.

an annex to the company's annual financial statements. First-time disclosure was scheduled for reporting periods beginning on or after 1 January 2014. The directive was implemented in Germany in section 26a of the German Banking Act (Kreditwesengesetz – KWG) in accordance with the stipulated content and time frame.

III. Cross-sector developments

1. Mandatory CbCR

a) OECD BEPS Action 13

In July 2013, the OECD published its BEPS Action Plan,[15] the purpose of which is to develop measures to combat base erosion and profit shifting by MNEs, and ensure fair competition in tax matters between different jurisdictions. Action 13 requires that transfer pricing documentation include country-specific tax information.[16] A discussion draft on this topic was issued in January 2014[17] and a few months later guidance was published on transfer pricing documentation and CbCR,[18] proposing a three-tiered approach. Besides, as a master file containing general information about an enterprise's global operations and a country-specific local file, which together set out the details of the corporate structure, internal transactions and the transfer pricing methods used, a separate country-by-country report would form a third component of transfer pricing reporting. In 2015, the OECD published guidance on implementing transfer pricing documentation and CbCR,[19] along with an implementation package[20] that provided more detailed information on the scope of the proposed regulations and their transposition into national law.[21] Published on 5 October 2015, the Final Report on Action 13[22] summarises the OECD's previous recommendations. These state that an MNE with annual consolidated group revenue in the immediately preceding fiscal year of at least EUR 750 million must provide the tax authorities with the following information for each country in which it operates: revenue (broken down by related parties and unrelated parties), profit/loss before income tax, income tax paid (including tax withheld at source), income tax accrued, stated capital, accumulated earnings, number of employees (FTEs), and tangible assets

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15 OECD (2013).

16 In Germany, for example, documentation detailing the basis for determining intra-group transfer prices must be provided in accordance with section 90 (3) of the Fiscal Code (Abgabenordnung – AO) in connection with the regulations regarding the documentation of profit allocations (Gewinnabgrenzungsaufzeichnungsverordnung – GAufzV). See detailed information in Endres/Spengel (2016), p. 1052 et seq.

17 OECD (2014a).

18 OECD (2014b).

19 OECD (2015a).

20 OECD (2015b).

21 In addition, three publications (handbooks and guidance) from September 2017 contain additional assistance for the participating countries as regards introducing CbCR and processing the data (OECD (2017a, b, c)).

22 OECD (2015c).

other than cash and cash equivalents. In addition, it must also provide the names and activities of the group's individual companies and facilities in each country. Subsidiaries and facilities, too, are obliged to prepare a report for the entire group, provided they are domiciled in an OECD member country and either their parent company is not already obliged to compile a country-by-country report or another group company has not already submitted such a report. The OECD estimates that, owing to the revenue threshold of EUR 750 million, 85–90 percent of MNEs will be exempted from the reporting obligation, but that enterprises whose tax payments account for around 90 percent of the corporate tax take will be subject to it.[23] The OECD's CbCR is *not* public reporting, as the reporting company has to submit the information only to its tax office, which subsequently shares the information with the tax authorities of the other participating countries. The OECD CbCR was to be applied for the first time in accounting periods beginning on or after 1 January 2016.

In May 2016, the EU amended its directive as regards the mandatory automatic exchange of information on taxes[24] in response to the OECD's CbCR in accordance with BEPS Action 13. In the accounting period beginning on or after 1 January 2016, MNEs with consolidated revenues of at least EUR 750 million in the immediately preceding fiscal year are, for the first time, to provide the tax authorities of their country of domicile with a country-by-country report containing the information proposed by the OECD. The automatic sharing of information with the tax authorities of different jurisdictions means that this report will also be made available to the tax authorities of those countries in which the relevant enterprise operates. In Germany, confidential CbCR was transposed into national law in section 138a of the Fiscal Code (Abgabenordnung – AO)[25] where it applies for the first time in accounting periods beginning after 31 December 2015 (Art. 97 section 31 of the law implementing the tax code – Einführungsgesetz zur Abgabenordnung or EGAO).

The OECD continually monitors the implementation of BEPS Action 13 in the participating countries. As part of the three-year peer review process (2017–2019), implementation of the CbCR standard is being documented with respect to the domestic legal and administrative framework, information sharing and confidentiality in each country, and to the appropriate use of the CbCR reports. The meanwhile second Peer Review Report[26] revealed that more than 80 countries have implemented CbCR regulations

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23 See OECD (2015c), p. 21, recital 53. A study by Spengel/Vay/Weck (2019) largely confirms this opinion.

24 Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation, OJ L 146, 3 June 2016, pp. 8–21.

25 In its letter dated 11 July 2017 (IV B 5 – S 1300/16/10010 :002), Germany's Federal Ministry of Finance made clear its stance as regards the technical details of transferring CbCR data to the Central Tax Office. See also Peters/Busch (2017).

26 OECD (2019a).

in their respective national laws.[27] However, there are differences in the dates of first-time application and individual aspects of implementation.[28] In order to regulate the sharing of CbCR data between countries, the OECD has initiated a Multilateral Competent Authority Agreement (CbC-MCAA), to which 87 nations – including Germany – have thus far become signatories.[29] But a number of countries, including the United States, have not signed the agreement. The United States is instead negotiating bilateral agreements with individual countries so as to determine itself what information it shares and under what conditions.[30] At present, a total of over 2,500 bilateral relationships are in place between countries that have undertaken to exchange CbCR data.[31] In addition to the exchange of data between CbC-MCAA signatories, these relationships include those between EU member states within the context of Council Directive 2016/881/EU and between the signatories of bilateral treaties for the exchange of data under double-taxation agreements or agreements on the exchange of tax information. CbCR data was exchanged automatically for the first time in June 2018.[32]

Based on the experiences of the participating countries thus far, the OECD published updated guidelines for implementing CbCR in December 2019. These guidelines specified aspects that had not been regulated to date, e.g. certain items to be covered in CbC reports and further details for the preparation and exchange of the reports.[33] In addition, typical problems arising during the preparation of reports were identified.[34] Different stakeholder groups are also being included in the ongoing evaluation of the CbCR standard. Moreover, as part of its review process the OECD organised a public hearing in February 2020, inviting the participants to comment on BEPS Action 13. The participants' responses revealed that some interest groups are calling, in particular, for the OECD CbCR rules to be more closely aligned

27 According to OECD data, the current figure is 90, see http://www.oecd.org/tax/beps/beps-actions/action13/ [11 August 2020].

28 The OECD also publishes a regularly updated list of participating countries along with an overview of the implementation status of CbCR worldwide at http://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm [11 August 2020].

29 See https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf [11 August 2020].

30 Thus far, the USA has concluded corresponding agreements with 41 other countries; see https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm [15 September 2020].

31 See https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm [15 September 2020].

32 See https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm [15 September 2020].

33 OECD (2019b).

34 OECD (2019c).

with the Global Reporting Initiative standard,[35] including disclosure of the data to the general public.[36] An initial evaluation of the anonymised and aggregated OECD CbCR data for the 2016 reporting period was published in July 2020 as part of the second edition of the OECD's Corporate Tax Statistics.[37,38]

b) The EU's draft Accounting Directive

In addition to the confidential CbCR mentioned above, the European Commission also prepared a proposal for public reporting. On 12 April 2016, the European Commission published a draft bill to amend the Accounting Directive.[39] This bill was revised by the European Parliament on 4 July 2017[40] and again on 27 March 2019.[41] On 15 November 2019, the Finnish Presidency of the Council of the European Union presented the latest compromise proposal;[42] however, a narrow majority of the Competitiveness Council rejected it in a vote taken on 28 November 2019.[43] Despite demands from CbCR advocates,[44] the topic has not yet found its way onto the agenda of the current German Presidency of the Council (second half of 2020).[45]

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35 See section B.III.2.

36 See https://www.globalreporting.org/information/news-and-press-center/Pages/US-Senators-join-call-for-OECD-to-%E2%80%98align-with-GRI-Tax-Standard%E2%80%99.aspx?utm_campaign=11408999_March_Newsletter_2020&utm_medium=Engagement%20Cloud&utm_source=Global%20Reporting%20Initiative&dm_i=4J5,6SJ8N,1G0RAX,R6JWL,1 [11 August 2020]. The following link will take you to the statements made by the representatives of the interest groups: https://www.oecd.org/tax/beps/public-comments-received-on-the-2020-review-of-country-by-country-reporting-beps-action-13-minimum-standard.htm [11 August 2020].

37 OECD (2020).

38 See section D.I for a brief description of the key results of the OECD's evaluation.

39 European Commission (2016).

40 European Parliament (2017).

41 European Parliament (2019).

42 Council of the European Union (2019a). Hereinafter "EU compromise proposal".

43 Whereas 14 member states voted for the proposal, 12 were against. The United Kingdom did not take part in the vote, while Germany abstained. A majority of 16 would have been needed for the proposal to proceed; see https://www.internationaltaxreview.com/article/b1j7hkz9m2y67b/public-cbcr-fails-to-move-forward-in-eu-council [14 August 2020]. On 20 December 2019, the Finnish Presidency of the Council of the European Union published a follow-up note in which the preface to the compromise proposal was modified slightly in order to lend greater emphasis to the proposal's objective (Council of the European Union (2019b)).

44 See Paus/Giegold (2020).

45 See https://www.tagesschau.de/investigativ/ndr/eu-steuertransparenz-103.html [19 August 2020].

The latest EU compromise proposal provides for an income tax information report for the following companies:[46]

- EU-based ultimate parent companies (referred to as "ultimate parent undertakings" by the EU) with total consolidated revenues[47] of at least EUR 750 million in each of the last two fiscal years;[48]
- unaffiliated EU companies ("standalone undertakings") with total revenues of at least EUR 750 million in each of the last two fiscal years;
- medium-sized and large EU subsidiaries controlled by a non-EU ultimate parent company with total consolidated revenues of at least EUR 750 million in each of the last two fiscal years;
- medium-sized and large EU branches opened by an enterprise established outside the EU that
  - i) is controlled by a non-EU parent company with total consolidated revenues of at least EUR 750 million in each of the last two fiscal years (branch obliged to report unless another subsidiary is already subject to the reporting obligation), or
  - ii) is an unaffiliated enterprise with total revenues of at least EUR 750 million in each of the last two fiscal years.[49]

Enterprises are exempted from the reporting obligation that have a branch, a fixed place of business or permanent business activities in only one member state, as well as enterprises that are already obliged under Article 89 of Directive 2013/36/EU to publish a CbC report.

In addition to being published in a central national register or in a commercial or company register, the CbC report must appear on the reporting company's website for at least five years.[50] The report must disclose the following information (broken down by individual EU member state and for the tax jurisdictions given in the EU list of non-cooperative countries for tax purposes, as well as on an aggregate basis for all other tax jurisdictions):

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46 The remarks below refer to the EU compromise proposal. The main differences compared with the European Parliament's proposal of 27 March 2019 are shown in the footnotes to this section.

47 Depending on the underlying accounting standards, revenues are defined as net revenues or as income as defined by the applicable financial reporting framework.

48 This is the fiscal year to which the income tax information report refers as well as the fiscal year immediately preceding it.

49 The European Parliament proposal of 27 March 2019 concerns a broader group of enterprises. Only in the fiscal year coinciding with the report does the revenue threshold of EUR 750 million have to be exceeded, and there is no limitation to medium-sized and large subsidiaries.

50 In its proposal of 27 March 2019 , the European Parliament advocated publication of the income tax information report on the respective company's website and in a public register kept by the Commission.

- name of the ultimate parent company or unaffiliated enterprise;
- brief description of the nature of business activities;
- number of employees (average over the fiscal year);
- amount of revenues;[51]
- amount of profit or loss before income tax;
- amount of income tax accrued (current year), which is the current tax expense recognised on taxable profits or losses for the fiscal year by enterprises and branches in the relevant tax jurisdiction;[52]
- amount of income tax paid on a cash basis, which is the amount of income tax paid during the respective fiscal year by enterprises and branches in the relevant tax jurisdiction;[53]
- amount of accumulated earnings;
- where applicable at group level, an overall narrative providing explanations on material discrepancies between the income tax amounts already paid and still to be paid.[54]

Under the EU compromise proposal, the member states may allow the information to be reported to match the requirements of the OECD CbCR, which were implemented in the Directive as regards the mandatory automatic exchange of information in the field of taxation (see section B.III.1.a)). The compromise proposal allows the companies in question to temporarily defer disclosure of certain information in cases

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51 These include the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income, and earnings in accordance with the underlying accounting principles. Income is to be calculated including transactions with related parties.

52 Without deferred taxes and provisions for uncertain tax liabilities.

53 Including tax paid at source by other companies.

54 The European Parliament's proposal of 27 March 2019 provides for a breakdown of the data by individual tax jurisdiction (also outside the European Union). The following data is to be published in addition to the information listed above: a list of all subsidiaries, a brief description of the nature of their activities and their geographical locations; tangible assets other than cash and cash equivalents; stated capital; breakdown of revenues by related and unrelated parties; details of government subsidies received and any donations made to politicians, political organisations or political foundations; and information on any preferential tax treatment granted by means of a patent box or comparable arrangements.

where disclosure would seriously disadvantage their commercial position.[55] Reasons for the waiver must be given in the report. The information in question must be published within six years of the waiver.[56]

c) Comparison of OECD and EU initiatives

Table 1 compares the CbCR initiatives of the OECD and the EU. The core difference between the two approaches lies in the manner of disclosure. Whereas, under BEPS Action 13, the information is provided confidentially to the relevant tax authority and subsequently shared with the tax authorities in other countries, under the EU compromise proposal the information is to be posted on the company's website and also entered in a central national register or in a commercial or company register. These differences in the manner of disclosure reveal the divergent purposes of the two proposals. What both initiatives have in common is the aim to limit, by means of enhanced transparency, the ability of MNEs to shift their profits to low-tax jurisdictions through tax planning. However, the channels used differ markedly. The OECD's focus is on enabling the tax authorities to assess profit-shifting risks better and more efficiently during tax audits – especially the risks posed by transfer pricing. The EU proposal concentrates primarily on generating public pressure by making sensitive corporate data available to the public. The objective is to influence the behaviour of the companies and ultimately prompt them to voluntarily pay their "fair" share of tax in the countries in which they operate.[57]

There are also differences as regards the scope – e.g. the reference period for consolidated revenues/ total revenues, which must exceed EUR 750 million before the company is obliged to file a report: in the EU compromise proposal, the reference period for these revenues is the fiscal year of the report and the immediately preceding fiscal year, whereas the reference period for CbCR in accordance with BEPS Action 13 is the immediately preceding fiscal year only.

Furthermore, the EU compromise proposal offers two exemption options that have no counterpart in the OECD proposal: firstly, for banking-sector enterprises that are already obliged to perform CbCR under Article 89 of Directive 2013/36/EU and, secondly, a temporary waiver of disclosure.

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55 The waiver does not extend to information on tax jurisdictions mentioned on the EU's list of non-cooperative countries for tax purposes.

56 According to the European Parliament's proposal of 27 March 2019, member states may allow companies to exclude certain information for individual countries if disclosure of that information would be "seriously prejudicial" to their commercial situations. Such exemptions may be granted only if they do not prevent the tax authorities from gaining a fair and balanced understanding of the company's tax position. A company must reapply every year for any exemption it has been granted. As soon as the prerequisites for non-disclosure are no longer met, the information must be published retroactively in the form of an arithmetic mean. The European Commission may revoke any exemption granted by a member state if it has a different opinion on the matter.

57 See Grotherr (2016a), p. 856.

As far as the data to be published is concerned, the OECD's CbCR goes further than the EU compromise proposal in requiring the disclosure of stated capital, tangible assets and the names of all companies and facilities included as well as a breakdown of revenues by related and unrelated parties.[58]

Table 1: Comparison of OECD CbCR (BEPS Action 13) and EU CbCR (EU compromise proposal to amend the Accounting Directive)

	OECD CbCR (BEPS Action 13)	EU CbCR (EU compromise proposal to amend the Accounting Directive)
Objective	Better assessment by tax authorities of profit-shifting risks, especially through transfer pricing arrangements	Influence behaviour of enterprises by means of public pressure
Manner of disclosure	Confidential; information shared between tax authorities	Public (on company website and in central national register or in commercial or company register)
Geographical scope	At least one group company/facility in an OECD country	At least one medium-sized or large (group) company/facility in an EU member state
Scope of application	■ Multinational enterprises with consolidated prior-year revenues of at least EUR 750 million ■ Subsidiaries and facilities of above corporate groups if domiciled in an OECD country and if the parent company is not obliged to produce a CbC report or no other group company produces a CbC report	■ EU-based ultimate parent companies with total consolidated revenues of at least EUR 750 million in each of the last two fiscal years ■ Unaffiliated EU enterprises with total revenues of at least EUR 750 million in each of the last two fiscal years ■ Medium-sized and large EU subsidiaries controlled by an ultimate non-EU parent company with total consolidated revenues of at least EUR 750 million in each of the last two fiscal years ■ Medium-sized and large EU branches opened by an enterprise established outside the EU that ■ i) is controlled by a non-EU parent entity with total consolidated revenues of at least EUR 750 million in each of the last two fiscal years (branch obliged to report unless another subsidiary is already subject to the reporting obligation), or ■ ii) is an unaffiliated enterprise with total revenues of at least EUR 750 million in each of the last two fiscal years.

58 However, the European Parliament's proposal of 27 March 2019 also includes disclosure of this information.

	OECD CbCR (BEPS Action 13)	EU CbCR (EU compromise proposal to amend the Accounting Directive)
Size threshold	EUR 750 million in revenues in the preceding fiscal year	EUR 750 million in total revenues in the fiscal year of the report and the preceding fiscal year
Sectors	All	All except for the banking sector (where CbCR obligation already exists under Article 89 of 2013/36/EU)
Exemptions	None	Temporary waiver (up to six years, reasons must be given) of the disclosure of certain information possible in cases where disclosure would seriously disadvantage the commercial position of the relevant enterprises.
Data	Revenues (broken down by related and unrelated parties)	Revenues
	Profit/loss before income tax	Profit/loss before income tax
	Income tax paid	Income tax paid
	Income tax accrued	Income tax accrued
	Accumulated earnings	Accumulated earnings
	Stated capital	
	Tangible assets (with the exception of cash and cash equivalents)	
	No. of employees (FTEs)	No. of employees (average over the fiscal year)
	Name(s) and activities of enterprises and facilities per country	Activities in each country
		Where applicable, overall description at group level of any material discrepancies between income tax already paid and still to be paid

2. Voluntary CbCR

In addition to the mandatory CbCR rules described in sections B.II and B.III.1, the Global Reporting Initiative recently launched a CbCR standard that companies may apply on a voluntary basis. Established in 1997, the GRI is an independent international organisation devoted to sustainability reporting.[59] The Sustainability Reporting Standards published by the Global Sustainability Standards Board adopt a best-practice approach to reporting the economic, ecological and social consequences of a company's business activities[60] and are the most widely used sustainability reporting standards worldwide.[61] Any

59 See https://www.globalreporting.org/Information/about-gri/Pages/default.aspx [17 August 2020].

60 See https://www.globalreporting.org/standards [17 August 2020].

61 See https://www.globalreporting.org/Information/about-gri/Pages/default.aspx [17 August 2020].

company wanting to report on its activities can use the GRI standards, either individually or in combination. A certain set of standards must be applied simultaneously before a sustainability report can be judged as being in accordance with the GRI standards.[62]

The “GRI 207: Tax 2019” standard was published in December 2019 and enters into force on 1 January 2021.[63] Alongside three areas of regulation that comprise qualitative information on the company’s management of its taxation,[64] the standard calls for the preparation of a public CbC report (“Disclosure 207-4”) as part of “topic-specific disclosure”.

Disclosure 207-4 requires publication of a list of all tax jurisdictions in which the companies included in the consolidated annual financial statements are resident for tax purposes. The following information must be disclosed for each of these countries:

- names of the resident entities;
- primary activities of the organisation;
- number of employees and the basis of calculation of this number;[65]
- revenues from third-party sales;
- revenues from intra-group transactions with other tax jurisdictions;
- profit/loss before tax;
- tangible assets other than cash and cash equivalents;
- corporate income tax paid on a cash basis;[66]
- corporate income tax accrued on profit/loss;[67]

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62 See GRI (2016).

63 GRI (2019).

64 These include details of the company’s general approach to taxation, governance, control and the management of tax-related risks as well as to the involvement of stakeholders.

65 E.g. calculated as the number of employees at the end of the reporting period or on an FTE basis.

66 Including withholding tax. Strictly speaking, the GRI’s CbCR standard requires only the disclosure of corporate income tax paid and accrued. However, in Germany and Hungary, for instance, trade tax makes up a material portion of a company’s total tax burden (see Spengel/Bräutigam/Dutt/Fischer/Stutzenberger (2019), p. 51). As the income tax picture would not be complete if only corporate income tax disclosures were made, we can assume that the GRI standard is intended to include other types of taxation as well (e.g. trade tax) – as is the case with the OECD’s CbCR and the EU compromise proposal.

67 Without deferred taxes and provisions for uncertain tax liabilities.

- reasons for the difference between corporate income tax accrued on profit/loss and the tax due if the statutory tax rate is applied to profit/loss before tax.[68]

Where possible, the information should be based on the latest consolidated annual financial statements and match the reported data. In addition to the above-mentioned reporting obligations, it is recommended that companies provide details per country of total employee remuneration, taxes withheld and paid on behalf of employees, taxes collected from customers on behalf of a tax authority,[69] industry-related and other taxes or payments to governments, significant uncertain tax positions, and the balance of intra-company debt held by entities in the tax jurisdiction.

The GRI standard includes comprehensive explanations that are designed to assist companies in implementing their reporting obligations. In certain cases, information can be left out of the report, provided the omission is justified using one of the reasons given in the "GRI 101: Foundation 2016"[70] standard (e.g. restrictions regarding confidentiality, unavailability of information).

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68 E.g. tax relief, allowances, incentives and other arrangements resulting in preferential tax treatment. In addition to providing a qualitative explanation as required by the disclosure, the company can also report a quantitative corporate tax reconciliation.

69 See Schnitger/Holle/Kockrow (2020), p. 1529.

70 GRI (2016).

C. Analysis of the fundamental concept behind country-by-country reporting, and of its costs and benefits

Now that the various CbCR rules and initiatives have been described, in this section we will analyse the concepts underlying CbCR and the potential costs and benefits of introducing rules of this kind. We will then move on to discuss initial scientific findings in section D.

I. Analysis of underlying concepts

The concept of CbCR as a tool for identifying profit shifting is based on the idea of using variables to divide up overall corporate profits between different countries. In order to assess the appropriateness of country-specific profits and tax payments, these profits and tax payments must be set against indicators of economic activity. According to the proposals of the OECD and EU, the variables to be used are the number of employees and revenues (as well as tangible assets apart from cash and cash equivalents). From the standpoint of the causation principle, however, it is impossible to define an unambiguous economic variable to assess the appropriateness of a company's profits and its income tax payments in any given country.[71] Corporate profits are also influenced by intangible internal and external factors, such as economic and environmental impacts, infrastructure, degree of automation or levels of education. Nor can synergies between affiliated companies be divided up between corporate units using simple variables. This is precisely the problem inherent in transfer prices. If a multinational enterprise's profits could be divided up clearly between the countries in which it operates using a simple process that respects the causation principle, no CbCR would be needed for tax purposes as the whole problem of profit shifting would be solved. This impossibility means it is also not possible to accurately allocate profits when preparing country-specific reports on income tax.[72] One way of obtaining better base data for CbCR would have been to choose more specific indicators for known profit-shifting instruments, such as the separate disclosure of intra-group licence payments.[73] Besides, other employment market characteristics – such as labour productivity and personnel costs – should be taken into account,[74] and an external comparison with the figures of a suitable peer group should be carried out in addition to an internal comparison of the figures between individual countries.[75]

71 See Schreiber/Voget (2017), p. 148.

72 See Evers/Hundsdoerfer (2014), p. 13.

73 See Steinegger (2016), p. 458.

74 See Schwarz/Stein/Weinert (2017), p. 737.

75 See Nientimp/Holinski/Schwarz/Stein (2016), p. 2743.

II. Analysis of costs

1. Direct costs

The introduction of mandatory CbCR entails significant costs for the companies concerned. These include, on the one hand, the direct costs incurred to prepare the reports. As the data to be included in the reports exceeds the scope of the information already presented in the annual or consolidated financial statements, the companies first have to adapt their reporting systems to the requirements of CbCR.[76] For example, both section 138a of the AO and the EU compromise proposal require that the figures for non-autonomous facilities or branches be assigned in each case to the country in which they are located; according to financial reporting standards, however, this data is simply included in the annual financial statements that the enterprise prepares in its country of domicile.[77] Further, some of the items in the CbC reports are more detailed or are broken down differently from what is usual in annual financial statements (e.g. the item concerning income tax paid in the fiscal year). In this respect, first-time implementation of the CbCR requirements in a company's reporting system will give rise to one-time adjustment costs. Further administrative expense would also be incurred if the confidential reports were to be based on data that differs from that used in other published reports. Under the EU compromise proposal, the member states are only free to allow companies to use matching data in both reports (see also section B.III.1.b)). If individual member states depart from that rule, this could result in the companies being doubly burdened by having to prepare two separate reports in parallel on the basis of different sets of data.[78]

In addition to one-time implementation costs, companies also incur recurrent costs to collect and process the data required to prepare the CbC reports once a year. As the naked figures require interpretation and could be misleading in some fiscal years, the companies' tax or PR departments might also want to consider voluntarily publishing additional information and explanations.[79] If the reports have to be vetted by the auditors of the company's consolidated financial statements – as is already the case under the CbCR regulations for banks in the EU[80] – that will also generate additional recurring costs. Under the current EU compromise proposal, member states may prescribe that auditors state in their reports whether the audited company has to publish a CbC report. As the reports prepared in accordance with section 138a of the AO are in any case intended only for the tax authorities and not for publication,

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76 See Evers/Meier/Spengel (2014), p. 301.

77 See Evers/Hundsdoerfer (2014), p. 25.

78 See also Deutsches Rechnungslegungs Standards Committee e.V. [Accounting Standards Committee of Germany] (2016), pp. 5–6.

79 See Deutsches Rechnungslegungs Standards Committee e.V. [Accounting Standards Committee of Germany] (2016), pp. 4–5.

80 Art. 89 (4) of the EU's Capital Requirements Directive and section 26a (1) sentence 2 of the Banking Act (Kreditwesengesetz - KWG).

there is no obligation to have them audited. We nevertheless expect the tax authorities to intensify their tax audits of individual companies on the basis of the CbCR data they receive and to demand that they furnish additional documents, e.g. a reconciliation with other financial data.[81] Regardless of whether these audits ultimately result in any additional tax payments, they will generate higher compliance costs.

It is difficult to quantify the actual amount of the direct costs companies will incur introducing CbCR. For one thing, these costs depend on the size of the company in question, the complexity of its corporate structure and the design of its previous internal reporting system. We can further assume that, like other compliance costs, these costs will not rise in proportion to the size of the company. As a result, within the group of companies that exceed the threshold of EUR 750 million in annual revenues, it is the smaller companies that will have to bear a higher cost burden.[82] The burden will be particularly heavy for family businesses. Whereas around one-third of the 500 German family businesses with the highest sales post annual revenues between EUR 750 million and EUR 2 billion,[83] the revenues of the 30 DAX-listed companies average EUR 47.7 billion.[84]

2. Implicit costs

Far more substantial than the direct costs to be borne by companies are the indirect ones associated with the implementation of CbCR, and especially with the publication of information. They include potential damage to a company's reputation, compromised tax confidentiality, the risk of double taxation and, in particular, competitive and locational disadvantages.

a) Reputational risks

Whereas the reports required by the OECD (and implemented in section 138a of the AO) are to be submitted to the tax authorities only, the EU compromise proposal stipulates that the CbCR data be published on the company's website and entered in a publicly accessible register. Unlike tax office experts, however, the public at large has neither access to supplementary information nor the necessary expertise to fully appreciate and contextualise the figures in these reports.[85] International taxation law and the corporate structures of MNEs are often highly complex. There is thus a danger that the data will be misinterpreted

81 See Preisser (2016), p. 495.

82 See Evers/Hundsdoerfer (2014), p. 21.

83 This information is based on unpublished rankings underlying the study carried out by Stiftung Familienunternehmen [Foundation for Family Businesses] (2017) as well as on publicly accessible rankings of Matchbird and PricewaterhouseCoopers, http://www.top-familienunternehmen.de/rankings [7 September 2017]. Over half of the 500 German family businesses with the highest sales have annual revenues in excess of the EUR 750 million threshold.

84 See https://de.statista.com/statistik/daten/studie/75495/umfrage/umsaetze-der-dax-konzerne/ [7 September 2020].

85 See Deutsches Rechnungslegungs Standards Committee e.V. [Accounting Standards Committee of Germany] (2016), pp. 4–5; Deutscher Steuerberater-Verband e.V. [German Association of Tax Advisers] (2016), p. 3.

in some cases – especially in view of the problems described in section C.I concerning the meaningfulness and information content of the CbC reports. For instance, the public may jump to the conclusion that a company with a low tax burden in a high-tax jurisdiction which simultaneously posts high profits there must be guilty of aggressive tax planning. In many cases, however, a constellation of this kind can have other causes, such as the corporate structure (e.g. tax-free dividends of a holding company) or the utilisation of carryforwards from commercial losses incurred in the past.[86] For the companies in question, there is a significant risk of unwarranted reputational damage and a consequent loss of revenue. Economic disadvantages can thus arise very quickly – and can often take an extremely long time to overcome.[87] Whether companies can avoid this problem by publishing additional explanatory information is open to doubt. Given the already large amount of financial information that has to be published, it is not unlikely that public and media interest will focus on just the figures in the CbC reports rather than on any additional explanatory information.

b) Erosion of tax confidentiality

Another implicit cost factor of public CbCR is that it runs counter to tax confidentiality, a principle that is highly prized, especially in Germany. As defined in section 30 of the AO, tax confidentiality is an expression of every citizen's constitutionally guaranteed right to data privacy.[88] Its purpose is to engender trust in the confidentiality of the tax authorities and thus encourage people to share with them the personal data that is essential for taxation. In this way it helps achieve the principle of equality in taxation.[89] As the EU's compromise proposal envisages a statutory basis for the companies themselves to publish their CbCR information, publication does not, in formal terms, constitute a breach of tax confidentiality. The provisions of section 30 of the AO refer only to the unauthorised disclosure of information by tax office employees. But the obligation to publish de facto erodes tax confidentiality: once the country-specific data is made public in the CbC report, it no longer constitutes protected information under section 30 of the AO.[90] However, we should not overlook the fact that, historically, the main purpose of tax confidentiality has always been to protect the rights of natural persons.[91] For large enterprises and, in particular, listed companies, the scope of tax confidentiality has been severely eroded by the disclosure obligations already in place; in many cases the additional erosion brought about by the CbCR regime will not constitute any serious change.[92] Family businesses, by contrast, are the most likely to be affected in view of the relatively close connection between the enterprise and a small number of private individuals. The

86 See Deutscher Steuerberater-Verband e.V. [German Association of Tax Advisers] (2016), p. 3.

87 See Lenter/Slemrod/Shackelford (2003), p. 824; Grotherr (2017), pp. 330–337.

88 See Intemann (2014), section 30 of the AO, recital no. 5.

89 See Schreiber/Voget (2017), p. 149; Evers/Hundsdoerfer (2014), p. 22.

90 See Schreiber/Voget (2017), p. 149.

91 See Rüsken (2016), section 30 of the AO, recital no. 2.

92 See Cockfield/MacArthur (2015), pp. 651–654; Evers/Hundsdoerfer (2014), p. 22.

publicly accessible data can thus be used to draw certain conclusions about the tax situation of those private individuals, which is not the case with large publicly listed companies.

c) Risk of double taxation

A further problem to bear in mind is that the CbCR data could arouse the interest of the tax authorities in certain countries.[93] For tax authorities, the data reveals the scope of a company's business activities and corresponding tax payments in each country. It is to be expected that the tax authorities in some countries will use the CbCR data to validate companies' transfer prices. If they were to gain the impression that a company's tax payments in their country do not match the magnitude of its business activities, they might be inclined to use this information to adjust the company's transfer prices[94] – even though the CbCR data alone is no indicator of the appropriateness of a company's transfer prices. As adjustments of this kind are made almost solely in order to increase the tax base, and the other countries involved are unlikely to be willing to make corresponding counter-adjustments, companies will face a rising risk of double taxation or at least of higher consultation and litigation costs.[95] This is reportedly already a problem for some companies. Implementation of the CbCR regime could ultimately lead to battles for tax receipts between different jurisdictions, to an increase in taxation at source, and to the de facto introduction of formulary apportionment in the absence of any explicit legal basis.[96] Incidentally, this is a problem posed not just by public CbCR as detailed in the EU compromise proposal, but also by the confidential sharing of CbCR information between the tax authorities of the participating countries under the OECD regime implemented in Germany under section 138a of the AO.

d) Competitive and locational disadvantages

Competitive and locational disadvantages are the most significant of the implicit costs that could result from the introduction of public CbCR across the EU. This is because the figures in the reports represent confidential corporate information.[97] Such information must always be protected against access by contractual partners and, in particular, by competitors, as otherwise the company would suffer substantial commercial disadvantages. Competitors could trawl the CbCR data for information on a company's international presence, cost structures and production processes, and assess the way it deploys know-how.[98] They could then use that information to analyse the company's strengths and weaknesses and make use of the findings to enhance their own efficiency. The CbCR data also provides insights into

93 See Schlie/Malke (2013), p. 2469.

94 See Evers/Hundsdoerfer (2014), p. 23.

95 See Schlie/Malke (2013), p. 2469; Hanlon (2018), p. 212.

96 See Cockfield/MacArthur (2015), p. 642; Evers/Meier/Spengel (2017), p. 10.

97 See Evers/Meier/Spengel (2017), p. 9.

98 See Institut der Wirtschaftsprüfer [Institute of Public Auditors in Germany] (2016), pp. 1-2; Evers/Hundsdoerfer (2014), p. 21.

the profitability of a company's individual locations. Country-specific profit margins and profitability ratios could allow competitors to gauge the market potential in those countries and use that data to move into particular markets.[99] CbCR data is a valuable source of information for a company's suppliers and customers too. Suppliers and customers at one location can compare a company's profit margin there with their counterparts at other locations. If a company has a relatively high profit margin in one country, the local suppliers and customers could well use that as an argument during future contractual negotiations to adjust the terms and conditions to their advantage. These examples illustrate that the reports contain sensitive data that is worthy of the same protection as business secrets. For this reason, on 8 December 2016, the Constitutional Council in France declared the government's plan to introduce public CbCR there to be unconstitutional.[100]

If public CbCR were to be introduced across the globe regardless of company size, all MNEs would be obliged to publish confidential data, a scenario that ultimately would not impair competition to any great extent.[101] However, the introduction of CbCR as proposed in the EU's compromise proposal is neither size-neutral, nor is it global in scope (it cannot be applied globally as the EU has no power to impose its regulations on third countries). As explained in section B.III.1.b), the proposed scheme is restricted to enterprises with annual revenues of over EUR 750 million that have at least one medium-sized or large subsidiary, company or branch in at least one EU member state. The scope of the proposed obligation to publish information is thus limited both in terms of company size and geographical location. This asymmetrical implementation can considerably distort competition as it grants individual groups of companies access to the CbCR information of their competitors or contractual partners without having to provide corresponding data themselves.

For one thing, EU-based groups that exceed the revenue threshold are clearly disadvantaged against their EU-based competitors that do not. Both groups of companies are domiciled in the same economic region, compete against each other in the same markets and may even be of a comparable size (e.g. enterprises with annual net revenues between EUR 500 million and EUR 1 billion). And yet, only one of these groups is obliged to publish data. Since, in Germany at least, almost all companies with revenues of around EUR 750 million are mid-tier enterprises (the German "Mittelstand"), larger mid-tier enterprises will suffer a competitive disadvantage compared with their smaller competitors.

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99 See Grotherr (2017), pp. 330–337.

100 See press release of the Conseil Constitutionnel [Constitutional Council] of 8 December 2016, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-741-dc/communique-de-presse.148311.html [7 September 2020]; see also Schreiber/Greil (2017), p. 18. By contrast, Cockfield/MacArthur (2015, p. 655) express the opinion that none of the information contained in the reports should be classified as business secrets or as information meriting similar protection.

101 See Schlie/Malke (2013), p. 2469.

A much weightier problem than that of a size-based threshold, however, is the asymmetry caused by the fact that the obligation to publish CbCR data is restricted in geographical terms. As already mentioned, the regulations outlined in the EU compromise proposal are to apply only to enterprises with at least one medium-sized or large subsidiary, company or facility in at least one EU member state. This clearly disadvantages companies with subsidiaries in EU member states as opposed to their competitors with no such subsidiaries. We can assume that this disadvantage will have less impact on large publicly listed companies. The 30 companies listed on Germany's DAX index, for instance, compete mainly with international enterprises of a similar size. However, the global players in this top size category that are domiciled in a third country (e.g. those listed on the Dow Jones) generally already have correspondingly large subsidiaries or branches in the EU due to the global nature of their business and are thus also subject to CbCR disclosure obligations. As the scope of disclosure for groups domiciled in third countries will cover their entire operations worldwide, EU-based groups in this size category will not be at any competitive disadvantage. The situation for family businesses is different. It is quite probable that many family businesses exceeding the EUR 750 million revenue threshold will be competing in markets outside the EU against third-country corporate groups that have no subsidiaries in the EU. If a European mid-tier enterprise with revenues above the threshold is competing for major international orders with a Japanese enterprise of comparable size, the European company will have a competitive disadvantage. It must publish its CbCR data, thus granting the Japanese competitor access to sensitive information that the latter can turn to its own advantage. Having no EU subsidiary, the Japanese competitor is not obliged to publish such data.

Concerns have also been raised that enterprises domiciled in third countries with medium-sized or large subsidiaries or branches in EU member states – and thus theoretically also subject to the CbC reporting obligation – might refuse to make the relevant information about their international corporate structure available to their EU subsidiaries. In such cases, the EU would have no suitable sanctions at its disposal to enforce its regulations; consequently, individual companies might attempt to circumvent publication.[102] The competitive disadvantages of EU-based companies would then broaden to include competitors of this kind as well. Here again we can assume that family businesses will be the main ones affected. It is rather unlikely that global players from third countries that generally have numerous subsidiaries across the EU and are also in the public eye would try to circumvent the regulations. By contrast, smaller MNEs with only one or a handful of subsidiaries in the EU and who are exposed to only a minor risk of reputational damage might be tempted to do so. This group includes the traditional competitors of European mid-tier enterprises.

Finally, it should be noted that the above-mentioned competitive disadvantages for certain EU companies imply a competitive disadvantage for the EU economy as a whole.[103] From the standpoint of

102 See Institut der Wirtschaftsprüfer [Institute of German Certified Public Accountants] (2016), pp. 1–2.

103 See Evers/Meier/Spengel (2017), p. 10.

competition, EU-based enterprises welcome the fact that the same obligation to publish data on their entire international corporate structure will apply to enterprises domiciled in third countries as soon as they have only a single medium-sized or large subsidiary in the EU (provided of course they comply with that obligation). On the other hand, this comprehensive reporting obligation and the associated competitive disadvantages it entails could deter growing enterprises in third countries from expanding an existing subsidiary in the EU or establishing one in the first place. Similarly, the regulations could be a significant factor for companies considering whether to close down or shrink their existing sites in the EU and, for instance, relocate to emerging markets.[104] Consequently, the implementation of public CbCR might ultimately have a negative impact on foreign direct investment in the EU and on European jobs.

As the OECD's CbCR regulations implemented in Germany in section 138a of the AO do not prescribe the publication of data (but merely notification of the tax authorities and the sharing of information between participating countries), they do not distort competition in the same way the asymmetrical publication of sensitive corporate data does. Nonetheless, indirect competitive disadvantages could arise in that groups domiciled in countries implementing the regulations (including Germany) have to bear both the direct costs described in section C.II.1 and the risk of double taxation outlined in section C.II.2.c), while competitors domiciled in countries not implementing the regulations will be spared these. These disadvantages will be aggravated if the OECD agreement is not implemented in the same way in each country, especially if there are differences in the information shared between countries. As Germany has already signed the multilateral agreement for the sharing of CbCR information between countries, it provides the CbCR data of German enterprises to the tax authorities of all other signatory states. By contrast, the USA negotiates bilateral agreements with individual countries and thus decides in each individual case what data on US companies will be shared with which other tax authorities and under what conditions.

III. Analysis of benefits

1. Benefits for the tax authorities

The common goal of both the OECD's CbCR regime and the EU compromise proposal is to combat tax avoidance and aggressive tax planning.[105] The reports are therefore primarily for the benefit of the tax authorities of the countries in which MNEs have subsidiaries. The CbCR data is intended to provide the tax authorities with additional information to assist them in unmasking mechanisms for shifting or reducing profits. In particular, the data is to help them assess companies' transfer pricing arrangements and determine the intensity of tax audits.[106]

104 See Kleinmanns (2016), p. 552; Institut der Wirtschaftsprüfer [Institute of Public Auditors in Germany] (2016), p. 2.

105 See European Commission (2016), p. 2; OECD (2013), pp. 7–8.

106 See Murphy (2012), p. 37; Grotherr (2016a), p. 856; Steinegger (2016), p. 459.

However, given that the tax authorities already have access to confidential corporate data that the general public does not, it is questionable whether the reports will provide them with real additional information. We should also remember that, by its very design, CbCR is not an appropriate method for uncovering the specific mechanisms or channels companies use to shift profits.[107] At most, the data can give an indication of a company's overall tax planning behaviour. In particular, the information cannot be used to determine whether a certain company's tax arrangements are still within what is legally permissible or whether they already constitute unlawful tax avoidance. The overwhelming majority of tax-planning activities employed by international enterprises – e.g. exploiting the leeway and tax loopholes that arise through inadequate coordination between different national tax jurisdictions – are in any case legal.[108] Even if the tax authorities of the countries concerned were to uncover such arrangements in the course of more intensive tax audits, the legal validity of those arrangements would rule out any adjustments to the companies' tax assessments. In view of this, the benefits of CbCR data for the tax authorities are doubtful.

It may be the case, however, that the knowledge that they have to provide CbCR data to the tax authorities will influence companies' behaviour. It might prompt MNEs to voluntarily renounce particularly aggressive (but legal) methods of profit shifting so as to avoid scrutiny – and more intensive tax audits – and the additional costs they entail. From a theoretical point of view, however, it is not possible to assess clearly whether the tax authorities actually benefit from the availability of CbCR data. In any case, the confidential provision of CbCR data under section 138a of the AO would be sufficient to supply the tax authorities with additional information and bring about the hoped-for change in company behaviour; an obligation to report such data publicly as set out in the EU compromise proposal would not.

2. Benefits for legislators

CbCR regulations are also intended to assist policymakers in drafting legislation. Firstly, enhanced transparency is supposed to help pinpoint specific deficits and loopholes in the tax system,[109] enabling explicit countermeasures to be taken at national and international level. In general, the information should engender a more informed political and public debate on profit-shifting mechanisms.[110] Secondly, greater transparency should, in a positive sense, generate public pressure on legislators. The fundamental idea is that the CbCR data will provide the public with information on the loopholes in the tax system that make excessive tax planning possible and on the countries that are attracting companies – perhaps deliberately – with tax rebates and incentives. A well-informed public is in a position to demand specific

107 See Evers/Hundsdoerfer (2014), p. 16.

108 See Evers/Meier/Spengel (2017), p. 11.

109 See Directive (EU) 2016/881, p. 8.

110 See Grotherr (2016a), pp. 856–857.

rule changes from legislators. In turn, legislators must respond to tax loopholes that become known or justify to the public why they tolerate certain tax arrangements.[111]

The objection to this argument is that CbCR can, at most, reveal basic trends, i.e. the countries to which profits are being channelled and what types of companies are more actively engaging in tax planning. However, the data does not indicate what specific mechanisms and arrangements companies employ to achieve their ends. At best, this could be revealed indirectly: if the tax authorities use CbCR data to subject individual companies to more intensive tax audits, if new instruments are discovered in the course of such audits, and if this information is passed on to legislators and/or the public.[112] It is nevertheless extremely doubtful to what extent this process would really lead to new insights. Both legislators and the public are already well aware of international tax loopholes and the tactics employed by companies to exploit these to shift profits.[113]

Finally, CbCR could at least contribute toward research into international tax planning: CbCR data available at company level is better than macroeconomic data when it comes to gaining a more accurate approximation of the magnitude of profit shifting. Moreover, empirical estimates based on CbCR data could, in combination with other data, control for various company- and country-specific factors.[114] Still, the nature of CbCR data means that only studies into the overall extent of profit shifting are possible. Due to a lack of specific indicators, CbCR data cannot be used to analyse the use of individual instruments or the effectiveness of legislative countermeasures against individual instruments.[115] This, however, would be the most valuable information for legislators and the public alike, and would enable specific conclusions to be drawn for the legislative process. In this respect, it is questionable whether legislators will benefit from the CbCR regime. Incidentally, publication of the reports (as proposed by the EU) is not necessary for the purposes of further research; it would be enough to anonymise the data and provide it to selected teams of researchers on a confidential basis.

3. Benefits for investors and analysts

Advocates of public CbCR also praise the benefits of the data for analysts and investors,[116] claiming that the reports provide them with additional information, e.g. on a company's geographical spread and the

111 See Cockfield/MacArthur (2015), p. 644.

112 See Steinegger (2016), p. 458.

113 See Evers/Meier/Spengel (2014), pp. 301–302.

114 See Steinegger (2016), p. 458.

115 See Steinegger (2016), p. 458.

116 See, for example, Cockfield/MacArthur (2015), p. 642.

associated geopolitical risks.[117] Investors may also find information on the use of tax havens and on the extent of tax planning significant if ethical aspects play a role in their investment decisions, or if they simply want to assess the risk of reputational damage and tax audits due to aggressive tax avoidance.[118] In this way, the publication of country-specific data can help to reduce information asymmetries between managers and investors – generally one of the main aims of financial reporting.[119] Reducing information asymmetries can, in turn, have a positive effect on the liquidity of the relevant companies' shares and ultimately reduce capital costs.[120] Beyond that, CbCR obligations could also restrict managers' opportunities to enrich themselves at the expense of investors. Several studies document a complementary relationship between tax avoidance and personal enrichment on the part of managers:[121] an incentive exists for management to conceal tax avoidance activities from the tax authorities and, to this end, to provide both public and confidential tax disclosures that are lacking in transparency. In turn, this lack of transparency offers managers an opportunity to enrich themselves without being noticed.[122] Additional disclosure obligations in the shape of CbCR could lead to better monitoring and control of management and thus alleviate this problem.

On the other hand, it is doubtful whether investors will actually process the information contained in the public reports at all. Large MNEs, in particular, which the CbCR regulations target, are already subject to extensive reporting obligations in the EU, and the volume of publicly accessible information will continue to grow as a result of current legislative initiatives such as the recently enacted Corporate Social Responsibility (CSR) Directive.[123, 124] This abundance of publicly available data forces investors and analysts to take a selective approach and choose carefully the information on which to base their decisions. The introduction of CbCR thus harbours the risk of financial reporting data overload.[125] It is therefore difficult to predict whether the proposed introduction of public CbCR by the EU will generate any benefit for investors. It should also be borne in mind that the above-mentioned mechanism for reducing managers' opportunities to enrich themselves does not necessarily require a public disclosure

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117 See Murphy (2012), p. 32.

118 See Murphy (2012), p. 32.

119 See Beyer/Cohen/Lys/Walther (2010).

120 See Healy/Palepu (2001).

121 See Desai/Dharmapala (2006); Atwood/Lewellen (2019).

122 See Hanlon/Hoopes/Shroff (2014).

123 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15 November 2014, pp. 1–9.

124 See Wirtschaftsprüferkammer [Chamber of Public Accountants] (2016), p. 2.

125 Deutsches Rechnungslegungs Standards Committee e.V. [Accounting Standards Committee of Germany] (2016), p. 5.

obligation. Confidential reporting to the tax authorities and the ensuing improvements in control and monitoring on the latter's part can curtail these self-serving activities.[126]

4. Benefits for the public and consumers

One of the main arguments for publishing CbCR data derives from the stakeholder concept, according to which a company's tax payments should satisfy the legitimate interests of all stakeholders, one of whom is society. Publication of CbCR data will supposedly enable the public to assess whether a company is meeting its social responsibilities in an adequate manner.[127] Pressure from the public is supposed to encourage a company to pay taxes commensurate with the scope of its business activities in each country. Ideally, that should induce companies – in view of the reputational risks involved – to voluntarily cease using some or all of the legal profit-shifting instruments in their repertoire, which constitute the majority of tax-planning measures.[128]

However, the public can exercise this control function only if the CbCR data provides reliable information on the scope of every reporting company's tax-planning activities and, additionally, if the public has the expertise required to make evaluations of this kind.[129] Both these aspects are questionable, however. In section C.I, for example, we described in detail the problems involved in dividing up a company's profit in an economically feasible manner. As already put forward in section C.II.2.a), there are fears that in some cases this will give rise to misinterpretation, false accusations and unwarranted reputational damage. This stands in the way of the efficient exercise of the control function.

But even if CbCR data provided unambiguous information on the magnitude of tax planning and the public were able to process that information correctly, we have to ask whether generating public pressure is an appropriate way of reining in profit shifting. If the chosen tax arrangements are legal, which is the case for the majority of the instruments currently used, assessing which ones are "acceptable" and which are "immoral" is highly subjective.[130] A consensus in this area seems impossible. The solution offered by public CbCR thus undermines the rule of law: it makes measuring the amount of tax a company has to pay a process that is no longer performed solely on the basis of the applicable laws, but also on the basis of the public opinion and perceptions.[131] That makes the process to a certain extent unpredictable and can lead to variations in results both over time and between different regions. For legislators, this

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126 The findings of Desai/Dyck/Zingales (2007) point in this direction.

127 See Schreiber/Voget (2017), p. 149.

128 See Grotherr (2016a), pp. 856–857.

129 See Evers/Hundsdoerfer (2014), pp. 16–17.

130 See Evers/Hundsdoerfer (2014), p. 18.

131 See Schreiber/Voget (2017), p. 153; Lagarden/Schreiber/Simons/Sureth-Sloane (2020), pp. 93–94.

restriction of the rule of law is tantamount to a minefield. It is absurd to take this approach in tax matters; instead, legislators should formulate clear laws whose enforcement is entrusted to adequately equipped tax authorities and the corresponding courts.

Another aspect requiring examination is the extent to which the public even pays attention to information on tax planning and what its attitude to tax compliance is. There are contradictory theories on this. On the one hand, the general public could credit companies for refraining from excessive tax planning and acknowledge that, in doing so, the companies are fulfilling their responsibility towards society. On the other hand, customers in particular could be focused on prices and might even tolerate or appreciate profit-shifting arrangements because they push prices down.[132] We therefore cannot know in advance how customers and the general public will respond to a company's CbCR data. Whether and to what extent a company's management will curb its lawful tax-optimisation activities if it is obliged to make them public depends, in turn, on its assessment of the risks and opportunities involved and on the probability that the public, customers and investors could react in a certain way. Several factors are likely to determine the magnitude of potential negative effects on a company's reputation, including the size of the company, its market power, its ownership structure and the nature of its business activities.[133] We can assume then that the effects will differ markedly from company to company. For instance, B2C companies, such as those in the retail sector, are exposed to a much higher risk than companies that have no or only a small number of private customers.[134] This discrimination for or against certain industries and different types of company runs counter to the true intention of public CbCR.

5. Potential converse effects

A further aspect is that the benefits of introducing public CbCR could be counteracted by converse effects in the wake of publication. For one thing, the publication of CbCR data demonstrates how "tax-optimised" individual enterprises are. Companies can use this data to benchmark themselves against their direct competitors.[135] If a company's tax planning activities are of a much smaller magnitude than those of its competitors, the company's management might feel prompted to expand them in future. Corresponding pressure could be exerted by investors to maximise after-tax earnings by adopting legal tax planning measures.[136] There is also a downside to the fact that the publication of CbCR data raises public awareness. If the reports point to a high level of aggressive tax planning and legislators fail to

132 See Schreiber/Voget (2017), pp. 154–155.

133 See Schreiber/Voget (2017), pp. 154–155.

134 See Cockfield/MacArthur (2015), p. 641.

135 See Cockfield/MacArthur (2015), pp. 642–644.

136 See Devereux (2011), p. 34; Cockfield/MacArthur (2015), pp. 642–644.

respond quickly and resolutely, this could be viewed as legitimising the companies' behaviour, further undermining overall tax compliance.[137]

Finally, side effects could arise between the confidential CbCR developed by the OECD and any cross-sector public CbCR in the EU. By its very design, the OECD agreement as implemented in section 138a of the AO – which comprises the submission of confidential reports to the national tax authorities and the subsequent sharing of data with the tax authorities of the other participating states – presupposes reciprocity. If public CbCR is introduced for EU-based enterprises, however, the tax authorities in third countries can get nearly all of the information they require from publicly accessible sources, rendering the mutual exchange of data virtually superfluous from the latter's point of view.[138] In this respect, public CbCR at EU level could have a negative impact on collaboration – and on the sharing of data – with other countries.

IV. Results of cost-benefit analysis

The basic idea behind CbCR – according to which corporate profits are to be divided between the countries in which a company operates using sometimes arbitrarily selected variables and then assessed to see whether they are appropriate – is a questionable one. CbCR cannot resolve the innate problem of taxing MNEs, namely how to apportion profits within the group.

The foregoing has shown that the confidential CbCR agreed by the OECD, and in particular the introduction of public CbCR as proposed by the EU, generate substantial costs for the companies involved. In this context, the potential implicit costs are much higher than the direct costs incurred to implement the reporting system in the first place, and to prepare and, where necessary, audit the annual reports. The limited information content of the CbCR data can give rise to misinterpretation by the public and to unwarranted reputational damage for individual companies. What is more, CbCR further compromises tax confidentiality. On top of that, individual national tax authorities could actually use the CbCR data to make unilateral adjustments to transfer prices, which could increase the risk of double taxation. The most serious effects, however, are the competitive and locational disadvantages that could arise through the introduction of CbCR publication obligations that apply only to companies of a certain size and only within the EU. The companies subject to the regulations must file public reports on sensitive internal data not related to tax. Competitors that are not subject to the regulations will be able to use this information to their own advantage, without having to publish comparable data themselves. An analysis of the individual scenarios shows that large family businesses in particular will likely be affected by the competitive disadvantages caused by this asymmetrical regime. In relative terms, this group of companies will also be more strongly affected by the direct costs of CbCR and the erosion of tax confidentiality it

137 See Deutscher Steuerberater-Verband e.V. [German Association of Tax Advisers] (2016), p. 4.

138 See Institut der Wirtschaftsprüfer [Institute of Public Auditors in Germany] (2016), p. 3.

entails. On the whole, therefore, we can assume that a large part of the costs generated by the proposed EU regulations will be borne by family businesses.

It is more than doubtful whether the hoped-for benefits of CbCR will materialise: given its design, the additional information it will provide tax authorities and legislators with is limited. At best, the data may be viewed as an indicator of the overall extent to which a company makes use of tax planning and may serve as a starting point for more intensive tax audits. But it does not reveal which individual tax-planning channels and instruments a company uses, and does not allow us to draw any conclusions as to whether the arrangements chosen are lawful or where, if necessary, specific reforms are needed. In any case, the majority of the tax-planning measures adopted are within the law and already public knowledge. It is difficult to predict whether publicly available CbCR data will be of advantage to investors. On the one hand, tax information is always of relevance for investment decisions. On the other hand, investors and analysts are facing information overload given the increasing number of disclosure obligations and are no longer able to process all the data available to them. The main argument advanced for public CbCR is the public's control function. However, given the problems interpreting CbCR data and the general public's lack of expertise in this area, it is doubtful whether this control function can be properly exercised. Quite apart from that, we need to ask whether stoking public pressure is an appropriate way to rein in tax planning. Public pressure undermines the rule of law because taxes will no longer be assessed solely on the basis of the law, but also in the court of public opinion. It is also uncertain what attitude the public has as regards tax compliance. Finally, we need to consider that the unilateral introduction of a public CbCR obligation across the EU could lead to negative interactions with the OECD's system of confidential CbCR and the mutual sharing of data.

Although the costs of public CbCR cannot really be quantified in advance, a conceptual analysis suggests that the costs could exceed the potential benefits – and it is large family businesses that are likely to bear a disproportionate share of these costs. Any potential benefits for the tax authorities and legislators can be achieved by means of the confidential CbCR regime implemented in section 138a of the AO. There is no need to make CbCR data public. Confidential CbCR covers direct costs only and in some cases entails a higher risk of double taxation; it avoids, in particular, the substantial competitive and locational disadvantages that publication of the data gives rise to.

D. Scientific evidence based on the CbCR regimes already in place

The public CbCR regime for EU financial institutions is already in place for accounting periods beginning in or after 2014, while public CbCR for EU-based enterprises in the extractive industry and the confidential CbCR propagated by the OECD applies to accounting periods beginning in or after 2016. That means companies have already gained several years' experience with these new regimes, and both CbCR data and initial scientific findings based on it are available. The research to date has included analyses of the underlying regulations from a legal standpoint, quantitative evaluations of the information content of the reported data, and empirical examinations of the effects of the CbCR rollout on the companies involved and on the various recipients of the reports. We summarise the main results of this research below. We also discuss studies into the impact of other tax-related transparency measures, especially where no specific results of the CbCR regulations are available yet in individual areas.

I. Information content of CbCR data

The legal analyses focus mainly on the different options and leeway granted by the OECD's CbCR regime. One of the key areas of criticism concerns the data used to compile the reports. The OECD concept[139] and its implementation in the corresponding Directive (EU) 2016/881[140] allow countries to use data drawn from consolidation reporting packages, from separate entity statutory financial statements, from regulatory financial statements and even from a company's internal management accounts. As a rule, separate financial statements are prepared in accordance with the respective national accounting rules, some of which vary considerably from country to country.[141] Consolidated financial statements are increasingly being drawn up in accordance with international accounting standards (IFRS). Nonetheless, many countries levy taxation on the basis of standalone financial statements of separate entities, which is why the tax burden in each country does not normally match the individual profits reported there.[142] Regulatory financial statements are customarily based on the applicable standards for separate or consolidated financial statements, meaning the problems mentioned apply to these as well. By contrast, internal accounting practices are not tied to any statutory requirements or standards. Rather, data is prepared in accordance with the information needs of management, as a result of which every group can pursue its own course when calculating key indicators.[143]

139 See OECD (2015c), p. 32.

140 Section III.B.4 in the annex to the Directive, p. 19.

141 See Grotherr (2016b), p. 711; Spengel/Vay/Weck (2019), p. 579.

142 See Evers/Hundsdoerfer (2014), p. 12.

143 See Möller/Hüfner/Ketteniß (2011), p. 7; Spengel/Vay/Weck (2019), p. 579.

It is thus evident that each of the optional data sources mentioned above poses problems as regards the comparability of different companies' reports (or even of the items reported by branches in different countries in one and the same report). This predictable heterogeneity is considerably exacerbated, however, because the option of choosing data sources granted to the participating countries is generally passed on to the companies themselves.[144] As regards the regulations in Germany, there is disagreement in the literature as to whether the explicit reference to consolidated financial statements in section 138a (2) no. 1 of the AO is to be understood as indicating a restriction to such statements as a source of data.[145] The German tax authorities denied this is the case in the course of an OECD peer review (referring to information on the website of the Federal Central Tax Office – BZSt).[146] As the wording of the statutes has not been changed, legal uncertainty remains.[147]

Even the definitions of the individual CbCR items to be reported under the OECD concept contain several ambiguities and scope for interpretation as well as inconsistencies in how the regime is implemented nationally. For instance, the OECD term "stated capital" was translated as "Eigenkapital" (equity) in section 138a (2) no. 1 (g) of the AO and not as "gezeichnetes Kapital" (subscribed capital), which can result in systematic inflation of this item in the reports of German companies compared with their international competitors.[148] Several questions are raised by the figure for the number of employees, which is to be reported on a country-by-country basis. Whereas the OECD concept specifies FTEs, not all countries comply with this requirement.[149] Under the OECD regime, companies are free to include subcontractors and to set their own reference dates for calculating employee numbers.[150]

In addition, it was still a matter of debate until recently whether dividends received from other group companies (what are known as intra-group dividends) were to be included in the item "profit before tax" – and, by the same token, whether any taxes on such dividends should be included in the items "income tax paid" and "income tax accrued". Neither the original OECD concept nor the corresponding EU directive contain any details of this.[151] If intra-group dividends are included in profit, it would mean that profits are counted twice in CbCR, because intra-group dividends are fundamentally based on

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144 See Spengel/Vay/Weck (2019), p. 579.

145 Supporters of this thesis include Steinegger (2016), p. 456; Kraft/Heider (2017), p. 1357; it is rejected by Schreiber/Greil (2017), p. 12 and Lutz/Seebeck (2019), p. 537, among others.

146 See OECD (2018), p. 270.

147 See also Eigelshoven/Tomson (2019), pp. 242–243; Spengel/Vay/Weck (2019), pp. 578–579.

148 See Grotherr (2016b), p. 716; Eigelshoven/Tomson (2019), p. 245.

149 See Spengel/Vay/Weck (2019), pp. 580–581.

150 See OECD (2015c), p. 34.

151 See Spengel/Vay/Weck (2019), p. 580.

profits a subsidiary earned in previous years and that were declared as such at the time in the country in which the subsidiary is domiciled for tax purposes. If profits like this are counted twice, it can ultimately result in overestimates of the profits allocated to the typical locations of holding companies. Initial analyses based on aggregated CbCR data from the USA substantiate the supposition that some profits are counted twice.[152] In the meantime, the OECD has recognised the problem as well and, in the context of initial analyses of aggregated CbCR data from several countries, has pointed to the potential distortions posed by the treatment of intra-group dividends.[153] The OECD has also revised its guidance for implementing CbCR and now explicitly states that intra-group dividends should not be included in profits.[154] Participating countries are to make these adjustments from the 2020 fiscal year onwards. It remains to be seen, however, whether and how quickly all 90 of the countries currently applying the OECD's CbCR will implement this change.

Thus far, hardly any analyses have been performed on the legal implications of the CbCR regime for EU financial institutions as set down in Article 89 of the EU's Capital Requirements Directive (2013/36/EU). Given that some of the terms used in the directive have not been clearly defined, however, we can assume that similar ambiguities and scope for interpretation will exist here as well. Furthermore, there is a particular problem in relation to how to interpret the revenue metric: owing to their special business model, banks' income statements do not usually have an item called "revenues".[155] Finally, discussions are in progress as to which corporate units of the banking groups in question should be included in CbCR. The reference to a "consolidated basis" in the regulations can be understood either as referring to the accounting consolidation scope according to the applicable financial reporting standards or to the (usually narrower) prudential scope of consolidation as defined under supervisory law.[156] In this respect as well, substantial differences in application can arise between different countries and different banks; in principle, data gathered in such different ways is of no value.

Apart from analyses of the underlying CbCR regulations from a legal standpoint, quantitative studies have now also been conducted of the information content of the public CbC reports of European banks and of confidential CbCR data published in aggregated form. These studies underscore the gain in information achieved through much broader geographical coverage. For example, the US tax authorities' CbCR data set includes significantly more presences in other countries than conventional data sets.[157] The CbC reports on EU financial institutions provide a more complete picture of their international

152 See Blouin/Robinson (2020); Horst/Curatolo (2020).

153 OECD (2020), pp. 37–38.

154 See OECD (2019b), p. 13.

155 See European Banking Authority (2014).

156 See Dutt/Nicolay/Vay/Voget (2019), p. 7.

157 See Garcia-Bernardo/Janský/Tørsløv (2019).

activities compared with the information provided in their annual and consolidated financial statements. In particular, CbCR uncovers both presence and activities in tax havens.[158] Several studies also attempt to use the CbCR data to analyse profit shifting by the companies in question. Descriptive results of the CbC reports of EU financial institutions demonstrate the extent to which companies take advantage of tax havens and highlight the exceptionally high profits per employee posted in certain tax havens.[159] The OECD has also carried out an initial aggregated evaluation of the confidential CbC reports submitted in 26 countries. This evaluation points to a disparity between reported profits and economic activity, and provides indications of how holding structures and intra-group transactions are used to shift profits.[160] On the other hand, regression analyses reveal that key economic variables (especially capital employed in metrics such as total assets/fixed assets as well as personnel costs) are missing in banks' CbC reports, thus preventing a more precise quantification of profit shifting.[161] An initial study using aggregated CbCR data from the United States reveals quite a high degree of profit shifting.[162] But this study is based on several key assumptions, which have been criticised – often sharply – in the literature.[163]

To sum up, the analyses of CbCR data conducted thus far do deliver certain information gains as regards geographical coverage and the use of tax havens compared with other publicly available data. As yet, however, there has been no research into whether this new data has enhanced the information situation of tax authorities. What is more, a number of problems limit the usability of the CbCR data. For one thing, the OECD's CbCR concept contains many options and plenty of leeway regarding admissible data sources and the definition of individual items, seriously hampering the comparability of different companies' reports. For another, key economic variables are omitted in the CbCR rules for European banks. Even if the information to be reported were expanded, we must remember that no unambiguous economic benchmark exists for the proper allocation of profit within an MNE (see section C.I). Finally, the CbCR data is generally based on accounting data, so that the profit allocation reported does not necessarily tell us anything about how the tax base is divided up between the different countries. Overall, the potential for CbCR data to add value in identifying and assessing potential profit shifting measures appears to be rather limited.

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158 See Dutt/Nicolay/Vay/Voget (2019).

159 See Brown/Jorgensen/Pope (2019); Dutt/Nicolay/Vay/Voget (2019); Fatica/Gregori (2020); Janský (2020).

160 OECD (2020), pp. 41–44.

161 See Dutt/Nicolay/Vay/Voget (2019). See also the contrasting findings of Fatica/Gregori (2020).

162 See Clausing (2020).

163 See Dyreng/Hanlon (2019); Blouin/Robinson (2020).

II. Impact of the CbCR obligation on the affected companies

The empirical studies conducted to date concerning the responses of the companies subject to the CbCR obligation can be broken down by CbCR initiative. As far as can be seen, only one study thus far has dealt with the effects of the CbCR obligation on companies in the European extractive industry.[164] The study in question found that greater transparency regarding the payments made by these companies to resource-rich countries subsequently caused the reporting companies to increase those payments. The increase was particularly pronounced with companies that had previously been in the focus of public attention, suggesting that they were keen to avoid public pressure and potential damage to their reputations (from accusations of corruption or from the perceived "exploitation" of these countries). However, the findings also indicated that the companies concerned reduced their investments in certain resource-rich countries and won fewer auctions for licences, with a resulting redistribution of business volume from companies subject to a reporting obligation to those that are not. As a consequence of this redistribution, the productivity of raw materials extraction in these countries also fell. Overall, the underlying CbCR regime appears to reduce corruption as intended, but simultaneously triggers undesired real economic consequences in the shape of distortions in capital allocation. Even though combating corruption is not a key goal of "conventional" cross-sector CbCR regimes, the findings nevertheless demonstrate that the introduction of CbCR obligations that are restricted in terms of geography or company size may have unintended side effects.

The first empirical findings concerning the effects of the CbCR obligation on EU financial institutions are also available. As Joshi et al[165] document, the banks in question reduced the scope of their tax-driven profit shifting after introduction of the disclosure obligation. They found no evidence, however, that these banks' effective tax rates rose (in comparison with various control groups not subject to the CbCR rules). The authors conclude from this that banks subject to reporting indeed reduced their international profit shifting, instead resorting to alternative tax-planning instruments that cannot be detected through CbCR data in order to keep their tax burdens constant. By contrast, Overesch/Wolff[166] observed a significant increase in the effective tax rates of multinational banks subject to disclosure obligations after adoption of CbCR (compared with banks operating in only one country, which are de facto not subject to the rules). The relative increase is particularly pronounced (at around 3.7 percentage points) for affected banks with branches in tax havens. Eberhartinger et al[167] focus on the effects of the CbCR rules on corporate structures and find that the affected financial institutions subsequently reduced their presence in tax havens by a significant amount. This effect was driven in particular by the closure of subsidiaries in what

164 See Rauter (2020).

165 Joshi/Outslay/Persson (2020).

166 Oversch/Wolff (2019).

167 Eberhartinger/Speitmann/Sureth-Sloane (2020).

are known as dot tax havens (i.e. tax havens of very little economic significance) and in tax havens with relatively strict banking secrecy laws.

Beyond that, several current studies are investigating the impact on companies of the confidential CbCR regime propagated by the OECD. The results of these studies suggest that companies with revenues of over EUR 750 million are responding to the reporting obligations by paring back profit shifting and that their effective tax rates are consequently increasing by one to two percentage points compared with companies not subject to the reporting obligation.[168] In addition, De Simone/Olbert[169] find that companies subject to the reporting obligation streamline their group organisational structures, in particular shutting subsidiaries in tax havens and at lower hierarchical levels in the organisational structure. De Simone/Olbert also demonstrate that the affected companies shift their business activities to European countries with favourable tax regimes (including Switzerland, Ireland and Luxembourg), by significantly increasing their tangible assets and employee numbers at their subsidiaries in these countries. The results outlined suggest that some companies adjust their investment decisions in order to keep their tax burdens at a relatively low level and at the same time avoid creating an impression with the tax authorities that their CbCR data is indicative of aggressive profit shifting.[170] This observation also corresponds with the relatively well-documented empirical evidence that international investments are highly tax-sensitive and that reducing tax avoidance options (like profit shifting) in high-tax countries can hobble investments there.[171] Finally, Hugger[172] finds certain indications from 2018 onwards that companies close to the EUR 750 million threshold have attempted to reduce their reported revenues in order to avoid both the reporting obligation and the attendant (direct and, in some cases, indirect) costs. This is consistent with similar findings as regards other tax transparency measures adopted in Australia and Japan, which are or were likewise linked to exceeding a certain size threshold.[173] Interestingly, it is mainly non-listed companies that try to avoid the reporting obligation,[174] suggesting that such companies would otherwise face disproportionately higher costs.

All in all, the studies cited confirm that companies respond to both public and confidential CbCR obligations and adapt their tax planning accordingly (by reducing profit shifting and closing branches in

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168 See Hugger (2020); Joshi (2020). However, Joshi (2020) does not find any indications of a decline in profit shifting until 2018.

169 De Simone/Olbert (2020).

170 See also Hanlon (2018), p. 212.

171 See, among others, Overesch (2009); Feld/Heckemeyer (2011); Suárez Serrato (2019).

172 As Hugger (2020) documents, as of 2018 a disproportionately high percentage of companies reported consolidated revenues of just under EUR 750 million.

173 See Hasegawa/Hoopes/Ishida/Slemrod (2013); Hoopes/Robinson/Slemrod (2018).

174 See Hoopes/Robinson/Slemrod (2018); Hugger (2020).

tax havens). It remains unclear, however, to what extent this leads to a reduction in overall levels of tax avoidance. The OECD's confidential CbCR regime seems to produce an increase in the effective tax rates of the affected companies, while conflicting results are observable in relation to the public CbCR regime for European banks. What is more, undesired economic effects are observable in the shape of the re-allocation of capital expenditure and employment to low-tax countries, and of a potential reduction in revenues so as not to breach the reporting threshold. Surprisingly, the effects of the OECD's confidential CbCR regime tend to be stronger – or at least better documented – than the corresponding effects of the EU's public CbCR regulations for financial institutions.

III. Effects of the CbCR obligation on individual stakeholders

1. Tax authorities and legislators

The tax authorities are one of the main (or, in the case of confidential CbCR, the only) recipients of CbCR information and beneficiaries of other tax transparency measures. In this respect, we have to ask whether and how the tax authorities utilise the information reported to them. According to the OECD, individual tax authorities have responded by saying that they use the confidential CbCR data primarily when deciding whether or not to order a tax audit and when planning such audits or other enquiries, but not as direct evidence of shifting or reducing profits.[175] It is almost impossible, however, for third parties to verify such statements. As the tax authorities' individual work and decision-making processes cannot generally be observed due to a lack of data, hardly any empirical evidence has been gathered to date on the implications of various tax transparency measures for the tax authorities.[176] It thus remains open how the tax authorities handle the large volume of information available, whether they can even process all this data, how they select and prioritise data from different potential sources, and what effect the availability of additional data has on the efficiency of tax audits. These questions are relevant particularly against the backdrop of the EU-wide introduction of a reporting obligation for cross-border tax planning (with international exchange of the information),[177] which is likely to trigger a further sharp increase in the volume of data available to the tax authorities. As the CbCR regime has been in force for only a relatively brief period, there are no indications as yet whether and to what extent conclusions drawn from the CbCR data have found their way into the tax legislation process.

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175 OECD (2020), p. 34.

176 The only exception is the study by Bozanic/Hoopes/Thornock/Williams (2017), which documented that the US tax authorities increasingly downloaded the consolidated financial statements available online after the information content of those statements in relation to risky tax items increased due to a change in accounting standards.

177 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139, 5 June 2018, pp. 1–13).

2. Investors and analysts

There is no empirical evidence as yet that existing and potential investors use publicly available CbCR data for their investment decisions or whether public CbCR can help reduce information asymmetries between managers and investors. Two studies have examined how the introduction of CbCR regimes affected share prices. However, it should be noted in this context that changes in a company's share price routinely mirror the net effect of all possible costs, benefits and reactions that investors expect. It is thus often difficult to break down such an effect into individual components. Johannesen/Larsen[178] analysed the introduction of the public CbCR obligation for EU companies in the extractive industry and documented a strong negative response from investors, with falls of five to ten percent in the affected companies' share prices. The findings of Rauter[179] described in section D.II, however, indicate that such falls are less the effect of tax transparency measures; rather, they are attributable to investors anticipating the resulting increase in payments for the extraction of raw materials and the deterioration in the affected companies' business outlooks. Dutt et al.[180] examined the decision to implement a public CbCR regime for financial institutions in the EU and observed on average no significant change in the affected banks' share prices. But they did find some evidence that negative reactions, both to reduced opportunities for tax avoidance and to reputational risks, cancelled out the positive reactions from an expected reduction in information asymmetries. No corresponding studies exist for the introduction of the OECD's confidential CbCR regime.

Further empirical studies analysing how share prices respond to other measures and types of enhanced tax transparency (i.e. not related to CbCR) delivered the following findings for instance. Investors expect the costs of tax transparency to be higher for reputation-sensitive companies, small companies and those perceived to have a very aggressive tax-planning policy.[181] Investors appreciate information on tax planning activities that are deemed to be low risk and offer a high degree of legal certainty.[182] In some cases, investors even prefer non-transparent public reporting, apparently because it reduces the risk that the tax authorities will pick up on aggressive tax planning.[183] At the same time, however, there is evidence that investors take a positive view of the reduced information asymmetries afforded by enhanced tax transparency and that, in certain cases, they even expect to be able to benefit from confidential reporting obligations vis-à-vis the tax authorities (because greater control by tax authorities will limit managers'

178 Johannesen/Larsen (2016).

179 Rauter (2020).

180 Dutt/Ludwig/Nicolay/Vay/Voget (2019).

181 See Brooks/Godfrey/Hillenbrand/Money (2016); Hoopes/Robinson/Slemrod (2018); O'Donovan/Wagner/Zeume (2019).

182 See Huesecken/Overesch/Tassius (2018); Campbell/Cecchini/Cianci/Ehinger/Werner (2019).

183 See Robinson/Schmidt (2013); Inger/Meckfessel/Zhou/Fan (2018).

opportunities for personal enrichment).[184] On the whole, these findings present a very heterogeneous and casuistic picture of investors' reactions to enhanced tax transparency.

As regards analysts, the research findings to date show that these intermediaries sometimes interpret the tax information in companies' financial reports incorrectly or incompletely, leading to errors in analysts' profit forecasts.[185] Recent studies also confirm that the voluntary publication of additional information by companies (e.g. management forecasts of the future tax burden) can reduce such errors.[186] As far as we can see, however, there are currently no studies in progress into the extent to which CbCR regulations or other tax transparency measures impact the activities of analysts or the quality of their forecasts.

3. The public and consumers

Thus far, there has also been a lack of research into the responses of the general public and consumers to the publication CbCR data. However, several studies based on laboratory experiments and surveys have investigated how the availability of information about companies' tax-planning activities affect this group of stakeholders. Initial findings suggest that information on aggressive tax avoidance has a negative impact on both how a company is perceived and on consumers' willingness to pay for its products.[187] One problem with these studies is social desirability bias, meaning the participants' tendency to behave or respond in line with social norms or expectations, rather than saying what they really feel or believe. Even the way questions are worded in surveys and experiments can induce a certain behaviour. After all, there is very often a discrepancy between the hypothetical expression of one's willingness to pay and one's actual buying behaviour. Recent studies try to circumvent these problems by wording questions in as neutral a manner as possible and using incentive-compatible mechanisms. The findings of these studies confirm the negative effect of information about tax avoidance on the public's and customers' general attitudes towards a company.[188] By contrast, there is hardly any proof that it affects their buying behaviour or willingness to pay for the company's products.[189] This last observation is also consistent with a study conducted by Gallemore et al,[190] which was unable to identify any drop in revenues for companies following the publication of press reports about their aggressive tax avoidance policies.

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184 See Bennedsen/Zeume (2018); O'Donovan/Wagner/Zeume (2019).

185 See Chen/Danielson/Schoderbek (2003); Weber (2009).

186 See Schwab (2009); Chen/Chi/Shevlin (2019).

187 See Hardeck/Hertl (2014); Antonetti/Anesa (2017).

188 See Hoopes/Robinson/Slemrod (2018).

189 See Jemiolo (2019); Hardeck/Harden/Upton (2019).

190 Gallemore/Maydew/Thornock (2014).

Overall, the research findings to date indicate a certain dissonance. On the one hand, a survey of corporate tax department managers shows that concerns about potential reputational damage play a significant role in their decisions on the use of tax-planning instruments[191] and the negative effects of information about tax avoidance on public perceptions and attitudes to companies appear to confirm this fear. On the other hand, there is hardly any solid evidence to prove that this alleged damage to a company's reputation also has knock-on effects in the shape of actual changes in customer buying patterns or declines in the companies' revenues. One possible explanation for this apparent contradiction could be that a company's tax-planning activities are only one very minor factor among many that ultimately influence consumers' decisions to buy.[192] Moreover, there are indications that, in reality, consumers hardly take any conscious notice of media reports or other public information about companies' tax avoidance strategies amid the flood of information available to them.[193] In this respect, it is questionable whether the intended mechanism of public pressure will really have a long-term impact in reducing tax avoidance.

IV. Summary of findings thus far

To date, the findings of research into the information content of CbCR data have been mixed. Advantages such as broader geographical coverage are offset by problems stemming from a lack of variables in some cases and from insufficient comparability due to the leeway granted in preparing the reports – all of which makes the data harder to interpret. The value added by CbCR data in identifying and assessing possible profit shifting measures thus appears to be rather limited.

Companies are responding to the introduction of CbCR rules by adapting their tax planning (i.e. by reducing their profit shifting and closing branches in tax havens). While such adjustments attributable to the launch of the OECD's confidential CbCR regime have also caused the affected companies' effective tax burdens to grow, the same effect cannot be clearly proven in relation to the EU's CbCR regime for financial institutions. What is more, there are indications of undesired economic side effects in the shape of the re-allocation of capital expenditure and employment to low-tax countries, and of a potential reduction in revenues in order to circumvent the reporting obligation.

As yet, there has not been any research into the extent to which tax authorities, legislators, investors and analysts actually make use of the CbCR information reported and whether this data helps them reach decisions. Studies of capital-market responses reveal the ambivalent and casuistic attitude of investors to greater tax transparency. Consumers and the general public indeed respond to information about tax avoidance with more negative perceptions of the companies in question. There is hardly any evidence,

191 See Graham/Hanlon/Shevlin/Shroff (2014).

192 See Asay/Hoopes/Thornock/Wilde (2018).

193 See Asay/Hoopes/Thornock/Wilde (2018).

however, that reputational damage of this kind actually results in altered buying behaviour or a decline in revenue.

The findings of the analyses and studies carried out to date do call into question the effectiveness and efficiency of the CbCR rules already implemented, especially if we take into account the doubts regarding information content, the – in some cases – inconsistent results concerning the impact on effective tax rates, the indications of undesired economic side effects and the virtual lack of evidence that the recipients actually use the data. In particular, it appears questionable whether a public cross-sector CbCR obligation is needed, given that the introduction of confidential CbCR already seems to have led to a certain adjustment in tax planning behaviour (and there is more evidence for this effect than with the EU's public CbCR regime for financial institutions).

Furthermore, we cannot necessarily draw conclusions about cross-sector public CbCR from the observed effects of a sector-specific CbCR regime. Rather, the results of sector-specific regulations must be interpreted in relation to the peculiarities of each sector. As already outlined, CbCR obligations in the extractive industry are primarily aimed at combating corruption and the possible "exploitation" of resource-rich countries, both of which are rife in this industry. That is why the regulations for companies in the extractive industry differ decisively from other CbCR regimes, both in their aims and in terms of the content of the reports. No such divergence exists as regards the CbCR obligation for financial institutions. But the finance industry does differ markedly from other sectors as regards its special business models, its much higher level of regulation and stricter disclosure obligations, and its specific tax-planning options and instruments. In this respect, it remains open to what extent the effects of the introduction of a public CbCR obligation are comparable between banks and companies in other industries.

Finally, we must remember that various findings indicate that the costs involved in meeting the CbCR obligation have a disproportionate impact on family businesses. For example, it is mainly non-listed companies that try to avoid a tax reporting obligation based on company size.[194] What is more, smaller companies appear to be more at threat from tax-related reputational damage.[195] This is confirmed by the findings of the conceptual analysis (see section C.II), according to which the introduction of CbCR generated higher direct and indirect costs for family businesses in particular.

194 See Hoopes/Robinson/Slemrod (2018); Hugger (2020).

195 See Brooks/Godfrey/Hillenbrand/Money (2016).

E. Selected aspects and unresolved questions regarding the EU's legislative initiative for cross-sector public CbCR

I. Size-related scaling of CbCR obligation

The EU compromise proposal provides for a reporting obligation for companies whose total revenues exceed EUR 750 million in both the fiscal year of the report and in the preceding fiscal year. The same reporting obligation is to apply to all these companies regardless of whether they exceeded the threshold by a narrow or a wide margin. As already noted in section C.II.1, the direct costs of introducing CbCR and preparing the annual reports are higher for smaller companies, potentially putting them at a disadvantage compared with their larger competitors. Given their comparatively close links with a small number of private individuals, small-scale (family) businesses feel the impact of the indirect costs of compromising tax confidentiality disproportionately greater than large companies, especially listed ones (see section C.II.2.b)). Similarly, reputational damage could have a stronger impact on small companies – with fewer customers and potentially fewer financial reserves – than on their larger competitors (see section D.IV). Given this, it would be conceivable to scale the scope or level of detail of the information to be reported to match the size of the company in question. This might not only reduce direct costs and some indirect costs, but also counteract competitive disadvantages. This is because, when smaller companies that operate in only a limited number of markets or have only a modest number of contractual partners have to disclose sensitive information, they routinely suffer greater competitive disadvantages than those of their competitors just below the reporting threshold (see section C.II.2.d)). However, this aspect is not linked per se to a company's size; it depends instead on the market situation in which the company finds itself. There are thus more targeted ways to address it than through blanket size-related exemptions. This is why it does not form the focus of our discussions in this section, and will be dealt with instead in the following section (E.II).

The scaling of reporting obligations by company size has already been implemented, for example, in the EU Accounting Directive. The latter distinguishes between micro, small, medium-sized and large companies or corporate groups on the basis of balance sheet total, net sales revenue and the average number of employees during the financial year, and subjects them to different regulations as regards the preparation and disclosure of their annual financial statements. The idea behind this is to take account of the unreasonable administrative costs that meeting such statutory requirements routinely entails, especially for micro companies.[196] A further reason is that the users of small companies' financial statements require only a limited amount of additional information, whereas providing such information involves high costs for the companies in question.[197] It goes without saying that the corporate size categories defined in the

196 See Directive 2013/34/EU, p. 21, recital 13.

197 See Directive 2013/34/EU, p. 22 recital 23 and p. 23, recital 33.

EU Accounting Directive cannot be used in relation to the EU compromise proposal for public CbCR. This is because – if we take total revenues as a basis – only large companies would be subject to the CbCR obligation anyway. Nevertheless, disproportionate administrative costs, and the balance between costs and benefits, also play a role for large companies, albeit a less crucial one.

In order to meet the disparate needs of large companies in different size categories, it would be worth considering differentiating between companies that exceed the revenue threshold of EUR 750 million only narrowly and those that exceed it by a wide margin. In addition to the above-mentioned reduction in the costs associated with disclosure, relief for companies whose revenues only marginally exceed the EUR 750-million threshold could also counter the risk that some companies approaching the threshold deliberately manipulate their earnings so as to avoid the reporting obligation (see section D.II). As is the case in the EU Accounting Directive, additional indicators such as balance sheet total or average number of employees could be used in addition to revenues.

There are two conceivable ways of reducing the cost burden on smaller companies of preparing and publishing CbCR data. One option is to reduce the publication frequency of CbC reports. In particular, it could make sense to delay the start of the CbCR obligation for smaller companies in order to grant them more time to adapt their reporting systems. Beyond that, the frequency of reporting could be reduced in the initial years after rollout of the CbCR regime. Companies would thus have more time to gain experience in preparing reports and be able to optimise their systems with each report. Where necessary, a lower reporting frequency could also reduce the ongoing costs of preparing the reports. A second option would be to allow companies to publish more highly aggregated data. The EU compromise proposal provides for the disclosure of data for each EU member state and for the tax jurisdictions given in the EU list of non-cooperative countries for tax purposes, as well as on an aggregate basis for all other tax jurisdictions. It would be feasible to aggregate country data if it does not exceed certain materiality thresholds and the countries in question are named in the report. Another possibility would be to reduce the number of variables to be reported, but that could restrict the information value of the CbCR data.[198]

Implementing an attenuated public CbCR obligation, however, will be a less apposite measure to reduce direct costs for certain companies if they are already subject to comprehensive reporting requirements under the OECD's confidential CbCR regime. These companies are in any case obliged to compile the corresponding information and disclose it to the tax authorities. On the assumption that the EU proposal continues to make no specifications as to the underlying data to be used – with the result that companies can use the same data sources as for their OECD reports – the additional direct costs incurred in connection with public disclosure should be limited to the associated communication costs and the cost of providing any necessary explanations and interpretation aids. Size-related scaling of the disclosure

198 See also Dutt/Nicolay/Vay/Voget (2019), for example, for an analysis of the information content of the CbCR data and of the significance of certain information.

obligation by means of more highly aggregated data could even prove counterproductive should the companies have to aggregate information again that they carefully broke down for the OECD's CbCR. In this context, it would be appropriate to grant small companies the option of submitting either a comprehensive or abridged report, depending on their particular cost situations. In view of the indirect costs incurred in publishing the data – e.g. compromised tax confidentiality, possible reputational damage and competitive disadvantages (see section E.II) – it would nevertheless be worthwhile to consider size-related scaling of the degree of detail required of the data submitted.

II. Exemptions to avoid competitive disadvantages

In addition to the types of relief described in section E.I, which are based very generally on a company's size, specific targeted exemptions are conceivable in cases where publication of the data would distort a company's competitive situation. As already detailed in section C.II.2.d), competitors, suppliers and customers could gain important insights into the profitability of individual locations from a company's CbCR data and attempt to exploit that information to their advantage. In particular for companies with modest product portfolios and a limited number of contractual partners, CbC reports routinely contain competition-sensitive information. If, for instance, a company's branch in one country has only a single customer, the customer could leverage information about a relatively high profit margin in that country in future contract negotiations to adjust the terms and conditions to its advantage. Another feasible constellation is where a company sources products from two alternative suppliers in the EU and pays both suppliers the same price. If the published CbCR data indicates that one of the two suppliers is more efficient and has a higher profit margin, the buyer could use that information to push down that supplier's prices in future. Finally, a company's competitors could glean important information from its CbCR data. This is especially critical if the company in question sells only a small number of specific products, making its CbCR data particularly transparent for competitors.

In these and similar cases, exemptions from the reporting obligation are conceivable in order to preserve the confidentiality of sensitive information. The EU's latest compromise proposal provides for a temporary waiver of the disclosure of certain information in cases where disclosure would seriously disadvantage a company's commercial position.[199] Reasons for the waiver must be given in the report, and the information in question must be published within six years of the waiver. The European Parliament's proposal of 27 March 2019 also includes an exemption under which member states may allow companies to exclude certain information for individual countries if disclosure of that information would be "seriously prejudicial" to the companies' commercial situation. Such exemptions may be granted only if they do not prevent the tax authorities from gaining "a fair and balanced understanding of the tax position of the undertaking". A company must reapply every year for any exemption it has been granted. As soon as the prerequisites for non-disclosure are no longer met, the information must be published retroactively

199 The waiver does not extend to information on tax jurisdictions mentioned on the EU's list of non-cooperative countries for tax purposes.

in the form of an arithmetic mean. The European Commission may revoke any exemption granted by a member state if it has a different opinion on the matter.

Although exemptions of this kind are generally to be welcomed in the constellations described above, the ambiguous formulations in the proposal ("disproportionate disadvantages", "seriously prejudicial") leave much scope for interpretation, which in turn considerably reduces legal certainty for the companies in question. More detailed specifications are called for here. For example, the cases in which the disclosure of certain information can be waived need to be fleshed out. This could be achieved, for instance, by means of reference to a certain number of suppliers or customers per country. Exemptions from the disclosure obligation are also conceivable for companies whose limited product portfolios render their CbC reports particularly transparent to competitors.

Instead of waiving the disclosure of certain information altogether, it would be possible – similar to what was described above – to combine data for individual countries in an aggregate item if the figures do not exceed certain materiality thresholds and the countries in question are listed in the report. This option also prevents any direct conclusions from being drawn for individual locations, but provides a more complete overall picture of a company's international activities than if the information were omitted altogether.

In this context it is worth repeating that the competitive disadvantages described here result solely from the disclosure of sensitive corporate data to the general public. Given the limited benefits of such reports to the general public as described in sections C.III.3 and C.III.4, the EU should consider sticking to the confidential CbCR regime established by the OECD. That would eliminate the need for any exemptions for particularly sensitive information, as the data would in any case be made available only to the tax authorities.

III. Breaches of reporting obligations and the significance of enforcement

Should the EU introduce a form of cross-sector public CbCR that has no adequate scaling for company size (see section E.I) and no sufficiently specific exemptions to rule out competitive disadvantages (see section E.II), it is quite conceivable that individual companies facing additional reporting costs will attempt to avoid or delay disclosure. This potential behaviour and the associated implications of it will be discussed in detail in this section, with special attention being paid to the findings of research into the disclosure obligations under commercial law for annual and group financial statements.

As already described, companies could attempt to circumvent a disclosure obligation that is either regional or size-dependent by employing (predominantly) legal means. In section D.II, for instance, we summarised initial empirical evidence that some companies are systemically managing their key indicators

so as to remain below the thresholds for the OECD's confidential CbCR and for the publication of certain tax return data in Australia and Japan. When it comes to the publications required under commercial law, there are also indications that EU-domiciled companies that are not publicly traded are systematically ensuring they stay below the threshold for mandatory disclosure of their income statements; the main incentive for this appears to be to avoid divulging competition-sensitive information.[200]

This is a response, however, available only to a small number of companies with revenues close to the relevant threshold; It is either impossible or not commercially viable for all those companies that exceed the threshold by a wide margin. For want of other options, these companies might – after weighing up the (indirect) costs of publication against those of the sanctions imposed for non-compliance – consider it quite rational to refuse publication (at least temporarily) in deliberate breach of the statutory requirements. This weighing up of the costs of compliance against those of non-compliance is observable in companies' behaviour with regard to the publications required under commercial law in the EU. In contrast with the situation in the United States, EU-domiciled limited liability companies of all legal forms that are not publicly traded are obliged to publish annual and group financial statements. Since enactment of the Disclosure Directive (2003/58/EC)[201] and the Transparency Directive (2004/109/EU)[202] – transposed into national law Germany in 2007 in the Act on Electronic Commercial Registers, Registers of Cooperatives and Business Registers (EHUG)[203] – the relevant documents must be submitted in digital form to the central electronic commercial register, where any interested party can access the information free of charge and without having to register. Enforcement measures have also been tightened, with breaches of the disclosure obligation prosecuted automatically and sanctioned with (cumulative) fines until disclosure is forthcoming.[204]

In the case of publicly traded companies, timely and comprehensive disclosures are in any case deemed essential in order to reduce information asymmetries between managers and investors and to enable an anonymous pool of existing and potential investors to assess the value of shares and bonds.[205] Critics of

200 See Bernard/Burgstahler/Kaya (2018).

201 Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies, OJ L 221, 4 September 2003, pp. 13–16.

202 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31 December 2004, pp. 38–57.

203 Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (Act on Electronic Commercial Registers, Registers of Cooperatives and Business Registers – EHUG) of November 2006, BGBl I 2006, pp. 2553–2586.

204 Re the provisions of the EHUG, see Buchheim (2010), pp. 1133–1134; Eierle/Eich/Klug (2011), p. 245.

205 See Fülbier/Wittmann/Bravidor (2019), pp. 797–798.

the current regime complain, however, that the starting point for companies that are not publicly traded is considerably different – with the small number of parties involved meaning the flow of information can be regulated on the basis of individual contracts.[206] The more modest benefits derived from disclosure are offset by the higher costs involved for companies that are not publicly traded (which are often family-run businesses). Accordingly, over 60 percent of non-publicly traded companies surveyed across Europe said that they would not publish their annual financial statements if there were no statutory obligation to do so.[207] The main concern of the companies surveyed was to prevent competitors from obtaining information on their performance and capital structure. German companies that are not publicly traded state that divulging as little information as possible is a key aim of their accounting policies.[208] A survey conducted on the EHUG regulations revealed that, on the whole, family-run companies consider enhanced transparency to be disadvantageous; they see risks chiefly in relation to competitors, customers and suppliers obtaining this information and in the potential conclusions drawn about the personal wealth of the company's shareholders.[209] That is why the majority of the companies surveyed admit to making systematic use of disclosure avoidance strategies – especially delaying tactics.[210]

Empirical studies of the actual disclosure behaviour of German companies that are not publicly traded confirm these findings. For instance: although the disclosure ratio for annual financial statements has risen to over 90 percent since introduction of the EHUG,[211] only around 30–40 percent of the companies comply with their disclosure obligations in a timely manner (i.e. within 12 months);[212] over one-third of companies even exceed the subsequent six-week extension period, incurring hefty fines.[213] The studies also confirm that preparing, checking and approving the annual financial statements does not take that much time; on average, the companies allow half a year to elapse before submitting them to the electronic company register.[214] Thus Fülbier et al come to the conclusion that, when companies are forced to be transparent even though disclosure does not appear advantageous to them after their own cost-benefit analysis, the potential for discretionary decisions is transferred to the time of disclosure.[215] The later the information is disclosed, the fewer competitive disadvantages the company suffers in

206 See Grottke/Löffelmann/Späth/Haendel (2012); Fülbier/Wittmann/Bravidor (2019).

207 See Minnis/Shroff (2017), p. 490.

208 See Eierle/Ther/Klamer (2019), p. 680.

209 See Grottke/Löffelmann/Späth/Haendel (2012), pp. 96–97.

210 See Grottke/Löffelmann/Späth/Haendel (2012), pp. 98–99.

211 See Eierle/Eich/Klug (2011), pp. 246–247; Fülbier/Wittmann/Bravidor (2019), p. 801.

212 See Eierle/Eich/Klug (2011), p. 247; Dilßner/Müller (2017), p. 566; Fülbier/Wittmann/Bravidor (2019), p. 801.

213 See Fülbier/Wittmann/Bravidor (2019), p. 801.

214 See Dilßner/Müller (2017), p. 566; Fülbier/Wittmann/Bravidor (2019), pp. 801–802.

215 Fülbier/Wittmann/Bravidor (2019), p. 803.

relation to competitors, customers and suppliers. This objective also appears to justify the payment of appreciable fines.

We can draw the following conclusions from this with respect to the potential introduction of cross-sector public CbCR. Firstly, the results of the studies confirm the significance of the competition-related indirect costs that a disclosure obligation could entail for companies – especially for family-run enterprises (see section C.II.2.d)). Secondly, the above-mentioned studies provide proof of material differences in disclosure strategies between companies that are publicly traded and those that are not, differences that result from these two groups' differing cost-benefit ratios in relation to disclosure. In view of these facts, it could make sense to limit any public CbCR regime to publicly traded companies. Otherwise, it is entirely conceivable that companies that are not publicly traded will employ similar delaying tactics with public CbCR as they do with the annual financial statements required under commercial law. Yet CbCR data that is disclosed late may well be of questionable benefit for its recipients. Thirdly, the studies underscore the role of functioning, internationally standardised enforcement. It would be particularly problematical if the fines imposed and the strictness of enforcement were to differ significantly between the EU member states, because in that case some companies would be able to circumvent their CbCR obligation more easily – or at a lower cost – than others.

IV. Public CbCR on a voluntary basis only

As the conceptual analysis of CbCR (in section C) and the review of the initial scientific findings (in section D) showed, and as was described again in greater detail earlier in the present section, the cost-benefit ratio of public CbCR varies greatly between different groups of companies. More precisely, smaller, family-run companies that are not publicly traded tend to incur higher costs with public CbCR and derive less benefit from it, so that a public CbCR obligation would constitute a considerable burden for some of these companies. Given these notable differences between different groups of companies and the difficulty of differentiating on the basis of clearly definable criteria, it would make sense to do without mandatory public CbCR altogether and instead rely on voluntary reporting.

Generally speaking, the need for disclosure obligations within the context of financial reporting is not uncontroversial in theoretical terms. Where there is no statutory obligation, the companies themselves, i.e. their managers, will decide what information they wish to publish voluntarily. They will make disclosures – for instance in the form of a CbC report – whenever the expected benefits for the company (e.g. lower capital costs thanks to greater transparency) exceed the expected costs (on this point, see section C.II). In a perfect market, managers acting rationally make optimal decisions in every case, generally resulting in efficient levels of published information.[216] Disclosure obligations under commercial law are therefore justified only if they produce an outcome that, from an overall economic standpoint, is

216 See Healy/Palepu (2001), p. 441.

advantageous compared with the market solution described.[217] This can arise especially where disclosure generates positive externalities, i.e. when a company's published data implicitly also includes relevant information about other companies and leads to better decisions on the part of those other companies.[218] However, the implementation and execution of disclosure obligations generate their own problems and follow-up costs; from a theoretical standpoint therefore, it is not clear whether individual mandatory regulations really lead to a more desirable overall economic outcome.[219] What is more, there is hardly any empirical evidence as yet for the existence of positive externalities.[220]

Although tax transparency measures are designed chiefly to reduce tax avoidance and profit shifting, and thus can and should include further implications for the economy as a whole, general considerations regarding corporate disclosures speak for public CbCR on a voluntary basis only. The CbCR described in connection with GRI Standard 207 in section B.III.2 could constitute an appropriate solution. Companies are not obliged to conform to the GRI regime. But if they voluntarily decide to prepare a sustainability report in accordance with the GRI standards, and if a materiality analysis identifies tax issues as relevant for that report, they should apply GRI 207, including the CbCR contained therein.[221] Furthermore, it is possible for companies that do not want to publish a full sustainability report but do want to make voluntary CbC disclosures to comply with Standard GRI 207 or with the relevant part thereof (Disclosure 207-4). CbCR of this kind can then be designated "GRI-referenced".[222] The advantage of applying the GRI standard is that its uniform set of rules ensures the comparability of different companies' CbCR disclosures without simultaneously imposing a disclosure obligation.

It should be noted, however, that the structure and content of CbCR in accordance with GRI 207 do not match either the OECD's confidential CbCR or its implementation within the EU in Directive (EU) 2016/881. Divergences exist as regards the permissible underlying data and the definition of individual reporting items.[223] That can generate additional costs for companies that are obliged to perform confidential CbCR for the tax authorities and simultaneously wish to make voluntary CbCR disclosures in accordance with GRI 207. Harmonisation of the two sets of rules would thus be desirable.

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217 See Beyer/Cohen/Lys/Walther (2010), pp. 315–319.

218 See Leuz/Wysocki (2016), p. 543; Christensen/Hail/Leuz (2019), pp. 16–18.

219 See Christensen/Hail/Leuz (2019), p. 20.

220 See Leuz/Wysocki (2016), p. 529.

221 See Sopp/Baumüller (2020), p. 440.

222 GRI (2016), pp. 21 and 25.

223 For a discussion of these discrepancies see Sopp/Baumüller (2020), p. 443.

F. Conclusions and alternatives

The many individual CbCR initiatives either recently implemented or currently under discussion reflect the trend of the last few years towards greater transparency in the fiscal reporting of MNEs. The main purpose of the first sector-specific CbCR regulations was to combat corruption in the extractive industry and to restore confidence in financial markets. By contrast, the latest cross-sector initiatives – the CbCR agreed by OECD member states and implemented in Germany in section 138a of the AO as well as the EU drafts for a public CbCR directive – have their origins in a package of measures designed to thwart the profit-reduction and profit-shifting arrangements of major MNEs. Both of these regimes oblige enterprises with consolidated annual revenues of at least EUR 750 million to implement CbCR. Though they diverge in a number of minor ways, the main difference between the two regimes is that the EU drafts provide for the publication of the reports, whereas, under the OECD scheme, the data is submitted confidentially to the tax authorities and subsequently shared internationally with other tax jurisdictions. In addition to these regimes, the Global Reporting Initiative recently passed a new standard (GRI 207) for reporting tax matters within the context of public sustainability reports that includes not only qualitative components but also CbCR. The GRI standards are not legally binding; companies can voluntarily decide to prepare a sustainability report in accordance with the GRI rules or simply apply individual standards or parts thereof.

A detailed conceptual analysis of the underpinnings of CbCR has revealed that the costs to companies of public reporting could exceed the posited overall benefits. It is not so much direct costs that play a role, but the potential implicit costs of competitive and locational disadvantages; a disproportionate share of these costs would be borne by large family businesses. The potential benefits of CbCR are considerably curbed by the fundamental problem that it is impossible to divide up a group's overall profit between individual countries in a consistent, economically meaningful way. At best, the CbCR data can give an indication of the extent of profit shifting; it does not reveal what individual channels and instruments a company uses. In any case, the majority of the methods employed are legal and already public knowledge, so that it seems questionable whether CbCR adds value for tax authorities and legislators. In addition, detailed analysis has shown that the expected benefits of public pressure cannot be clearly theoretically justified.

Initial studies of the CbCR rules already implemented indeed demonstrate that, when compared with other sources of data, the reports provide a better reflection of a company's business activities in geographical terms. But the studies also underscore the considerable amount of leeway granted in preparing the reports, which severely limits the comparability and meaningfulness of the data. Companies respond to the introduction of CbCR by adapting their tax-planning measures. There is no clear evidence, however, that this will lead to an overall reduction in the level of tax avoidance – at least as regards CbCR for EU financial institutions. What is more, there is evidence of undesired economic side effects in the shape of the re-allocation of capital expenditure and employment to low-tax countries, and of a potential reduction

in revenues in order to circumvent the reporting obligation. Thus far, there has been no examination of the extent to which tax authorities, legislators, investors, analysts and the public actually utilise or profit from the reported CbCR data. Studies of other measures and forms of enhanced tax transparency show that, although information on tax avoidance has a negative impact on how the companies in question are viewed by consumers and the general public, there is hardly any evidence that this also leads to changes in buying behaviour.

On the whole, the scientific findings thus far cast doubt on the effectiveness and efficiency of CbCR. In particular, it appears questionable whether a public cross-sector CbCR obligation is needed, given that the introduction of confidential CbCR already seems to have led to a certain adjustment in tax planning behaviour. In view of this, the EU should limit itself to implementing the OECD's concept and refrain from putting in place a general obligation to publish CbCR data. In particular, this would avoid the competitive disadvantages public CbCR threatens to bring as well as any negative interactions with confidential CbCR.

If, despite all the reservations that exist, the EU should decide to implement an obligation to publish CbCR data, we must bear in mind that, based on both conceptual considerations and initial empirical findings, it is small-scale, family-run enterprises – and not publicly traded companies – that will bear a disproportionate burden in terms of the costs of such a regime. Disadvantages of this kind could be mitigated if the CbCR disclosure obligations were scaled (e.g. in terms of scope, frequency and degree of aggregation) to match a company's size. Beyond that, targeted exemptions appear to be a sensible way of avoiding competitive disadvantages caused by the publication of sensitive information. The EU compromise proposal indeed contains an approach to this problem, but its ambiguous wording would need to be tightened and made more specific. Furthermore, it is worth considering limiting the public CbCR obligation to publicly traded companies, given that public disclosure plays a much bigger role for the latter due to their large number of anonymous investors. Otherwise, non-capital-market-oriented companies could find themselves compelled to delay publication of their CbC reports, even at the risk of incurring fines. Finally, notable differences in the cost-benefit ratio between different types of companies and the difficulties of adequate differentiation favour waiving mandatory public CbCR and opting for voluntary publication instead. The CbCR envisaged in the GRI 207 standard could constitute a suitable solution.

As the majority of the methods used to minimise taxation are legal and already public knowledge, it would make sense to regulate the known tax-planning channels more strongly rather than to expand tax-related disclosure obligations. As Heckemeyer/Overesch have shown in their meta-study,[224] tax-optimised financing of cross-border investments accounts for around 18 percent of all profit shifting and non-financial instruments (e.g. design of the transfer prices used for intra-group transactions) for around 82 percent. In view of this, transfer pricing regulations could be tightened and harmonised internationally, and compliance with them monitored more closely by the tax authorities. In addition, more efficient

224 Heckemeyer/Overesch (2017), pp. 984–987.

and uniform thin capitalisation rules could be introduced. The effectiveness of such instruments can be verified empirically.[225]

It is also worth noting that the actual extent of profit shifting is still very much open to debate. The results of numerous studies fluctuate substantially, depending on the methodology and underlying data used.[226] Current meta-studies by Heckemeyer/Overesch[227] and by Beer et al[228] calculate, on average, a tax semi-elasticity of reported profit before tax of 0.8 and 1.0 in absolute terms. That means that reported pre-tax profit decreases by an average of around 0.8 percent (or 1.0 percent) for every one-percentage-point increase in the tax rate differential utilisable for tax arbitrage. The empirically verifiable magnitude of profit shifting is thus relatively minor. Rather, there is the perception that a few known cases of such practices by US companies – above all Apple, Google, Amazon and Caterpillar[229] – are being instrumentalised to fuel the ongoing controversy surrounding tax planning by multinationals. It has become known, for example, that four US groups (Apple, Microsoft, Pfizer and General Electric) are responsible for around one-quarter of the total of some USD 2.5 billion in profits shifted from the US to tax havens.[230]

Moreover, there are concerns that a tightening of the regulations to combat abuse could have a negative impact on investment. As Feld/Heckemeyer showed in their meta-study,[231] the mean tax semi-elasticity of foreign direct investment is 2.49 in absolute terms. That means foreign direct investment in a country decreases by an average of 2.49 percent for every increase of one percentage point in the country's tax rate. The tax semi-elasticity of foreign direct investment is thus almost three times higher than the tax semi-elasticity of reported pre-tax profit. Studies by Overesch[232] and Suárez Serrato[233] also confirm that reducing tax avoidance options in high-tax countries can cause companies to shift their investments to other countries. Therefore, in their efforts to limit companies' options to transfer profits to low-tax jurisdictions, legislators should not lose sight of the fact that such measures can lead to a noticeable reduction in real capital expenditure in some industrialised countries. Given this, the EU would be well

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225 For an overview, see Evers/Meier/Spengel (2017), pp. 13–14.

226 For a summary of the corresponding literature, see Riedel (2018); Dyreng/Hanlon (2019); Dharmapala (2020).

227 Heckemeyer/Overesch (2017).

228 Beer/De Mooij/Liu (2020).

229 See, for example, Fuest/Spengel/Finke/Heckemeyer/Nusser (2013); Pinkernell (2012).

230 See Avi-Yonah/Mazzoni (2017), pp. 9–10 with further references.

231 Feld/Heckemeyer (2011).

232 Overesch (2009).

233 Suárez Serrato (2019).

advised to take a measured approach. There is no need either to introduce CbCR across the board or, more particularly, to prescribe public CbCR.

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