TAX JUSTICE FOCUS

The newsletter of the tax justice network

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Contents

COUNTRY-BY-COUNTRY REPORTING

Richard Murphy

A little more than a decade ago John Christensen of the Tax Justice Network asked Richard Murphy how accounting standards could be reformed to address transfer mispricing by multinational corporations. Murphy's answer marked the beginning of the campaign for country-by-country reporting. Here he traces the history of the idea, sets out its objectives, and addresses its critics.

It's fair to say that the Tax Justice Network and country-by-country reporting can claim close association. In the very first conversation John Christensen and I had in October 2002 we discussed the problems of transfer pricing and John asked me what I would do to tackle the issue. Flippantly I answered that the solution was easy: what we needed was an International Financial Reporting Standard that required that countries reported their trading results for each and every jurisdiction in which they traded. I added that it must, to be useful, disclose intra-group transactions in those accounts. Three months later I wrote it up[1] and, as the feature articles in this *Tax Justice Focus* note in varying ways, the story of country-by-country had begun.

The story of country-by-country reporting is not, however, by any means complete. It began as a mechanism to reveal which multinational

editorial

The difference country-by-country reporting makes, the Tax Justice Network's take.

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corporations used secrecy jurisdictions, and to indicate the likely influence of intra-group trading on the profits recorded in any particular state. But, as Corinna Gilfillan of Global Witness notes, it has become the basis for widespread disclosure of payments made to governments by companies operating in the extractive industries. US and EU legislation on this issue, whilst yet to be enacted, looks as though it still might possibly deliver data that could help reduce corruption within this enormously troubled sector worldwide, although difficulties and obstacles remain. If this helps counter the so-called 'resource curse' then this achievement alone would have justified all the time expended on country-by-country reporting since 2002. Those who have won progress on these laws will be owed a massive vote of thanks by people in many countries in the years to come.

Welcome as this is however, it was never intended to be one of the main purposes of country-by-country reporting. In my mind there were three such purposes.

The first was to disclose the precise nature of a group of companies, indicating where it traded and what it did in each place where that trade took place. This is little more than the publication by each multinational corporation of lists of companies and trades by jurisdiction and yet this data is almost impossible to secure for any such group. This is transparency and accountability at its most basic level.

The second purpose was to provide a local perspective on the global affairs of a multinational corporation. This would be achieved by providing sufficient data to indicate:

1 The relative and absolute amounts of economic activity in a given jurisdiction (by reporting things like sales, employment and investment data).

2 The contribution made by the company to the local economy through tax paid.

3 The degree of dependency of a local operation on the group as a whole: this last point was primarily what the provision of intra-group trading data was always about. If all trade in a jurisdiction is intra-group the dependency of the operation on decisions taken elsewhere is high but if it is low there is more likely to be local autonomy and so durable in its own right. This is of importance when appraising the risk the operation creates in a local economy. If the trade is mainly intra-group the chance of it being transient may be high. If it serves a local market then it is likely to have a long-term association with the country where it is based. The same data also happens to be of use when considering tax risk from a local perspective because it provides an immediate insight into the risk of there being significant transfer pricing issues arising. If there is little intra-group trade this is low, and vice versa.

The third and final purpose was to make TNCs accountable to both their shareholders and to their stakeholders in the countries in which they operate.

"There is an undue emphasis on tax when considering the merits of country-by-country reporting."

When country-by-country reporting was created the links between tax havens, weak governance structures and corporate failures had been made painfully obvious through the collapse of Enron and other, similar, scandals. Since then the opacity of bank accounting, much of it offshore – the presence of which may well have been revealed by CbC – greatly exacerbated the impact of the 2008 financial crash and it is likely that serious risks are still being obscured by shortcomings in accounting standards because these have changed little since then. Country-by-country reporting might have helped mitigate these risks. That is because country-by-country reporting is about holding global companies to account locally amongst the communities that both grant them their licence to operate and in those places in which they actually make their profits.

It is unfortunate that much debate on country-by-country reporting often ducks the substance of these three key issues. So, for example, despite my best efforts intra-group trading is not yet seen as a priority for disclosure in many of the current developments that claim to be country-by-country reporting. And as the articles from both Joe Andrus of the OECD and Will Morris, written in his capacity as chair of BIAC, show, there is an undue emphasis on tax when considering the merits of country-by-country reporting.

That said, I do of course welcome the fact that country-by-country reporting is now on the international tax agenda. As Joe Andrus has said publicly, country-by-country reporting will happen for tax purposes. It has to; a commitment has been made by the G20. Joe describes the BEPS (Base Erosion and Profits Shifting) process, currently being undertaken at the OECD as part of that G20 commitment, in which he is a participant. Country-by-country reporting has significance in that process largely because it is believed that CbC might help identify when BEPS is taking place. Will Morris, as chairman of the committee representing industry interests at the OECD, is also engaged in these discussions. He was invited to contribute to this *Tax Justice Focus* to set out the concerns many in business have about country-by-country reporting.

Will does so, ably, but in the process it is clear that he ignores most of the benefits country-by-country reporting might provide. As I make clear above, identifying transfer pricing risk is just one of those benefits but there are others and any cost-benefit analysis can be unbalanced by ignoring many of the gains.

I also think the issue of cost to which Will refers is massively overstated. First of all, I have been told by many businesses that they have the data required and as a chartered accountant I know they must be in possession of it: if they do not have it then they are not maintaining the legally required books and records to make sure that they are declaring their income properly for tax or accounting purposes. In that case in my view claims to the contrary are either bluster or worrying admissions of failure.

In addition, the cries of country-by-country reporting being a burden make no sense. If business can create complex structures in multiple countries at what must be considerable cost then it can definitely afford to account for them. Claims to the contrary are, simply, incredible, in the literal sense of that word.

But let me deal with what I think the two most unjustified objections to country-by-country reporting last of all. Of these the first is that it would damage the interests of companies by disclosing commercially sensitive data. This is not true for two reasons. The first is that companies that only trade in one country disclose the kind of data that worries critics of CbC data because their accounts are, by default, always on a country-by-country reporting basis. If the critics are correct, then these single-jurisdiction companies are being put at an unfair disadvantage by existing accounting requirements. Furthermore, as any economist knows, markets only work if all those competing in them have equal access to information. Country-by-country reporting deliberately creates this level playing field in information. As such it is a pro-business and pro-market policy. The objectors are actually seeking to defend monopoly profits and market exploitation that exist behind a veil of secrecy. Doing so does not help their cause.

The second of these objections to CbC is, candidly, rather patronising, and is that users of CbC accounts simply won't understand the data they might provide. This objection is hard to take seriously. What CbC asks for is profit and loss account data by jurisdiction in the same basic format used in all company income statements prepared on a consolidated basis at present. Those who object to CbC data for this reason are, then, saying that the accounts issued by all companies are incomprehensible to users: they are not making a point on CbC. However, if that is the case then accountants have failed in their basis task of delivering accountability in any set of accounts, not just those including country-by-country reporting information. I happen not to share that view: most people with any interest in the financial affairs of companies grasp what is happening in the income statement of a company fairly quickly: it is the balance sheet (which CbC does not expect on a jurisdictional basis) that causes confusion. Therefore this objection is baseless.

Why then are these objections to country-by-country reporting raised from big business and the accountancy profession? The very obvious possibility must be that business does not want us to know what it is doing, or where and when it may record its profits and pay tax, if at all. This is why they do not like country-by-country reporting which was always intended to make business accountable to all people, whether they be employees of, or investors in, the companies involved, customers, suppliers, politicians, civil society or members of tax authorities. The aim was, unambiguously, to make available the data needed to check, as far as is reasonably possible, that profits are declared where it looks likely that they are earned. And the intended result was always that country-by-country reporting should help ensure that multinational corporations make a fair contribution to the societies where they operate. What is clear is that big business does still not appear to want to be clear that it is willing to make that fair contribution and so seeks to hide what it is doing.

"Country-by-country reporting was always intended to make global business accountable to people locally."

As this *Tax Justice Focus* makes clear, country-by-country reporting has come a long way since John Christensen and I first discussed it. But it also has a long way to go. If global capital is to be held to account locally – as it must be – then the demand for full country-by-country reporting by all multinational corporations with the data being placed on public record must go on. After all, country-by-country reporting is about making sure each of us counts when it comes to corporate reporting. I think each of us is as important as anyone else when that issue is considered. That's why everyone should have the right to know what's happening where they are, whichever multinational corporation does it. And that's why we must have country-by-country reporting.

Richard Murphy directs Tax Research UK and has led the global campaign to adopt CBCR.

Endnotes

1 **http://visar.csustan.edu/aaba/ProposedAccstd.pdf**

TAX BASE EROSION, PROFIT SHIFTING, AND COUNTRY-BY-COUNTRY REPORTING

feature

THE OECD WORK ON BEPS ACTION 13

Joseph L. Andrus

In January of this year the OECD issued a Discussion Draft on Transfer Pricing Documentation. The organization is required by its members to complete its work by September. Joseph L. Andrus, one of the lead authors of the Draft, summarises its contents and calls for comments and responses from the full range of interested parties.

The Action Plan on Base Erosion and Profit Shifting,[1] adopted by the OECD in July 2013 and endorsed by the G20 Leaders in September 2013, mandates the development of consistent transfer pricing documentation requirements including a country-by-country reporting template. The mandated CbC template is required to include information on a company's income, economic activity and taxes. Specifically, Action 13 of the Action Plan requires the OECD to:

> Develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that MNE's provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.

The work on Action 13 is to be concluded by September 2014.

On 30 January 2014 the OECD released a Discussion Draft[2] setting out a proposed revision to Chapter V of the OECD Transfer Pricing Guidelines related to transfer pricing documentation. The Discussion Draft is an interim document, intended to generate specific comments and suggestions from interested persons. It is not a finished product nor is it a consensus document. It describes a uniform two-tier approach to transfer pricing documentation to be adopted by all countries and includes a proposed CbC template. The Discussion Draft suggests that the CbC template should serve as a transfer pricing risk assessment tool for tax administrations. Consistent with the mandate of the Action Plan, the Discussion Draft contains the following elements:

- It proposes a consistent detailed approach to transfer pricing documentation, based on a global master file providing a worldwide overview of the group's structure, operations, financing, and allocation of income plus supplementing local analyses of transfer pricing compliance with respect to specific transactions.
- It includes as part of the global master file a CbC template requiring the reporting of revenue, earnings before tax, and cash taxes paid by separate entity and by country. The approach in the Discussion Draft would rely primarily on existing data found in statutory financial statements as the source for most of the required data.
- It requires the reporting of some indicators of economic activity, including tangible assets, employment, employee costs, and stated capital and accumulated income by entity and by country. The Discussion Draft makes it clear, however, that such information should be used for risk assessment, and not as a basis for formulary allocations of earnings among countries.[3]
- The Discussion Draft requires reporting of data on the aggregate volume of certain types of transactions between members of an MNE group to facilitate transfer pricing risk assessment.

One of the accountancy giants wakes up to country-by-country reporting

> *"The OECD's Discussion Draft on transfer pricing documentation has been described as being 'not quite half-baked.'"*

"The questions posed by the Discussion Draft are every bit as important as its specific content."

- It notes the importance, in making transfer pricing documentation and compliance workable, of materiality standards that would exempt small transactions from some or all of the documentation requirements. Such materiality standards would focus taxpayer compliance and tax administration enforcement efforts on the most important matters. However, the Discussion Draft stops short of proposing specific quantitative measures of materiality, leaving such judgments to individual countries.
- The Discussion Draft requires local affiliates of the MNE group to make the master file and country-by-country template available to country tax authorities in their local jurisdictions. Thus, while the Discussion Draft contemplates that the master file and CbC reporting template would be prepared centrally by the MNE group, it would be provided directly to tax authorities in each country.
- It suggests that local country tax administrations take all required measures to keep transfer pricing documentation and the CbC template confidential. This is important because some of the required information may be competitively sensitive. In this regard the Discussion Draft is fully consistent with the G20 mandate, which calls for disclosure of information to tax administrations, but pointedly not to the public.

The work on documentation and country-by-country reporting raises numerous practical, technical, compliance and accounting issues. The Discussion Draft identifies many of these issues in inter-textual boxes and poses a number of specific questions for public comment. These questions are every bit as important as the specific content of the Discussion Draft.

The questions posed in the Discussion Draft reflect the fact that publication of this guidance requires a balancing of numerous competing concerns. Most important among the considerations to be balanced is the usefulness of the reported data for transfer pricing and tax enforcement purposes weighed against the administrative burdens imposed on business in complying. The need for governments to have a big picture overview of the MNE group's operations and income allocation must be weighed against legitimate confidentiality concerns regarding some of the required data were it to be publicly disclosed. The need for governments to have consistent information across a broad range of businesses to monitor the scale and economic impact of BEPS must be weighed against the desire of business for flexibility in providing useful data from existing accounting systems in the least burdensome way possible. This need for balance is evident in the language of Action 13.

Specifically, the OECD has asked in the Discussion Draft that commentators indicate:

Should the CbC report be part of the transfer pricing master file, or should it be a totally separate document?

Should the CbC report be compiled using a "bottom-up" entity by entity approach, or compiled using a "top-down" allocation of consolidated financial statement income among countries, or should companies have the flexibility to choose either a top down or a bottom up approach?

How should a "top down" allocation be carried out, and what specific income and expense allocation rules would be required to clearly explain to companies how to get from their consolidated accounts to separate country allocations of income, tax and economic activity? The Discussion Draft opts for a "bottom-up" approach largely because of concern over the burden of requiring businesses to undertake a separate country consolidation in each country that would not be undertaken for other accounting or management purposes. It notes that a top-down approach would need to include cross-border related party revenue and expense that would otherwise be eliminated in consolidation.

How can cross border payments between related parties be reported most effectively and how does data on such payments affect transfer pricing risk assessment?

What mechanisms should be used for filing and sharing the information among countries, and how can those mechanisms be tailored to help protect competitively sensitive data?

These and many other challenging questions will need to be resolved in order to complete the work on Action 13. In its current form, the Discussion Draft has been described as being "not quite half-baked." Completing the baking process in the short time allowed by the Action Plan will require a detailed and clear interchange of views among all interested parties over the next few months. Hopefully the Discussion Draft will facilitate that interchange.

Joseph L. Andrus is the Head of the Transfer Pricing Unit at the OECD. Prior to joining the OECD he was a transfer pricing partner in a major accounting firm and in an international law firm in the United States for nearly 30 years. He served as the Deputy International Tax Counsel at the United States Treasury Department in the mid-1980s. He is a 1976 graduate of the University of Chicago Law School.

Endnotes

1. http://www.oecd.org/ctp/BEPSActionPlan.pdf
2. http://www.oecd.org/ctp/transfer-pricing/discussion-draft-transfer-pricing-documentation.pdf
3. This is in line with the BEPS Action Plan and the views of all participating countries that the existing arm's length principle based transfer pricing regime should not be replaced with a system of formulary apportionment.

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THE EU HIT THE SNOOZE BUTTON ON COUNTRY-BY-COUNTRY REPORTING

feature

Tove Maria Ryding

In the wake of a series of tax avoidance scandals the European heads of state called for "rapid progress" on corporate transparency and measures to prevent tax dodging, including country-by-country reporting. After intense lobbying from business and pressure from the UK government, the Parliament and the Council agreed to postpone the discussion on country-by-country reporting until 2018.

How much do multinational enterprises pay in taxes in the countries where they operate? And how do these tax payments correspond to their profits and the economic activities in those countries? Are the multinationals paying their fair share of tax? We're not allowed to know.

Every once in a while, we get to peek behind the veil of secrecy, only to discover shocking examples of companies shifting their profits out of the countries where they have their economic activity, to tax havens where they can substantially reduce, or altogether avoid, taxes. In 2013, scandals about the tax-related acrobatics of Amazon, Google and Starbucks caused the debate to explode in the UK, and previous examples include companies such as SAB Miller and Glencore pulling large profits out of African countries – in these cases Ghana and Zambia – with the aim of dodging taxes.

In the midst of draining European austerity measures and budget cutbacks, the sight of corporate tax avoidance in broad daylight created a public outcry for the EU governments to "wake up and smell the coffee", and in a beautiful moment in May 2013, the EU heads of state heard the call. Thus, in their European Council conclusions they called for "rapid progress" on corporate transparency and measures to prevent tax dodging, including country by country reporting.

This "country by country reporting" was not a new issue in the EU context. In February 2013, a group of European parliamentarians responded to months of civil society campaigning by demanding that banks should be required to carry out country by country reporting – a move that was praised in a *Financial Times* editorial under the headline "Let the sun shine on banks' tax affairs". The MEPs were successful in convincing the Council and country by country reporting for banks was agreed as part of the Capital Requirements Directive.

But no one has ever been able to explain why only some sectors should be covered by the country-by-country reporting requirements while others should not, and at the end of the May meeting of the European Council, the heads of state mandated the extension of country by country reporting to cover all sectors.

The European Commissioner in charge of this portfolio, Michel Barnier, responded to this new mandate by saying that:

> *"…We must go further now and take measures on more transparency on tax for all large companies and groups – the taxes they pay, how much and to whom. I think it should be possible to introduce rules for the publication of the information on a country by country basis, similar to those approved for banks in [the Capital Requirements Directive]…".*

Unfortunately, the popular term "ass-backwards" fits well to describe the way the EU has ended up going about this. Due to approaching European Parliament elections in May 2014, the commissioners were requested to refrain from presenting any new legislative proposals after Spring 2013. So instead of having the commission put forward a legislative proposal on country-by-country reporting for all sectors, it was suggested that the issue could be included in an existing proposal that was already on the negotiating table, namely the revision of the Accounting Directive to include non-financial reporting requirements for multinational enterprises. In theory, there is nothing wrong with this approach and legally speaking it was perfectly possible to adopt country-by-country reporting as a part of the proposal on non-financial reporting. But the approach still caused confusion in Brussels and gave opponents a chance to raise concerns about "the process", rather than expressing opposition to the idea of country-by-country reporting as such, and thereby risk being seen as defenders of financial opacity, secrecy and corporate tax dodging.

The loudest resistance came from the UK government who even hinted at a willingness to obstruct the entire non-financial reporting proposal, including some important new provisions on business and human rights, unless all references to country-by-country reporting were kept out of the proposal. Noticeably, this aggressive approach came in spite of Prime Minister David Cameron's self-declared status as champion of financial transparency.

On the other side of the spectrum, France stood up as a strong defender of country-by-country reporting, and despite the UK's loud opposition, the issue made it into the draft positions of both the Council and the European parliament.

Meanwhile, some business representatives opposed the idea of country-by-country reporting due to the "reputational risk" it entails. While this fear of getting a bad image is no doubt valid for the multinational enterprises that are not paying their fair share of taxes, it is hardly an argument against transparency. On the contrary, the strong resistance from certain enterprises to the idea of sharing this very basic information about their operations underlines the importance of breaking down the walls of secrecy. As regards the reputational risk it is noteworthy that transparency will also shed light on the many corporations who are paying their taxes, have nothing to hide and are currently innocent victims of a growing public mistrust towards all multinational enterprises.

But back to the political circus. The EU procedures require country-by-country reporting to be approved in both the Council and the Parliament. However, the discussions about process problems continued and the resistance from the UK got support from other countries including Germany. In the Parliament, supporters of the non-financial reporting proposal started to fear that resistance from the Council would slow down the process and make it impossible to get the proposal approved before the EU elections unless country-by-country reporting was taken out.

In the end, the parliament committee vote on adding country-by-country reporting to the non-financial reporting proposal was lost by a narrow margin. Instead, the Parliament came out in favour of a review clause calling for the Commission to draft a proposal on country-by-country reporting in the near future. The Council, however, requested the proposal from the Parliament to be watered down and at the end of February, the Parliament and the Council agreed a final outcome that includes a weak reference to country-by-country reporting in the context of a 2018 review.

To state the obvious, 2018 is painfully inconsistent with the call by the heads of state for "rapid progress" on country-by-country reporting, and keeping in mind that corporate tax dodging is costing our societies billions of Euros every year, delay is also an expensive affair.

Luckily it seems very unlikely that the EU will get to sit on this issue until 2018. The issue of country-by-country reporting is still on the international agenda, and there is a rapidly growing recognition of the absolute necessity of getting clarity on the structures, profits and tax payments of multinational enterprises.

"Transparency will shed light on the many corporations who are paying their taxes, have nothing to hide and are currently innocent victims of a growing public mistrust towards all multinational enterprises."

Meanwhile, the corporate tax scandals keep being exposed by the media and the public is still expecting their political leaders to deliver on promises to end corporate tax dodging. For the new European Parliament, which will be elected in May 2014, and the new European Commission that will be put together after that, country-by-country reporting is an issue with broad public support, ready to be pushed forward.
To be continued!

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"The loudest resistance to country-by-country reporting came from the UK government."

COUNTRY-BY-COUNTRY REPORTING AND THE GLOBAL STANDARD OF EXTRACTIVE INDUSTRY TRANSPARENCY

feature

Corinna Gilfillan

American legislation that requires greater transparency in the extractive industries has made what was previously unthinkable a very live possibility. If civil society keeps up the pressure, country-by-country reporting could soon become standard across the private sector.

G8 leaders at Loch Erne in June 2013. The meeting saw them commit to country-by-country reporting in the oil, gas and mining sectors.

The passage of Section 1504 of the Dodd-Frank Consumer Protection and Wall Street Reform Act in the U.S. in 2010 marked a major step forward in the global campaign to achieve country-by-country reporting. Section 1504, also known as the Cardin-Lugar Amendment, was passed to help deter and combat corruption in the extractive sector and to provide important information to investors and citizens about the payments extractive companies make to governments for natural resource extraction. Many countries rich in oil, gas and other minerals are mired in poverty because the public revenues earned from selling these resources are not collected in full by the government and are often squandered through corruption and lack of government accountability.

Opacity around payments generated in the extractive sector makes it all too easy for companies to avoid and evade taxes as well as for corrupt government officials to siphon off or misappropriate them, diverting natural resource revenues from development and poverty alleviation.

Global Witness recently highlighted a case in Nigeria where a huge sum paid for an oil block appears to have ended up in the hands of a company controlled by a former Nigerian oil minister. In May 2012 Global Witness reported on New York court documents that revealed that in 2011 Nigerian subsidiaries of Shell and ENI agreed to pay the Nigerian government US$1.092 billion to acquire oil block OPL 245 (a project level payment). The court documents also revealed that the Nigerian government agreed, in the same month, to pay precisely the same amount to *Malabu Oil and Gas*, a company widely reported as controlled by Abacha-era Minister, Dan Etete, who was convicted in France in 2007 of money-laundering. The details of this payment only came to light as a result of a court case, otherwise they may never have seen the light of day. Transparency that would expose such payments has to become routine. In the current system vast oil and mineral wealth runs parallel with widespread poverty. Nigeria is the largest oil producing country in Africa but over 80% of its citizens live on less than $2 dollars a day.[1]

Information is also needed that might make it easier to identify the tax abuse of oil companies and, in particular, the widespread practice of manipulating internal company prices in order to shift taxable profits to low-tax jurisdictions (so-called "transfer mispricing"). Nigerian tax authorities are beginning to scrutinize this type of abuse[2], and these investigations require additional information that would only be available through mandatory country-by-country reporting.

Taken together problems of these types make a compelling case for more transparency: Nigerian citizens should have the right to know what money is being paid, and should be paid, to their government as the starting point to demand accountability for where the money ends up.

The good news is that there is now strong global momentum for lifting the veil of secrecy around payments worth hundreds of billions of dollars that companies make to governments for access to natural resources. Global Witness, which has worked on these issues since the late 1990s and the Publish What You Pay (PWYP) coalition, a global coalition of over 790 member organizations including human rights, development, *"59 per cent of CEOs agree that multinationals should be required to publish the revenues, profits and taxes paid for each territory where they operate."*

environmental and faith-based groups have advocated for greater transparency of extractive industries to improve the lives of people in resource-rich countries. Their combined work resulted in the pressure that led to the United States being the first country to adopt mandatory reporting in the extractive sector in 2010.

Section 1504 of the Dodd-Frank Act, enacted in 2010, requires oil, gas and mining companies registered with the U.S. Securities and Exchange Commission (SEC) to disclose in their annual filings what they pay to the U.S. Federal Government and to foreign governments. It requires that they disclose all taxes, royalties, fees, signature bonuses and other payments made on a project and country level.

In August 2012, the SEC issued a strong rule to implement Section 1504.

The provision is actively supported by a broad group of investors with over $5.6 trillion in assets that see payment information as critical to assessing and mitigating investment risks associated with corruption and conflict.[3]

U.S. leadership helped catalyse global action. In 2013, the European Union ratified the 'Accounting and Transparency Directives', which require disclosure similar to Section 1504 across the 28 member states of the EU. Norway has adopted a similar law to the European Directives and Canada is also working to adopt mandatory reporting that is consistent with the U.S. and European laws. G8 leaders made a strong commitment last June to require disclosure of oil, gas and mining revenue payments.

However, the implementation of Section 1504 has been challenged in the USA. On 24 July 2013 the DC District Court vacated the implementing rule for Section 1504 of the Dodd-Frank Act. This decision came after the American Petroleum Institute (API) brought a legal challenge against the SEC's 1504 rule that was issued in August 2012. Importantly though, Section 1504 remains the law of the land and the Court's ruling gives the SEC the authority to re-issue a substantively identical rule with better justifications that meet the intent of Congress.

Given the remarkable advances made internationally with mandatory payment disclosure, it is hoped that the SEC now sees that it is in a strong position to defend its original rule by granting no reporting exemptions and issuing a robust project definition that is consistent with the EU requirement. This is critical: the U.S. and EU, which together host over two-thirds of the world's listed extractive companies by value, must have harmonized disclosure requirements to ensure that the information is consistently reported so it is easily comparable by citizens and investors, and to minimize additional reporting burdens and compliance costs on the industry.

Mandatory reporting for the extractive industries has played an important role in raising attention at a broader level for more transparency and accountability on how companies are taxed and in advancing financial country-by-country reporting applicable to the entire private sector, not just the extractive sector. The ultimate aim is to require all sectors to report on payments to governments consistent with Section 1504 as well as to provide information on the revenues and profits generated in each country of operation. This is critical because there should be more transparency over payments due, as well as payments actually received. Citizens and tax authorities should have access to additional information that would enable them to identify companies that may be abusing tax rules, and also to assess the fairness and effectiveness of these rules.

There are exciting developments in the campaign to secure broader country-by-country reporting - the OECD has recently published a proposal for a comprehensive country by country reporting and is now seeking comments on the proposal through a public consultation process. These developments show that country-by-country reporting has become "a pressing issue for most multinationals"[4] according to a recent report by major accounting firm KPMG, and is gaining acceptance in business circles, with 59 per cent of CEOs agreeing that "multinationals should be required to publish the revenues, profits and taxes paid for each territory where they operate."[5] It is thanks to the advances made in the area of extractive revenue payment transparency that this once-taboo idea has come this far.

Corinna Gilfillan is Head of the US Office for Global Witness and has worked for over 10 years to strengthen governance of the natural resource sector. Previously Corinna led Global Witness' global campaign to combat conflict diamonds. Gilfillan has testified before the U.S. Congress on these issues and currently serves on the International Board of the Extractive Industries Transparency Initiative.

Endnotes

1 World Bank: Poverty headcount ratio at US$2 a day (PPP) (% of population) available at: **http://data.worldbank.org/indicator/SI.POV.2DAY**

2 http://businessdayonline.com/2013/08/tax-evasion-firs-begins-audit-of-firms-transactions-with-off-shore-arms.

3 See Letter to Chairman Mary Jo White (August 14, 2013), **http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf.**

4 **http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Tax/country-by-country-reporting-overview-initiatives.pdf.**

5 **http://www.pwc.com/gx/en/ceo-survey/2014/explore-the-data.jhtml.**

"Nigeria is the largest oil producing country in Africa but over 80% of its citizens live on less than $2 dollars a day."

COUNTRY-BY-COUNTRY REPORTING: A BUSINESS VIEW OR "HE WOULD SAY THAT, WOULDN'T HE?"

feature

Will Morris

Country-by-Country reporting has played an important role in highlighting the need for a new overall picture of multinational groups. But, argues Will Morris, it will not do the work its advocates claim it will and, in its current form, it will add significant additional costs to business. Country-by-Country has identified a problem. It does not describe a solution.

I take my hat off to Richard Murphy for making the weather on Country-by-Country reporting (CbC) since starting out in 2003. After 10 years, governments and the G20 agree that they need a new overall picture of multinational (MNC) groups to better determine where the tax risks lie (which they also call CbC). Many businesses accept that public trust can only be regained through better explanation of their tax strategy. And still others agree that more transparency in less developed countries (LDCs) will allow communities to hold both their own governments, as well as business, to account. On these items there is no going back – and a lot of this is down to Richard's original initiative and tireless work since then.

However, though I greatly respect this initiative, I do not believe that Richard's version of CbC is appropriate. (This is where my subtitle comes in.) I have three reasons, but, to be clear, this is not about being against transparency. It's about a proportionate and balanced approach to information collecting and reporting that allows tax authorities to do their jobs properly and efficiently, and that restores the faith of the public in the tax system.

I'll start with the argument against CbC that makes everyone groan: cost. But cost really is a consideration. The argument is made that all this information is already collected, and therefore must be simple to report in a different format. But this misunderstands and underestimates the massive task for a MNC with hundreds, perhaps thousands, of entities to ensure there is a smooth and error-free path between the first ledger entries and the final audited accounts and/or tax return.

Reporting information differently usually means collecting and aggregating it differently. That's a big systems issue. Add in likely multiple CbC regimes, and constant tweaking of requirements, and the costs will mount rapidly. Groups have estimated start-up costs of anywhere up to $50 million for systems changes, etc., with annual running costs of up to $5-10 million and thousands of man-hours. Multiplied over hundreds of groups these are substantial sums that that won't go into creating value (and jobs) in an MNC's real business. Costs like that should only be incurred for real benefit.

Which leads to my second reason – the arguments made for CbC don't always add up. Let me list a couple of them, with my response:

- "CbC will help prevent transfer pricing abuse." *This is unlikely. Transfer pricing (TP) analysis requires transactional information that is very different to CbC. CbC will, at best, provide only suggestive information for TP purposes, and other, more effective, less-resource intensive options are available.*

- "This will help less developed countries spot and counter tax avoidance." *I agree that some information could be useful, but, it is clear the LDCs are not calling for this massive expansion in data they can't process. They want help with simplified TP, with closing the cases they already have, training for their tax inspectors, and designing effective rules – in other words, "capacity building".*

- "Investors want this increased transparency". *Only a small handful has asked for this type of information. What investors really want to know is whether any particular tax rate is sustainable. But that requires a narrative from business (see below) – CbC won't help.*

So, to the last reason given for CbC: that it will help restore public confidence in business. I think this needs to be split out into two strands. First there is the question of how CbC will restore that trust. Second, why the incredibly detailed information reported to developed country tax authorities by MNCs does not currently engender trust.

On the first of those, I doubt that public CbC reporting would directly "restore trust" in business because the data first has to be understood – and that requires a high

"Less Developed Countries are not calling for this massive expansion in data they can't process."

degree of accounting and/or tax knowledge. So, this new information would still have to be translated for the public. And in that process this information can be spun, or, just as easily, misunderstood. We tax profit, not income, for example, so turnover is always many multiples of a taxable profit number – but it's easy to start a story running on the disparity between the very different numbers. MNCs could assemble teams to interpret this complex information for the public, but, again, where is the real value-add in that? I suspect that what the public really wants to know is that the tax system is actually working – not to be able to make the detailed calculations themselves.

Which brings me to the second strand of this last argument. What seems to be going on here is not just mistrust in business, as such, but also mistrust in government. Would CbC really restore trust by allowing the public to check up on tax authorities such as HMRC in the UK? Poorly-followed procedure in a handful of settlement cases (although subsequent independent reviews showed the deals were good for the UK) has unsettled people, and this is certainly a dangerous development. If people no longer trust the authorities then they no longer trust the system. If they no longer trust the system they will eventually stop paying their taxes.

So this is a real problem – but is it cured by CbC? I don't think so. First, proving the tax authority is doing its job requires real investigation, by experts, of people and facts, not the disclosure of numbers. (A task performed by the National Audit Office in the UK.) Second, the breakdown is in public confidence that the authorities are making taxpayers pay the tax due and not making "cosy" deals. That requires not CbC, but a robust, well-understood process for dealing with taxpayers in audit, settlements, and litigation. Again, those rigorous institutional processes are now in place in the UK (and other countries).

So, I don't believe detailed CbC is the answer to regaining trust. But equally, both business and government must tell their story much better – transparency again – to reassure the public. The CBI issued a statement of tax principles last year that called upon businesses to adhere to those principles, but also to better explain themselves to the public. An explanation not solely by reference to numbers, but also in narrative form – explaining an approach to tax, government incentives, and the effect of international operations on the tax rate. Equally, governments must – repeatedly – tell the public in accessible language how they hold *all* taxpayers to account in tax collection; and how the settlement and litigation processes work (including internal governance procedures). Governments also need sometimes to explain to the public that the tax system (particularly where international rules intersect) is just plain complex, and there can be more than one "right" answer – but also that they are working right now with the G20 both to close loopholes and make things simpler.

To conclude, I don't think that full CbC is the answer to these critical issues. But prompted by Richard Murphy's efforts, I endorse the G8/G20 call for better tax transparency to and among governments, have helped with the CBI's tax principles, and agree that some well-designed public transparency could be beneficial for civil society in LDCs. Richard identified a problem. I may not agree with his solution, but I applaud his insight and his sheer determination to make us all think and then act on it.

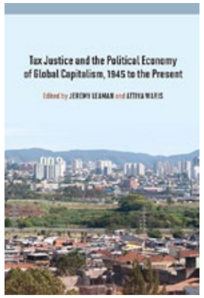
"Both business and government must tell their story much better to reassure the public."

Will Morris is Chair of the BIAC Tax Committee & CBI Tax Committee.

Endnotes

1 For the non-British reader, Britain has just marked the 50th anniversary of the "Profumo Scandal". This was one of the most memorable lines from that time.

book review



Tax Justice and the Political Economy of Global Capitalism, 1945 to the present

Editors: Jeremy Leaman and Attiya Waris

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New York and Oxford, 2013

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In the wake of the global financial crisis the contradictions between the resource requirements of the state and state capacity to harness global capital have become more apparent than ever. The nature of the multinational corporation combined with the now dominant role of the so-called knowledge economy, the increasing fluidity of financial transactions and mobility of capital, and the systemic incoherence of the inter-national fiscal architecture raise the specter of a permanent schism between the location of value creation and the distribution of wealth.

This contradiction in the context of crisis, austerity, rising inequality and civil society activism has generated acute public and policy interest in the issue of tax justice. Leaman and Waris' panoramic edited volume traverses the characteristics of, and multiple and diverse processes conditioning, tax equity within and between societies across the developed and developing world. The analyses point to directions for progressive policy innovation, providing an interdisciplinary resource for scholars, policy makers and activists seeking to intervene.

Tax abuse occurs at the intersection between myriad jealously guarded and 'competitively designed' national rules and the opportunities generated by frictions between them. Part I, addressing tax in Europe, mirrors this, providing case studies on the evolution of the fiscal systems of United Kingdom, Germany and Portugal and an analysis of the neoliberal trajectory of the European project and policy making and consequent deficiencies in the European tax policy framework. Given the concerted emasculation of fiscal capacity in Germany and the United Kingdom, the erosion of a cultural consensus around the importance of social provision, and the positive role of fiscal development in Portugal's democracy and state building, Leaman calls for a multilateral 'politically defined framework of horizontal equity and mutual support'. The political will to act seems evident in updates to European Directives, the partial transposition of the U.S. Foreign Account Tax Compliance Act into Europe, and now a parliamentary vote in favour of ownership transparency. However, while a host of radical policy initiatives are on the table, progress is piecemeal and updates to the Savings Tax Directive remain mired in the conflicting preferences of member states. The direction of travel in Europe remains unclear.

Of course, fiscal architectures in Europe are not purely a European concern. Part II focuses on developing country tax systems and their interaction with developed states. Sagar, Christensen and Shaxson trace an elite contest within the British political economy over the emergence of an archipelago of 'secrecy jurisdictions' in the wake of British empire. This archipelago is the key conduit for an 'onshore-offshore' interface facilitating an annual loss of $100 billion in illicit flows from developing countries. It would seem the network of tax treaties between developing and developed countries offers little redress. The predominant OECD model privileges the interests of capital exporting states and the more developing country focused UN model is far less prevalent. In 'Tax Treaties between Developed and Developing Countries', on the basis of a subtle comparison of competing treaties and how these are used, Vega concludes that as emerging economies export more capital, any progress depends on the space made for developing country concerns in treaty design.

Fiscal development and tax injustice in the developing world are the concerns of three subsequent chapters. Ottusanya provides a vivid demonstration of the corrosive impact of the intangible economy in Nigeria. Intangible capital now accounts for the majority of all capital. It can't accurately be measured, located or identified in company accounts, and increases the utility of low tax jurisdictions in corporate tax abuse. The consequence is weakening fiscal capacity and the regressive distribution of the tax burden. Waris' analysis of 'Taxation and State Legitimacy in Kenya' and Grown and Valodia's cross-national exploration of the gendered dimensions of taxation suggest that national fiscal systems must be re-engineered to prioritise fundamental rights and democratic legitimacy. Further, despite substantive obstacles, the mechanisms to do so may be available.

It is specifically mechanisms of redress that concern the final part of the collection. Ermano forensically dismantles neoclassical

"The idea of country-by-country reporting has already made a remarkable journey."

book review (contd)

accounts of optimal fiscal design which privilege wealth concentration in the name of an imaginary efficiency. High and progressive taxes don't inhibit growth or curtail freedom. Instead, increasingly progressive taxation offers a means to address both social exclusion and macroeconomic volatility.

The solution offered by Bamford is a radical simplification. In place of the myriad taxes between which tax arbitrage unfolds, tax should be targeted on the comprehensive lifetime income of individuals, and international individuals be subjected to the taxes of states according the their degree of allegiance to them. While this requires an International Tax Organisation, Schratzenstaller concludes in an analysis of the potential for, and practical and conceptual basis of international taxes, that the creation of such taxes is more a political than an economic or technical issue.

The idea of country-by-country reporting has already made a remarkable journey. Lesage and Kaçar's chapter traces the central role of civil society in placing a corporate reporting standard promising to re-link value creation and wealth distribution into EU and U.S. law and onto the agendas of the OECD, IMF, World Bank and G8. This chapter is important not only because of its contribution to the analysis of the political dynamics behind substantive policy transformation. It shows that despite structural obstacles to change, apparent policy inertia, and the tenacity of a seemingly crude neoliberal politics, the mantle on tax justice is up for grabs.

If social history and political economy can be understood through the lens of taxation, this collection occupies an important position. Not only is the collection panoramic and systemic. And not only does it make a distinct analytical contribution to an urgent debate. At a time of almost unprecedented uncertainty regarding the future of tax policy, it provides both the knowledge necessary to understand, and grounds upon which to adjudicate between competing courses of action.

Review by Duncan Wigan.

news in brief…

Bayern Munich Boss Sentenced

Uli Hoeness, president of Bayern Munich football club, was given a three and a half year sentence for tax evasion on March 13. Originally charged with evading 3.5 million euros he later admitted failing to pay another 15 million. In the end he was held to owe the authorities 27.2 million euros.

The former German international used the time-honoured method of a secret Swiss bank account to evade tax. But the modern game has more sophisticated, and perfectly legal, ways to reduce its tax liabilities. Back in 2010 Christian Aid reported that more than a dozen British clubs "were owned in whole or in part through structures in offshore jurisdictions, including the Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Jersey, Guernsey, and the Isle of Man."

Hoeness is expected to appeal against the sentence.

Credit Suisse Banker Admits Guilt

On March 12th Andreas Bachmann, a Swiss national, pleaded guilty to involvement in a scheme to help US nationals hide $4 billion in assets from their government through the use of offshore shell companies. According to Bachmann, the scheme broke both US law and the terms of a 2001 agreement between the bank and the Internal Revenue Service (IRS). Bachmann told the court that an unnamed executive at his business unit "instructed him with words to the following effect: 'Mr. Bachmann: You know what we expect of you – don't get caught.'"

The US authorities are currently investigating 14 Swiss banks, of which Credit Suisse is the largest. A Senate report has claimed that this bank alone has helped 22,000 Americans to hide $10 billion from the IRS.

The Charge of the Capital Flight Brigade

The British government appears to have the needs of the offshore sector close to its heart as it contemplates its response to the Russian occupation of Crimea. On March 3rd a freelance photographer took a picture of the text of a secret document being carried into Downing Street. The memo, according to reports in the Guardian, said that Britain should "not support, for now, trade sanctions… or close London's financial centre to Russians."

The City of London and its satellites have long competed for a share of the vast sums that pour out of the Russian economy and into the trackless labyrinth of the offshore system. Nothing, least of all international law, should be allowed to disrupt the flow. Campaigners against organized crime and grand corruption might want to bear that in mind.

Another Ukraine-London Connection

London is also the destination of choice for Ukraine's political class, it seems. Back in 2011 openDemocracy reported that President Victor Yanukovych's 340 acre estate Mezhyhiriya was officially owned by 'Tantalit', a company in Donetsk.

According to the openDemocracy article, "'Tantalit' is 99.97% owned by an Austrian company, Euro East Beteilungs GmbH. After that the trail leads to the UK. The Austrian firm is 100% owned by a British company, Blythe (Europe) Ltd, with a registered address in London, at Formations House, 29 Harvey Street." Blythe is itself owned by a company registered in Lichtenstein.

Who says *Tax Justice Focus* uses gratuitous pictures of celebrities to liven up its pages? (Picture by Darkness Blackheart)

Taxing the Stars

The *Daily Mail* reports that as many as a thousand "household names" seeking to reduce their tax liabilities through a film production scheme now face the prospect of a bill from Her Majesty's Revenue and Customs (HMRC). The celebrities, including Gary Lineker, Bob Geldof, Anne Robinson

news in brief (contd)

and Victoria Beckham may have to pay more than a billion pounds to the UK tax authorities.

Meanwhile, the *Financial Times* reports that far fewer tax planning schemes are being launched. "The move away from contrived and artificial schemes", according to the paper, "has accelerated as a result of a public backlash, heightened reputational risks for tax avoiders, a new anti-abuse rule, an attempt to block tax avoiders from public contracts and a code of conduct for banks that used to facilitate many schemes."

Boy Band Facing in More Than One Direction on Tax

On the one hand, global pop sensation One Direction are calling on their millions of fans to put pressure on the UK government to keep its commitment to

Another, entirely justified, picture of famous people. (Picture by Eva Rinaldi)

spend 0.7% of gross national income on international development assistance. Fans who send letters and take other actions will enter a lottery for free tickets to see the band. According to Global Citizen, the organization running the scheme, the letters will "also encourage the government to crack down on company tax avoidance by British companies in the developing world, which hampers progress in those states." On the other hand, the band use subsidiaries in the Republic of Ireland to reduce their tax liabilities.

Perhaps tax authorities could use Twitter followers in a formula to apportion the tax paid by teen idols in a fair and transparent way? Most of the band's 17 million followers on the social network site probably live outside the Emerald Isle.

Digital Giants Buying US Government Bonds with Money Held Offshore

According to a report from the Bureau of Investigative Journalism, Apple, Microsoft, Google and other tech companies have amassed $124 billion in US Treasury bonds and another $39 billion in other forms of government debt. These interest-bearing investments have been bought with money held offshore. The American people are paying the companies to borrow money that would be taxed at 35% if brought back into the United States.

The American senator Carl Levin responded to the Bureau's findings by saying that "if a US multinational puts its offshore cash into a US bank and uses the money to buy US treasuries, stocks and bonds, those funds ought to be treated as having been repatriated and subject to US tax." It does seem extraordinary that American corporates can park their cash in the safe haven of US government debt while remaining offshore for tax purposes.

Uncertainty Surrounds UK Claims on Tax

The British Parliament's Treasury Select Committee has suggested that "great uncertainty" surrounds government claims about the revenues to be expected from crackdowns on tax avoidance, evasion and fraud.

The Committee points out that a scheme introduced in January 2013, in which the Swiss government agreed to collect tax from UK citizens, was first projected to be worth £5.3bn over six years. By the end of 2013 the government had revised this amount down to £1.9 billion.

The Tax Justice Network was always sceptical about the claims being made for the Swiss deal. By ignoring discretionary trusts the UK government ensured that only the most primitive forms of tax avoidance and evasion would be affected.

The Apple Falls Far From the Tree

Apple's tax arrangements have been in the news again. While the company reported earnings of $88.5 million in Australia last year it moved $2bn of income to an Irish subsidiary, Apple Sales International, according to documents seen by the *Australian Financial Review*.

In April last year Apple Australia's vice-president, Tony King, told a parliamentary committee that "our tax affairs in Australia are very straightforward." So it seems. But not in a good way.