



Lund University

School of Economics and Management
Department of Business Law

BEPS Action plan 13 in the light of confidentiality

by

Filippa Håkansson

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Supervisor: Mats Tjernberg

Author's contact information:

fl.hakansson@gmail.com

+46705259793

Contents

| | | |
|----------|--|-----------|
| 1 | Introduction | 1 |
| 1.1 | Background..... | 1 |
| 1.2 | Purpose | 1 |
| 1.3 | Method and material | 2 |
| 1.4 | Delimitation..... | 3 |
| 1.5 | Outline..... | 3 |
| 2 | TP and Action Plan 13 | 4 |
| 2.1 | Introduction to TP | 4 |
| 2.2 | EU Joint Transfer Pricing Forum | 4 |
| 2.3 | Guidelines on TP | 5 |
| 2.4 | Transfer Pricing Documentation..... | 5 |
| 2.4.1 | Chapter V OECD Guidelines on TP..... | 6 |
| 2.5 | Action Plan 13..... | 7 |
| 2.6 | Automatic Exchange of Information | 9 |
| 2.7 | Confidentiality in Action 13..... | 10 |
| 2.7.1 | Article 6 OECD implementation package | 10 |
| 2.8 | Commentaries to Action plan 13 and confidentiality | 11 |
| 2.9 | Summary | 12 |
| 3 | Public disclosure..... | 14 |
| 3.1 | Introduction..... | 14 |
| 3.2 | Public - Arguments..... | 15 |
| 3.3 | Transparency | 16 |
| 3.3.1 | Tax Transparency Package | 17 |
| 3.3.2 | Global Forum on Transparency and Exchange of Information for Tax Purposes | 17 |
| 3.4 | Summary | 18 |
| 4 | Confidentiality in general | 19 |
| 4.1 | Introduction..... | 19 |
| 4.2 | OECD Guide on confidentiality | 19 |
| 4.2.1 | Article 26 OECD Model tax convention | 19 |
| 4.2.1 | Article 8 TIEA | 20 |

| | | |
|------------|--|-----------|
| 4.2.2 | Article 22 The Multilateral Convention on Mutual Administrative Assistance | 20 |
| 4.3 | Domestic legislation | 21 |
| 4.4 | Summary | 21 |
| 5 | Analysis | 23 |
| 5.1 | Introduction..... | 23 |
| 5.2 | Action 13 as a tool to combat BEPS | 23 |
| 5.3 | Action 13 in the light of confidentiality | 25 |
| 5.4 | Public vs. confidential | 27 |
| 5.4.1 | Does public disclosure go further than the purpose?..... | 28 |
| 5.4.2 | Possible effects of public disclosure..... | 29 |
| 5.5 | Can the EU go further than the OECD? | 29 |
| 5.6 | Final remark..... | 30 |
| 6 | Conclusion..... | 31 |
| | Bibliography | 32 |

Summary

OECD introduced 15 Action plans as part of the BEPS-project in 2014 in their work to combat base erosion and profit shifting (BEPS). Action plan 13 provides for a re-examined transfer pricing documentation and a new Country-by-country-reporting. The CbC-reporting is to be included in a three-tiered approach including a master-file and a local-file. This thesis will focus on Action plan 13 in the light of confidentiality. The background to the CbC-reporting will be presented for, but the focus will be on the criteria of confidentiality and the current discussion on whether the reports should be made available to the public.

The purpose of Action plan 13 and the CbC-reporting is to increase transparency and facilitate for the tax authorities in their exchange of information. All MNEs with annual consolidated group revenue equal to or exceeding 750 million Euros have to report the relevant information to all relevant governments. This has to be made through a three-tiered approach, namely, a local-file, master-file and a CbC-reporting.

One of the conditions that the Member states implementing the CbC-reporting have to follow is confidentiality. It is up to the domestic jurisdictions themselves to provide for provisions concerning the protection of sensitive information. Through out their work, the OECD is advocating confidentiality and the protection of the taxpayer. On the other hand, there are, mainly NGOs that are proposing a public CbC-reporting, which would lead to the reports being publicly disclosed. The main argument for publicly disclosing the CbC-reports is to increase transparency. It has been argued that without a public CbC-reporting it is not possible to fulfil the aim of Action plan 13 at all.

Action plan 13 can be seen as an appropriate tool to combat BEPS. That is to say if the benefits exceed the costs. At the moment there are not strong enough reasons as to why the CbC-reports should be made public and would therefore go further than the actual purpose of Action plan 13. In other words, the tax authorities are the only ones to whom the information should be made available. At the moment the Member states have agreed, after implementation of CbC-reporting, to provide for provisions on confidentiality in the domestic law. On the other hand, with the EU and mainly the European Commission, advocating public CbC-reporting, we might see a change in the near future, since they can decided to go further than the OECD. The 2020 review on the BEPS project will tell how Action plan 13 is working as a tool to combat BEPS and also possibly bring up the discussion on the potential public CbC-reporting.

Abbreviation list

| | |
|--------|--|
| BEPS | Base Erosion and Profit Shifting |
| BMG | BEPS Monitoring Group |
| CbC | Country-by-Country |
| CMAA | Convention on Mutual Administrative Assistance |
| EOI | Exchange of Information |
| EU | European Union |
| EU TPD | European Union Transfer Pricing Documentation |
| JTPF | Joint Transfer Pricing Forum |
| MCAA | Multilateral Competent Authority Agreement |
| MNE | Multinational Enterprise |
| NGO | Non-governmental Organisation |
| OECD | Organisation for Economic Co-operation and Development |
| p. | Page |
| para. | Paragraph |
| TIEA | Tax Information Exchange Agreement |
| TP | Transfer Pricing |
| TPD | Transfer Pricing Documentation |
| XML | Extensible Markup Language |

1 Introduction

1.1 Background

Due to globalisation and the increased amount of cross-border streams of capital, tax avoidance and tax evasion have become an issue. This leads to a greater burden on the tax authorities and their work in assessing potential Transfer Pricing (TP) risks. Increased transparency and the exchange of information between the different tax authorities will facilitate the assessment of potential risks. OECD has been aiming for increased transparency and exchange of information through out its work, for example through the Global Forum on Transparency and Exchange of Information.¹

In 2014 the Country-by-Country (CbC) reporting was introduced as a part of The OECDs work against Base Erosion Profit Shifting (BEPS). Through the 15 Action plans the OECD gives the Member States guidance on how to tackle double non-taxation.² What is central through out the Action plan is transparency, since it enables the tax authorities to assess TP risks. 31 countries signed the Multilateral Competent Authority Agreement, MCAA, in January 2016, agreeing the automatic exchange of information concerning CbC-reports.³

Due to the implementation of the CbC-reporting MNEs are obliged to report the information required under Action plan 13, including potential sensitive information. The information is under the CbC-reporting protected by the criteria of confidentiality. On the other hand, it has been discussed, mainly by NGOs, whether the CbC reporting documentation should be made public, and in that way reach an increased transparency.

The OECD is advocating confidentiality, and if that view was to be followed what kind of tools, both national and international, exist to prevent member states from misusing sensitive information and how is a taxpayer protected by confidentiality?

1.2 Purpose

This thesis has as its main purpose to analyse BEPS Action plan 13 on CbC-reporting in the light of the confidentiality criteria. The writer will discuss whether it is possible for the member states to have an automatic exchange of information, through the CbC-reporting, between the tax authorities and

¹ OECD (2011), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, Second Edition, OECD Publishing, p. 9.

² OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD publishing, p. 13.

³ Tax Insights from Transfer Pricing (PwC), 31-country agreement will effectuate exchanges of CbC-reports, p. 1.

at the same time fulfil the criteria of confidentiality. Another part of the purpose is to highlight and analyse the arguments, mainly from NGOs, for making the CbC-report public. The author will further on discuss whether Action plan 13 is a proper tool to combat BEPS and whether a potential public CbC-reporting would go outside the aim of the OECD.

The focus will mainly be from an OECD perspective, but also from a EU perspective. This is done to demonstrate that the work of the EU is influenced by the work of the OECD.

1.3 Method and material

The legal-dogmatic method will be used in order to analyse the legal questions concerning BEPS Action plan 13. This means that, written and unwritten international law as it stands will be applied.⁴ The basis for this thesis is tax conventions and the OECD guidelines. Although, recommendations and guidelines do not have any legally binding force on the Member States they still have a normative effect. When it comes to TP principles the guidelines play an important role when implementing them into national law.⁵ They can be seen as a type of “soft law” that turns into “domestic hard law” when implemented into the national legislation.⁶

To get the main idea of BEPS Action plan 13, the OECD guidelines and the implementation package will be used. Also articles and other literature will be examined to get a detailed picture of the status of the Action plan as it stands. This is done in order to compare the aim of the OECD and the CbC-reporting as a suitable tool to combat BEPS. Doctrinal debates of different recognised authors will be used to point out divergences, uncertainties and unsolved issues in the field of TP and especially Action 13.

Other sources concerning the exchange of information and confidentiality will be provided for, since the CbC-reporting by the OECD will have to follow the standards of a TIEA or equivalent tax treaties. This is done to demonstrate what affect the confidentiality criteria have on the exchange of information and how it also should protect the taxpayer when it comes to CbC-reporting.

Articles will be presented to provide for comments to Action plan 13, and in that way analyse the pros and cons of making the reported information public. The commentaries also provides for a picture of the current situation and discussion on the area of Transfer pricing documentation (TPD).

⁴ Douma, Sjoerd, *Legal research in international and EU Tax Law*, Kluwer, 2014, p 18.

⁵ Douma, Sjoerd, Engele, Frank, *The legal status of the OECD Commentaries*, Vol. 1 - Conflict of Norms in International Tax Law Series, IBFD, 2008, p. 258.

⁶ Calderón Jose, *The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?*, INTERTAX, Volume 35, Issue 1, Kluwer Law International 2007, p. 4.

1.4 Delimitation

The OECDs work concerns 15 action plans to combat BEPS, this thesis will only focus on action 13 and the CbC-reporting requirements. When implementing action 13 the Member States have to fulfil the criteria of confidentiality, consistency and appropriate use. However, the focus will be on the criteria of confidentiality and the other criteria will only be mentioned in a smaller extent. A presentation of action 13 will not be exhaustive, which means that the focus will not be on the technical approach towards transfer pricing.

Other theses have been written in this area, but with the focus on the implementation of action plan 13 both from an international and a domestic perspective. This thesis focuses on the criteria of confidentiality and how and if the CbC-reports should be kept confidential in the future.

1.5 Outline

The chapters in this thesis focus on the different aspects of BEPS Action plan 13 in the light of confidentiality. *Chapter 2* provides for an introduction to Transfer Pricing and documentation both from a EU and an OECD perspective. Subsequently Action plan 13 is presented in the light of confidentiality. *Chapter 3* presents the argumentation concerning public CbC-reporting and the underlying importance of increased transparency. Subsequently, *chapter 4* focuses on the concept of confidentiality and how OECD is advocating confidentiality in general through different exchange of information instruments. *Chapter 5* will analyse the questions brought up concerning public CbC-reporting and also how Action plan 13 is a proper tool to combat base erosion and profit shifting. Lastly, *chapter 6* provides for a conclusion.

2 TP and Action Plan 13

2.1 Introduction to TP

The OECD provides for recommendations concerning TP due to the increased importance put on this area. MNEs, but also the tax authorities, can in this way get guidance on how to apply the arms length principle.⁷ When associated enterprises do business with each other it might be difficult to set a price affected by market forces, which is normally the case when non-related companies trade with each other. To be able to determine a price between related parties equivalent to that between independent parties, the price has to be in line with the arms length principle^{8,9}. The arm's length price is determined by a functional analysis and a comparability analysis. The role of the functional analysis is to determine which role each party plays in the transaction. This is relevant since the importance of the party in the transaction will affect how exposed it should be to profits or losses. To determine the role, played by each party, three elements should be taken into account; the functions performed, the risks assumed and the assets used.¹⁰ The comparability analysis is the step after the functional analysis, and by using the outcome from that analysis a transfer price can be determined. Comparing independent companies that are in a comparable situation can set the arm's length price. The comparability analysis analyses information between either internal comparables or external comparables.¹¹

2.2 EU Joint Transfer Pricing Forum

The EU Joint Transfer Pricing Forum, JTPF, is a group consisting of representatives from each of the Member States tax authorities, and also members from NGOs. Their main purpose is to give assistance to the European Commission in questions concerning TP. The JTPF is exercising their work on the grounds of the OECD Transfer Pricing Guidelines.¹²

In 2005 the European Commission proposed a code of conduct concerning Transfer Pricing documentation, "EU Transfer Pricing Documentation", EU TPD. The EU TPD was to consist of a "master-file" and a "country-specific documentation". The main aim was to create a balance between the tax

⁷ Monsenego, Jérôme, *Introduction to Transfer Pricing*, Studentlitteratur, 2013, p. 35.

⁸ Definition of the arms length principle can be found in article 9 of the OECD Model Tax Convention.

⁹ Monsenego, Jérôme, *Introduction to Transfer Pricing*, Studentlitteratur, 2013, p. 17.

¹⁰ OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, 2010 p. 45 & 46.

¹¹ OECD, *Guidelines on Transfer Pricing 2012*, p. 41 & 42.

¹² http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#background.

authorities and the taxpayers. The Member States were not obliged to implement the EU TPD, and they could decide not to implement it or implement it partially. The reason not to put an obligation on the Member States to implement it was the fact that the aim of JTPF was to give non-legislative standards on how to solve TP issues. The Member States could in this way keep their sovereignty and implement the EU TPD in the way as the domestic jurisdiction wished.¹³

2.3 Guidelines on TP

The first guidelines on TP came in 1979¹⁴, which was updated in 1995¹⁵. The guidelines that are applicable today are the guidelines issued in 2010.¹⁶ The guidelines are not binding but they are agreed principles amongst the OECD countries, due to its guidance on for example the arm's length principle.¹⁷ As mentioned above, there is also guidance on EU-level through the European Commission who has created the Joint Transfer Pricing Forum that consist of experts in the area. Also these recommendations are not binding.¹⁸

The guidelines consist of different chapters concerning different areas of TP. Chapter one provides for the application of the arm's length principle and the meaning of the functional analysis and the comparability analysis (also chapter three). Chapter two provides for the different transfer pricing methods and how to select the most appropriate one. Chapter four provides for TPD, which will be presented below.

2.4 Transfer Pricing Documentation

The TPD is a way for the MNEs to prove to the tax authorities that the correct transfer prices has been set and that the price is following the arm's length principle. The burden of proof normally lies on the tax administrations, but the taxpayer still has the obligation to provide for the documentation needed for the authorities to be able to determine whether the price is in accordance with the arm's length principle. If the taxpayer does not provide for the information needed, the burden of proof might change to the taxpayer, which possibly puts an enticement on the taxpayer to actually provide for all the TPD concerned.¹⁹ The tax authorities and the

¹³ European Commission, Press release database, Code of Conduct on Transfer Pricing documentation in the EU – Frequently asked questions, 2005, http://europa.eu/rapid/press-release_MEMO-05-414_en.htm

¹⁴ OECD, Transfer Pricing and Multinational Enterprises, 1979.

¹⁵ OECD, Transfer Pricing Guidelines for multinational enterprises and tax administrations, 1995.

¹⁶ Monsenego, Jérôme, *Introduction to Transfer Pricing*, Studentlitteratur, 2013, p. 35.

¹⁷ Ibid. p. 36.

¹⁸ Ibid. p. 37.

¹⁹ OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 p. 181.

taxpayer should cooperate as far as possible to be able to at one hand minimise the documentation burden and on the other hand secure that the arm's length principle is being followed.²⁰s

2.4.1 Chapter V OECD Guidelines on TP

Chapter V in the OECD Guidelines on Transfer Pricing provides for guidance concerning documentation. The guidelines concerning documentation were introduced to help the tax authorities when developing new rules regarding the documentation in the domestic jurisdiction.

Chapter V was deleted in its entirety and replaced with a new version. Since the development of the guidelines in 1995 many countries have implemented TP rules in their domestic legislation. With the combination of a more complicated intra-group trade it was necessary to develop the guidance on the obligation of documentation.²¹

The new chapter V provides for the three purposes of the TPD. First of all the documentation is aiming to ensure that the taxpayer is taking into account all TP requirements in establishing prices and other criteria for transactions between related enterprises. Secondly, the taxpayer has to provide the tax authorities with all the information needed to perform a risk assessment. Thirdly, the new rules should provide the tax authorities with useful information to be used when thoroughly examining a company and its compliance. When domestic legislation concerning TPD is to be enacted these three purposes should be taken into account.²²

Chapter V provides for guidance on what TPD is necessary to assess transfer prices. The OECD are thus clear that the list is not either minimum requirements nor a complete list. Accordingly, it *may* consist of:

- analysis consisting of information about the associated enterprises taking part in the controlled transaction,
- documentation of business strategies and special circumstances or other factors affecting the price set,
- functional analysis consisting of functions, risks and assets
- commercial and industry conditions that possibly could affect the taxpayer,
- description of the TP-method used and how it follows the arms length principle.²³

²⁰ OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 p. 189.

²¹ OECD (2014), *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 13-14.

²² Ibid. p. 14.

²³ OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2010 p. 185-188.

2.5 Action Plan 13

In 2014 the CbC-reporting was introduced as a part of Action plan 13 in the OECDs work against BEPS. “*Action 13 of the Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan, OECD, 2013) requires the development of 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 MNEs 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.*”²⁴ The CbC-reporting has to be implemented into national law and will then become legally binding.²⁵

Through the 15 Action plans the OECD gives the Member States tools to counter actions that for example lead to double non-taxation.²⁶ What is central through out Action plan 13 is transparency, since it enables for example the tax authorities to assess potential TP risks. This is information that before has not been available to them. Without the transparency it is not possible to counter BEPS.²⁷ The CbC-reporting were to be implemented on or after 1 January 2016 and only concerns MNEs with annual consolidated group revenue equal to or exceeding 750 million Euros.²⁸

Action Plan 13 presents standards and is re-examining the TPD. As mentioned before, this is to increase the tax transparency for the tax authorities. These rules include the obligation on MNEs to provide for the information needed to all the relevant governments, through a three-tiered approach. The relevant information concern their global allocation of the income, economic activity and taxes paid. The MNEs are required to provide for a “master file” including information concerning the MNEs global business operations and transfer pricing policies, giving an overview of the business. Secondly a “local file” must be provided for, which contrary to the master file, should provide detailed information as a supplement to the master file.²⁹

Thirdly the MNEs have to provide for the CbC reporting, in each jurisdiction that they are involved, including;

- Amount of revenue

²⁴ OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 38.

²⁵ Eg. Skatteverket has published; *OECD standard och EU-direktiv för dokumentation vid internprissättning och utbyte av land-för-land-rapporter*, proposing the implementation of the CbC-reporting into Swedish domestic law by the 1 of January 2017.

²⁶ OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD publishing, p. 13.

²⁷ Ibid. p. 14.

²⁸ OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 38.

²⁹ Ibid. p. 37.

- Profit before income tax
- Income tax paid and accrued
- Number of employees
- Stated capital
- Retained earnings
- Tangible assets³⁰

This information (the master file, the local file and the CbC-reporting) will help the tax authorities with for example;

- assessing transfer pricing risks,
- determining where audit resources can most effectively be deployed,
- providing information to commence and target audit enquiries.

In 2015 The OECD presented a Reporting Implementing package to provide the Member States with information about BEPS Action plan 13. The implementing package consists of a model legislation; three model Competent Authority Agreements including Multilateral Convention on Administrative Assistance in Tax Matters (MCAA), Bilateral Tax conventions and Tax Information Exchange Agreements (TIEA).³¹

The CbC-reporting will be reviewed in 2020 where the outcomes will be discussed. The reporting will be introduced at a domestic level and the review will for example provide for the effectiveness of the reporting in question.³²

In the implementation package a model legislation is provided by the OECD for the national jurisdictions to use when implementing Action plan 13 and the CbC-reporting.³³ Article 1 provides for the definitions of certain relevant terms. First of all a “Constituent entity” is a business unit that is a part of an MNE group regarding financial reporting purposes.³⁴ With “Reporting entity” means the entity that is obliged to file the CbC-reporting. Normally it is the Ultimate parent company, but it can also be a Surrogate Parent entity.³⁵ A “Surrogate parent entity” is an entity that has been assigned by the MNE group to file the CbC-reporting.³⁶

³⁰ Ibid. p. 37.

³¹ OECD, Action 13: Country-by-Country Reporting Implementation Package, 2015, p. 5 & 6.

³² OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 39.

³³ OECD, Action 13: Country-by-Country Reporting Implementation Package, 2015, p. 9

³⁴ Ibid. p. 9, Art. 1 para. 4.

³⁵ Ibid. p. 9, Art. 1 para. 5.

³⁶ Ibid. p. 9, Art. 1 para. 7.

2.6 Automatic Exchange of Information

As mentioned in the background, 31 countries signed the MCAA in January 2016, agreeing the automatic exchange of information concerning CbC-reports. The aim of the MCAA is to give the tax authorities an overall view of the structure of the MNEs and at the same time keep the information confidential. Subsequently, the competent authorities can automatically exchange the reported information under the CbC-reports after implementing BEPS Action 13. The MCAA is included in the *implementation package* and contains provisions with the aim to protect confidentiality and appropriate use.³⁷ Transparency is a key aspect in the exchange of information, which will be demonstrated later on. (See 3.3)

In March 2016, OECD released a standardised electronic format for the exchange of information in the CbC-reports, XML (Extensible markup language) Schema. This is another step to implement the CbC-reporting under the BEPS action plans. This is to be used for the automatic exchange of information between the tax authorities.³⁸ With the XML schema came also a user guide for tax administrations and taxpayers. The user guide will provide for information on how to report in the CbC XML Schema and what information should be provided for.³⁹ From the beginning the XML was formed to be used by the tax authorities, but is now also applicable for the taxpayers when reporting the information to the tax authorities.⁴⁰ As mentioned before 31 countries signed the MCAA and that agreement provides for the automatic change of information by using the XML Schema.⁴¹

The XML Schema consists of three parts, which is also explained in the user guide. First the message header, which provides for both the receiving and the sending authority and what kind of message that is sent between the two parties. It is also provided for the period and the nature of the report.⁴² Second is the Organisation Party Type, which provides for the identification of all the constituent entities and what information is to be included in the

³⁷ Tax Insights from Transfer Pricing (PwC), 31-country agreement will effectuate exchanges of CbC-reports, p. 1.

³⁸ <http://www.oecd.org/tax/oecd-releases-standardised-electronic-format-for-the-exchange-of-beps-country-by-country-reports.htm>

³⁹ OECD (2016), *Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers*, OECD.

⁴⁰ OECD releases Country-by-Country reporting XML Schema and related user guide, p. 1 www.ey.com/taxalerts

⁴¹ Ibid. p. 2.

⁴² OECD (2016), *Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers*, OECD, www.oecd.org/tax/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations-and-taxpayers, p. 7.

CbC-report.⁴³ The third part is the CbC body that provides for the information about the constituent entities and the reporting entity, also the key indicators for the whole MNE group and the constituent entities individually.⁴⁴ The MNEs have to report their first CbC-report in January 2016 and it is at the same time up to the domestic jurisdiction to decide whether to apply the XML Schema in their legislation.⁴⁵

2.7 Confidentiality in Action 13

There are three conditions following the CbC-reporting that needs to be taken into account by the Member States, or the countries that have implemented the reporting. The three conditions are confidentiality, consistency and appropriate use.⁴⁶ Under the confidentiality condition it is provided for the obligation for the member states to protect confidentiality of the information, in form of legal protections. The legal protection has to fulfil the minimum criteria of a MCAA, TIEA or a tax treaty.⁴⁷

The guidelines implies the obligation on the national jurisdictions to have in place provisions concerning confidentiality, but it is up to the national legislation to provide for protection of confidentiality for its taxpayers. That is to say, it is up to the countries themselves to fulfil the criteria of confidentiality as long as they do it in line with the OECD.

When it comes to the confidentiality criteria the guidance on CbC-reporting provides for the obligation on the tax authorities to ensure that the information provided through the CbC-report is kept confidential. Examples are also given on what can be confidential information, for example trade secrets or scientific secrets. In the case of a court proceeding, where the information will be public, the tax authorities must ensure that the information is being kept confidential to the largest extent possible. The OECD advocate the Guide “keeping it safe” concerning confidentiality of information exchanged for tax purposes. (See 4.2)

2.7.1 Article 6 OECD implementation package

As mentioned above the implementation package provides for a model legislation for the CbC-reporting. It is up to the domestic jurisdiction to implement the model legislation into domestic legislation.⁴⁸ Article 6 provides for confidentiality concerning the reporting. The article states that the information provided should be preserved as confidential under the same

⁴³ Ibid. p. 10

⁴⁴ Ibid. p. 14.

⁴⁵ OECD releases Country-by-Country reporting XML Schema and related user guide, p. 3.

⁴⁶ Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting, OECD, 2015, p. 5.

⁴⁷ Ibid. p. 5 para. 13.

⁴⁸ Action 13: Country-by-Country Reporting Implementation Package, OECD, 2015, p. 6.

rules as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

2.8 Commentaries to Action plan 13 and confidentiality

When it comes to the different commentaries to Action plan 13 and the opinions on confidentiality there are different aspects as to whether it should be made public or be kept confidential. After the presentation in January 2014 of the Discussion Draft on Transfer Pricing Documentation and CbC Reporting⁴⁹ the OECD received public comments that will be provided for below. Also commentaries from *Svensk Skattetidning* will be provided for.

Anders Hultqvist wrote an article⁵⁰ in *Svensk Skattetidning* as a commentary to Action 13 and the TP documentation. He puts the focus on transparency and its importance for the tax authorities exchange of information. According to Hultqvist the CbC-reporting will be an instrument for the tax authorities to locate the risks of the MNEs when it comes to TP. This could be of big importance for the developing countries, and in that way make them a part of the cooperation. By using the CbC-reporting the tax authorities will be able to obtain information that they would not otherwise be able to, which according to Hultqvist is the big important change that comes with action 13. Now the information also will be provided to the tax authorities, which will create a better balance.⁵¹ Hultqvist states that there might exist risks with the information exchange in the way that the information could end up in the wrong hands. He also discusses the request from the NGOs to make this kind of information public, which could jeopardies the confidentiality for the taxpayers in question. He is questioning whether it is possible to protect the taxpayer from the spread of information, to for example media or competitors. Since a lot of information will be exchanged between the different authorities there is a risk that the information will be misused or spread to other parties, even though it could be unintentionally. It is a risk that the protection of the information will not be protected through out the whole chain, and the information will be public or partly public.⁵²

The BEPS Monitoring group, BMG, gave a response to the OECD Discussion draft on TPD and CbC-reporting⁵³. The BMG consists of different experts in international taxation and some civil society

⁴⁹ Discussion Draft on Transfer Pricing Documentation and CbC Reporting Public comments received, OECD, 23 February 2014.

⁵⁰ Hultqvist, Anders, *Kommentar till Action 13 – TP-dokumentation*, Svensk Skattetidning vol. 10, 2014.

⁵¹ Ibid. p. 804.

⁵² Hultqvist, Anders, *Kommentar till Action 13 – TP-dokumentation*, Svensk Skattetidning vol. 10, 2014, p. 805.

⁵³ <http://www.oecd.org/tax/transfer-pricing/discussion-draft-transfer-pricing-documentation.htm>

organisations. First of all they state that the CbC-reporting is highly necessary for the BEPS action plans. They say that this makes it possible for the tax authorities to make sure ‘that profits are taxed where economic activities occur and value is created’. What is worth noting is that BMG thinks that this does not only concern the area of TP but the BEPS Action plans as a whole. Subsequently it is stated that the CbC-reporting should be a part of the commentary to article 7 and 9 of the model treaty.⁵⁴ The BMG is of the opinion that there are no specific reasons as to why the information in the CbC-report should not be made public. The fact that the information in question would be provided to the public would not affect MNEs competitive situation. They state that the only reason for keeping it confidential would be commercial confidentiality. They do argue for a wider transparency, which would make the whole idea of CbC-reporting more efficient.⁵⁵

The BIAC Tax Committee⁵⁶ advocate the importance of transparency between the authorities to be able to fulfil the goals set out in Action plan 13. Since the CbC-reporting consists of sensitive or confidential information, it is of big importance that the tax authorities keep the information confidential. According to BIAC the confidentiality is the corner stone to both be able to protect the taxpayer and at the same time increase transparency between the tax authorities. Accordingly this would work best if the information were to be provided to national tax administration and then exchanged to other authorities under the condition of confidentiality.⁵⁷

2.9 Summary

This chapter has explored the basics for the area of TP and TPD. By introducing the function of the TP rules and documentation requirements it is easier to understand the role of Action plan 13 and the CbC-reporting. As seen in this chapter, both EU, through the EU joint Transfer Pricing Forum, and the OECD are working with and giving guidance concerning the area of TP. The guidelines give the MNEs guidance on how to set a price consistent with the arm’s length principle. What is the most relevant in this thesis is chapter V and the guidance on TPD. The OECD has, in chapter V, provided for a list (non exhaustive) on what should be included in the documentation of a MNE.

⁵⁴ BEPS Monitoring Group, Response to OECD Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting, p. 1.

⁵⁵ Ibid. p. 2.

⁵⁶ The Business and Industry Advisory Committee to the OECD.

⁵⁷ Discussion Draft on Transfer Pricing Documentation and CbC Reporting Public comments received, OECD, 23 February 2014, p. 2 (p.98)

Action plan 13 was introduced as a part of the BEPS-project to facilitate for the tax authorities in their exchange of information, by the obligation on the MNEs to provide for all the relevant information to all the relevant governments. The guidance and the implementation package play an important part in the implementation of the CbC-reporting by the domestic jurisdictions. By the introduction of the XML schema the exchange of information will be standardised.

Confidentiality is advocated through Action plan 13 by the OECD. By presenting different commentaries on Action plan 13 and mainly introducing the discussion on whether the CbC-reports should be made public demonstrates the existence of a conflict in this question. Therefore, the next chapter will provide for the discussion and the argumentation on public disclosure of CbC-reporting and why it would be necessary for the ability to fulfil the purpose of Action plan 13.

3 Public disclosure

3.1 Introduction

It has been discussed, mainly by NGOs, whether the information filed in the CbC-reporting, should be made public or if it should follow the criteria of confidentiality as set out by the OECD in Action plan 13.⁵⁸ This chapter will provide for the argumentation for public disclosure as a step to analyse whether the CbC-reporting should be kept confidential in the future.

As mentioned before transparency plays an important role in the BEPS-project and particularly when it comes to CbC-reporting. Transparency is of importance when combating tax avoidance.⁵⁹ The lack of transparency has led to a less open relationship between the tax authorities and the MNEs, which has led to wrongful transfer price being set without the tax authorities being aware of it.⁶⁰ With MNEs being transparent, through the CbC-reports, the tax authorities can simplify the analysis of potential TP risks. On the other hand the information reported through the CbC-report can be sensitive and can easily be spread. The risks are increasing due to the fact that the information is being sent to different tax authorities worldwide, keeping information confidential can hence be a difficult task.⁶¹

The OECD argues in favour of keeping the reported information confidential to protect the taxpayer from the expose of sensitive information. On the other hand there is NGOs and The European Commission that thinks that the only way to fulfil the aim of Action plan 13 is to increase the tax transparency and make the CbC-reports public.⁶² After 31 countries had signed the MCAA in January the European Commission introduced an Anti-Tax Avoidance Package, which is intended to implement a corresponding CbC-reporting between the Member states of the EU. What differs from CbC-reporting by the OECD is that the European Commission is proposing publication of the information reported.⁶³ The

⁵⁸ Blank, D. Joshua, *Reconsidering Corporate Tax privacy*, Law & Economics Paper Series working paper no. 14-37, p. 105.

⁵⁹ Joint civil society, *Why public Country-by-Country Reporting for Large Multinationals is a Must* – Questions and answers, 2016, p. 3.

⁶⁰ Glansberg, Roberth, *Vägledning för internprissättningsdokumentation och land för land-rapportering*, Svensk Skattetidning vol. 10, 2014, p. 794

⁶¹ Hultqvist, Anders, *Kommentar till Action 13 – TP-dokumentation*, Svensk Skattetidning vol. 10, 2014, p. 805.

⁶² European Parliament resolution of 8 July 2015 on tax avoidance and tax evasion as challenges for governance, social protection and development in developing countries (2015/2058(INI)), para 7. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0265+0+DOC+PDF+V0//EN>

⁶³ Tax Insights from Transfer Pricing (PwC), 31-country agreement will effectuate exchanges of CbC-reports, p. 2 & 3.

question that will be answered in this chapter is whether it is worth to increase the transparency to combat aggressive transfer pricing practices, where MNEs pay little tax or no tax at all, and at the same time risk that sensitive financial information is being disposed to the public?

3.2 Public - Arguments

NGOs are advocating public CbC-reporting and have jointly published a report on the necessity of a public CbC-reporting. The Joint Civil Society has in its report discussed and answered questions on why public CbC-reporting for large MNEs is a must.⁶⁴ Due to the fact that all entities inside a group are being taxed individually it is problematic to sort out what is occurring in each part of the enterprise.⁶⁵

To make the information public is not only important to assess TP risks but would also result in other positive effects. For example it could have an impact on governments' tax policies. By making the CbC-report public the tax authorities could easier identify risks of corruption since the tax authorities can have an overall picture of the entities.⁶⁶

Making the CbC-reporting public could increase the number of people that can assess possible TP risks. This could be of particular interest for developing countries, especially in the case of a tax administration with limited capacity. With more eyes on the companies the chances to get caught would increase which possibly could work as an incentive for companies to make other decisions.⁶⁷ It can be discussed whether naming and shaming could have an impact on the companies' actions. It would probably not have an effect since the CbC-reporting primarily is a tool to identify risks and not as a tool to fear companies from being publicly shamed. Subsequently an argument for making the reporting public is that it would make the request for the exchange of information more efficient.⁶⁸

It has been argued that there does not exist any specific reasons why the information could not be made public. In other words, will a MNE be affected by the fact that their number of employees and their assets are being exposed to the public? There is some information that should be categorized as sensitive information and therefore be treated as confidential.

⁶⁴ Joint civil society, Why public Country-by-Country Reporting for Large Multinationals is a Must – Questions and answers, 2016.

⁶⁵ Ibid. p. 3.

⁶⁶ Ibid. p. 4.

⁶⁷ Ibid. p 5 & 6

⁶⁸ Blank, D. Joshua, *Reconsidering Corporate Tax privacy*, Law & Economics Paper Series working paper no. 14-37, p. 106.

What is being said is that the information needed to realize a risk assessment is not automatically going to harm the MNE when it is being published.⁶⁹

Another argument for public disclosure of the reported information is that it could help the tax authorities in assessing TP risks. On the other hand the information would not only be available to the tax authorities, but also other companies (the civil society), which could increase the risks of inappropriate use. To argue for confidentiality by showing the risks for inappropriate use is not going to last in the long run. This is because that type of argumentation could be used in all kinds of situations, and for information that is already required by the tax authorities.⁷⁰

Yariv Brauner proposed in his article⁷¹ that the CbC-reporting should be made public and that it would be the only way to increase transparency, which is the underlying purpose of Action plan 13 and the whole BEPS project. He is arguing, that without public disclosure the CbC-reporting would be ineffective. Brauner is stating that the most used argument for confidentiality is the risk of leakage of key intangible information. However, the discussion draft does not state these kinds of concerns, instead it expresses concern for the spread of “confidential information”. He is arguing that the OECD is not clear enough in its definition of what could be seen as sensitive information. What should be protected under the provisions of confidentiality are trade secrets and scientific secrets.⁷² The article is introducing an argument that the CbC-reporting, instead of being Action plan 13, could be a part of Action 11. This is due to the fact that it is not only the area of TP that could use this kind of reporting.⁷³

3.3 Transparency

Transparency is the basis for a more open environment amongst taxpayers and will potentially secure that the right tax is being paid. Transparency is also one of the leading words in the BEPS project and particularly concerning Action plan 13. With increased transparency the tax authorities can easier exchange information and in that way assess potential TP risks.⁷⁴ Transparency and the exchange of information is based on three fundamental elements; availability, appropriate access and existence of

⁶⁹ Discussion Draft on Transfer Pricing Documentation and CbC Reporting Public comments received, OECD, 23 February 2014, p. 164.

⁷⁰ Devereux, Michael, *Transparency in reporting financial data by multinational corporations*, Centre for business taxation, 2011 p. 31 & 32.

⁷¹ Brauner, Yariv, *What the BEPS*, Florida Tax review, vol. 16 no. 2, 2014.

⁷² Ibid. p. 106.

⁷³ Ibid. p. 105.

⁷⁴ OECD (2011), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions, Second Edition*, OECD Publishing, p. 9.

information. These are all necessary for an effective exchange of information.⁷⁵

The work for increased transparency is being exercised both by the OECD but also at the EU level, through the European Commission. The same problem is faced at both levels and the EU is following the path of OECD and the G20. However, EU still plays its own role in protecting the single market.⁷⁶

3.3.1 Tax Transparency Package

In March 2015 the European Commission presented a tax transparency package as a part of their work to combat tax avoidance and aggressive tax planning. Transparency is the key element in making that possible. The lack of transparency could possibly lead to abusive tax practices due to the fact that the tax authorities lack the information needed to prevent it. The European Commission advocates the increase of transparency as the ultimate tool. One of the important parts in the Tax transparency package is the suggestion of the introduction of the automatic exchange of information between Member States.⁷⁷

In January 2016 the European Commission presented an Anti-tax avoidance package and as a part of that came an agreement on the automatic exchange of information on CbC-reports. Transparency is the keyword in the Commissions work to combat tax avoidance and aggressive tax planning.⁷⁸ The purpose of the Anti-tax avoidance package is to make sure that the tax is being paid where the value is generated, by setting out a minimum level of protection.⁷⁹

3.3.2 Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum on Transparency and Exchange of Information for Tax Purposes, The Global Forum, is a multilateral body active in the area of exchange of information. The Global forum has been working towards increased transparency, taking their starting point from three aspects. First of all, the automatic exchange of information has been adopted by more

⁷⁵ OECD (2011), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, Second Edition, OECD Publishing, p. 23.

⁷⁶ Communication from the Commission to the European Parliament and the Council – Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU, p. 4-5.

⁷⁷ http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm

⁷⁸ European Commission, Tax Transparency: Commission welcomes agreement reached by Member states for the automatic exchange of information on country-by-country reports (CbCR) of multinational companies, subject to UK scrutiny, Brussels, 2016.

⁷⁹ Communication from the Commission to the European Parliament and the Council – Anti Tax Avoidance Package: Next Steps towards delivering effective taxation and greater tax transparency in the EU, p. 8-9.

than 96 jurisdictions (in 2015). Second, the standards on the exchange of information on request have been reviewed and improved.⁸⁰ Lastly, a step has been taken towards integrating the developing countries into the system of the exchange of information.⁸¹ Their aim is to assist the domestic jurisdictions in implementing transparency and exchange of information standards.⁸²

3.4 Summary

This chapter has introduced the argumentation for public disclosure of the CbC-reports as the only way to increase transparency and subsequently fulfil the aim of Action plan 13. The commentaries to Action 13 gives substance to the argumentation on public CbC-reports, but the question is whether the argumentation is strong enough and can prove enough benefits? (See below in chapter 5). It is clear that increased transparency is the way to combat BEPS. EU has introduced its tax transparency package as a step to increase transparency and to combat tax avoidance and aggressive tax planning. There is also the Global Forum that is working towards a more open tax society through the exchange of information.

Since this chapter have provided for the argumentation on making the CbC-reports public the next chapter will demonstrate the work done by the OECD to secure confidentiality in general. This is provided for to show why the OECD also is advocating confidentiality concerning the CbC-reporting.

⁸⁰ OECD, Tax Transparency 2015, Global Forum on Transparency and Exchange of Information for Tax Purposes, p. 9.

⁸¹ Ibid. p. 10.

⁸² OECD (2011), *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions*, Second Edition, OECD Publishing, p. 7. <http://dx.doi.org/10.1787/9789264110496-en>

4 Confidentiality in general

4.1 Introduction

This chapter will provide for confidentiality provisions in general when it comes to the exchange of information. These are so called exchange of information instruments that both at domestic level and at international level have provisions that can protect taxpayers in situations of exchange of information. They all provide for similar protection but in different ways. They can be a set of tools that together can maintain confidentiality. This is another proof that the OECD advocates confidentiality and that they continue on the work of keeping the taxpayers protected from their information being exposed.

What the OECD has been defined as sensitive information is not particularly clear. The sensitive information can for example be the MNEs overview of their business or allocation of income. Since the information will be spread around the world through the tax administrations there is a risk that the information will be made public or partly public. The taxpayer should be protected by confidentiality, but there is always the risk that the tax authorities fail in fulfilling those criteria, even though it might be unintentional.⁸³

4.2 OECD Guide on confidentiality

The OECD has in its guide on protection of confidentiality, *Keeping it safe*, provided for guidelines in the exchange of information for tax purposes. Accordingly, both taxpayers and the tax authorities have the right to be ascertained confidentiality in the event of exchange of information. The information should always be exchanged in line with the agreement that exists between the parties. It is up to the national jurisdiction to provide for the protection of confidentiality.⁸⁴ The guidance provides for how confidentiality could be protected at domestic level, by the tax authorities. Subsequently it also provides for the use of different exchange of information instruments.⁸⁵

4.2.1 Article 26 OECD Model tax convention

The Model tax convention provides for the exchange of the *foreseeably relevant* information between the competent authorities. Article 26 works as

⁸³ Hultqvist, Anders, *Kommentar till Action 13 – TP-dokumentation*, Svensk Skattetidning vol. 10, 2014, p. 805

⁸⁴ OECD, *Keeping it safe, The OECD Guide on the protection of confidentiality of information exchanged for tax purposes*, 2012, p. 5.

⁸⁵ *Ibid.* p. 6.

an instrument to facilitate the cooperation between the tax authorities in a way that at the same time protects the taxpayer.⁸⁶ Subsequently, the information should be kept secret and shall only be disclosed to the authorities involved. The information shall be treated in the same way as under the domestic jurisdiction of the receiving state. The only exception would be in the case of a public court proceeding or similar.⁸⁷ As long as there does not exist any express provision in the bilateral treaty the information can never be revealed to a third country.⁸⁸

4.2.1 Article 8 TIEA

The Agreement on the exchange of information on tax matters works as an instrument to increase the cooperation between the tax authorities and was developed by the OECD Global Forum Working Group on Effective Exchange of Information. The Agreement is not binding, but is a multilateral instrument and model agreement.⁸⁹ Article 8 provides for confidentiality and states that all the information exchanged under the agreement shall be treated as confidential, and can only be exchanged between the relevant authorities. The information can be made public in situations such as court proceedings.

4.2.2 Article 22 The Multilateral Convention on Mutual Administrative Assistance

The Multilateral convention was instigated in 1988 to encourage international cooperation between the national jurisdictions and at the same time protect the rights of the taxpayers. The convention was amended in 2010 and entered into force in July 2011. The convention can be seen as a global instrument to increase cooperation between the countries concerning tax matters and as a tool to combat offshore tax avoidance.⁹⁰ This convention applies to all types of exchange of information that is *foreseeably relevant*. Due to the fact that the convention is a multilateral instrument it opens up for the cooperation also with a third country. There are five types of exchange of information situations caught under the convention; exchange of information on request, automatic exchange of information, spontaneous exchange of information, simultaneous exchange of information and tax examinations abroad.⁹¹

⁸⁶ Article 26 para. 1 OECD Model Tax Convention (2014).

⁸⁷ Article 26 para. 2 OECD Model Tax Convention (2014).

⁸⁸ OECD, *Keeping it safe, The OECD Guide on the protection of confidentiality of information exchanged for tax purposes*, 2012, p. 9.

⁸⁹ OECD, Agreement on Exchange of Information on Tax Matters, Introduction.

⁹⁰ Pross, Achim, Russo, Rafaele, *The Amended Convention on Mutual Administrative Assistance in Tax Matters: A powerful Tool to counter Tax Avoidance and Evasion*, Bulletin For International Taxation, July 2012, p. 361.

⁹¹ Ibid. p. 362.

Article 22 provides for *secrecy* of the information exchanged in the same way, as it should have been under the domestic jurisdiction.⁹² The information may only be disposed to the parties concerned, except for in the case of public court proceedings or similar.⁹³ The information provided for may be used for other aims if they could be used for that particular aim under the domestic law of the supplying party.⁹⁴ Both tax authorities, in a case of exchange of information, must safeguard confidentiality, which means that the information obtained under the provisions of the convention is to be protected as secret information. The information exchanged can be used for other purposes, but only if it could be used for that kind of purpose under the domestic law of the supplying party.⁹⁵

4.3 Domestic legislation

To be able to protect the taxpayer from the information being exposed, the national laws needs to have provisions in place providing for confidentiality. There should also exist penalties for those who do not apply with the rules concerning confidentiality. The domestic jurisdiction can implement rules on confidentiality in two different manners. On one hand they can implement a law to fulfil the criteria for confidentiality under the treaty, which includes amending of the domestic legislation. On the other hand the domestic jurisdiction can provide for, in the case of conflict between the treaty and the domestic legislation, that the treaty will have precedence.⁹⁶ As long as the information exchanged is protected under the domestic legislation it is up to the domestic jurisdiction how.

4.4 Summary

The exchange of information tools all have the same purpose, which is to protect confidentiality and secrecy of the information exchanged. The Multilateral convention and the Model convention is both referring to the domestic legislation and that the information must be kept confidential in the same way as under domestic legislation.⁹⁷ When it comes to the TIEA there is no explicit reference to the domestic legislation, but instead only that the information should be kept confidential.

⁹² The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Article 22 para. 1.

⁹³ The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Article 22 para. 2.

⁹⁴ The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Article 22 para. 4.

⁹⁵ Pross, Achim, Russo, Rafaele, The Amended Convention on Mutual Administrative Assistance in Tax Matters: A powerful Tool to counter Tax Avoidance and Evasion, Bulletin For International Taxation, July 2012, p. 364.

⁹⁶ OECD, *Keeping it safe, The OECD Guide on the protection of confidentiality of information exchanged for tax purposes*, 2012, p. 11.

⁹⁷ Article 22 The Multilateral Convention on Mutual Administrative Assistance in Tax Matters and Article 26 OECD Model Tax Convention (2014).

Regarding both the Multilateral convention and the TIEA the provisions concerning confidentiality make it possible for the information to be used by other parties, but only with the consent from the authority of the requested party.⁹⁸ Concerning the Model convention it is stated that the information only can be disclosed to the authorities concerned.⁹⁹ Even though they differ in some aspects they still have the same aim and there are no practical distinctions in the outcome.

⁹⁸ OECD, Agreement on Exchange of Information on Tax Matters, Article 8.

⁹⁹ Article 26 para. 2 OECD Model Tax Convention (2014).

5 Analysis

5.1 Introduction

This analysis will be divided into different parts and will discuss different aspects of Action plan 13 and the CbC-reporting. First of all the CbC-reporting will be analysed and the writer will discuss whether it is an appropriate tool to combat BEPS. Also it will be discussed whether transparency is the key in the work to combat BEPS. After that, Action plan 13 will be discussed in the light of confidentiality. By demonstrating OECDs work to protect confidentiality in general gives an idea why they are advocating confidentiality concerning the CbC-reports. Further on, a discussion will be held whether the CbC-reports should be made public and if that is the only way to fulfil the purpose of Action plan 13.

When discussing Action plan 13 and the CbC-reporting and specifically its purpose there should be made a distinction between the two. The purpose of Action plan 13 is to re-examine the TPD rules by introducing a three-tiered approach including the local file, the master file and the CbC-reporting. The purpose with the CbC-reporting is to increase transparency for the tax authorities and in that way assess potential TP risks. Although, in some cases it might be presented for the fact the purpose of the whole Action plan 13 is to increase transparency, which might be incorrect to say due to the fact that it is the CbC-reporting that will open up for a wider cooperation between the countries. Instead it could be that it is the purpose of the CbC-reporting alone.

5.2 Action 13 as a tool to combat BEPS

First of all Action plan 13 is aiming at making the TPD transparent and in that way make it possible to assess potential TP risks. All the relevant information will be provided to all relevant governments.¹⁰⁰ By facilitating for the tax authorities in their exchange of information with other countries this action plan could potentially be a successful tool to combat BEPS. On the other hand Action plan 13 has been criticized as not being proper to combat international profit shifting. Instead international profit shifting could be fought by a development of both national and international tax rules. The fact that MNEs are finding shortcuts in the international tax law does not necessarily mean that they are illegal. One of the arguments against the CbC-reporting is the fact that it will not counteract MNEs from engaging in profit shifting. Another argument is that the costs, that comes

¹⁰⁰ OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 37.

with the CbC-reporting, will surpass the potential benefits.¹⁰¹ To sum up there is both an existing administrative/cost issue and a more technical issue.

When discussing benefits and costs concerning the CbC-reporting the general view is that if the CbC-reporting were to be successful the benefits would be bigger than the costs. On the other hand, if Action plan 13 is not suitable to combat international profit shifting and will end up with both the costs and an unsuccessfully combat of BEPS. The costs will also be affected by whether the CbC-reporting is going to be public or only be accessible to the tax authorities.¹⁰² In this case, with increased costs due to public disclosure, it has to be considered whether the public disclosure actually is going to lead to a better result than keeping the reports confidential. If the purpose of Action plan 13 will be fulfilled in a more efficient way then increased costs are appropriate. That is what it is all about; the benefits have to exceed the costs. Otherwise it is not an efficient tool to combat base erosion and profit shifting. This discussion will lead to the discussion whether public disclosure is a must to increase transparency and it that way fulfil the purpose of Action plan 13 which will be discussed in 5.4.

What actually is the appropriate tool to combat BEPS is increased transparency. This can be done by giving the tax authorities the overtake over the MNEs when it comes to the collection of information.¹⁰³ If the tax authorities can obtain the information normally only available to the MNEs it is possible to create a more fair balance between the two parties. This also leads to the discussion on whether the CbC-reporting should be made public in the way that public CbC-reporting is advocated on the basis that it is the only way to increase transparency and fulfil the aim of this type of reporting at all. (See. 5.4) Therefore it is probably more correct to discuss whether transparency is the appropriate tool to combat BEPS. With increased transparency for the tax authorities, by the collection of information concerning the MNEs, it will be easier to create an overall picture of a MNE and all its entities, which appears to be the goal with having CbC-reports.

If Action plan 13 is considered an appropriate tool to combat BEPS it has to be considered whether it is proportionate. It should be a fair balance between the burdens put on the MNE and the aims of the tax authorities. Ideally it should not be added any redundant costs either on the MNEs or the tax authorities in filing the CbC-reports. If that is the case then it should

¹⁰¹ Evers, Maria Theresia & Meier, Ina & Spengel, Christoph: *Transparency in financial reporting: is country-by-country reporting suitable to combat international profit shifting?* Bulletin for International Taxation, Journals IBFD, 2014, p. 295-296.

¹⁰² Evers, Maria Theresia & Meier, Ina & Spengel, Christoph: *Transparency in financial reporting: is country-by-country reporting suitable to combat international profit shifting?*, Bulletin for International Taxation, Journals IBFD, 2014, p. 300-301.

¹⁰³ Ting, Antony, Discussion Draft on Transfer Pricing Documentation and CbC Reporting Public comments received, OECD, 23 February 2014, p. 66.

be regarded as proportionate.¹⁰⁴ As been discussed above, if the benefits exceed the costs it should be seen as proportionate.

As a side note, Brauner proposed in his article that Action plan 13 instead could be a part of action plan 11, concerning measuring and monitoring BEPS.¹⁰⁵ He has a point in the fact that the issues concerned in Action plan 13 also is relevant for other areas, and not only TP. Transparency is something that shines through the whole BEPS project and maybe therefore it could be appropriate to be a part of Action 11 that has a more general approach towards transparency.

5.3 Action 13 in the light of confidentiality

The OECD is advocating confidentiality in general and the fact that they do so as well concerning Action plan 13 proves that it is one of the cornerstones in their work to combat BEPS. The OECD advocates transparency but at the same time they give protection to the taxpayers in the form of guidance concerning the implementation of confidentiality provisions.¹⁰⁶ The guidelines and the implementing package provides for guidance on provisions on confidentiality, which means that the taxpayer should be protected in the same manner as under any equivalent treaty. This could be read as that the aim, according to the OECD, of Action plan 13 is not to publicly dispose any information but instead to assist the tax authorities in assessing potential TP risks.¹⁰⁷ Accordingly, is it worth fulfilling the purpose of action plan 13 and at the same time risk that sensitive information is being disposed to the public?

Before it can be argued whether there exist enough tools for the protection of confidentiality some other question marks needs to be considered. It has been presented for the fact that the OECD is not that clear in its definition of what is confidential information.¹⁰⁸ What can be discussed is how the OECD is to protect the taxpayer's confidentiality and the sensitive information when it is not clear what kind of information that is actually ought to be protected. It has to be made clear in the guidelines and in the implementation package what is meant with confidential information. Since the CbC-reporting is to be implemented by the domestic jurisdictions they will need as much guidance from the OECD as possible to facilitate the implementation of confidentiality provisions. As proposed by Brauner, the information that should be protected by the confidentiality provisions is

¹⁰⁴ Amparo Grau Ruiz, María, *Country-by-Country Reporting: The Primary Concerns Raised by a Dynamic Approach*, Bulletin For International Taxation, October 2014, p. 561.

¹⁰⁵ Brauner, Yariv, What the BEPS, Florida Tax review, vol. 16 no. 2, 2014, p. 105.

¹⁰⁶ OECD, *Keeping it safe, The OECD Guide on the protection of confidentiality of information exchanged for tax purposes*, 2012.

¹⁰⁷ OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 37.

¹⁰⁸ See Brauner.

trade secrets and scientific secrets.¹⁰⁹ If that is what the OECD is intended to protect by including confidentiality provisions in the CbC-reporting they should be clear that that is what they are actually aiming for.

In the guidance to Transfer Pricing and CbC-reporting sensitive information is defined as trade secrets and scientific secrets, but also “other commercially sensitive information”. When it comes to the guidance on the implementation of the CbC-reporting and the implementation package there does not exist any specific definition of sensitive information. To know what is “other commercially sensitive information” can therefore be difficult. On the other hand, all the information reported by the MNEs should be kept confidential and not disclosed to the public.¹¹⁰

After discussing what information that actually is intended to be included and protected by the confidentiality provisions, it is possible to discuss the first question, whether there exist enough tools to protect confidentiality. The OECD obliges the Member states to implement provisions concerning confidentiality and they are clear in the way that there must exist provisions that are at least equivalent to a MCAA, TIEA or tax treaties.¹¹¹ This should give enough guidance for the Member states how to design the provisions for confidentiality. To answer the question, it must be stated that there do exist enough tools to protect confidentiality. With the OECD guide *keeping it safe* the OECD is giving the taxpayers and the tax authorities an extensive guide on how to protect confidentiality concerning the exchange of information. On the other hand it was presented in 2012 and it could therefore be relevant to update the guide due to the implementation of the CbC-reporting. When it comes to the exchange of information between the tax authorities there is a need for an updated guidance on how to be able to protect the information reported and exchanged through the CbC-reporting. Even though the information probably will be protected in the same manner as in 2012, updating this kind of guidelines would be a statement of the OECD that they advocate confidentiality.

Talking about the OECDs work as tools to protect confidentiality might not be the right term to use. Indirectly they tools that the countries can use, but should instead be called guidelines or standards for the implementation of confidentiality provisions. In *keeping it safe* the author is talking about exchange of information *instruments* that are provisions protecting

¹⁰⁹ Brauner, Yariy, What the BEPS, Florida Tax review, vol. 16 no. 2, 2014, p. 106.

¹¹⁰ OECD (2014), *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 24.

¹¹¹ Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting, OECD, 2015, p. 5 para. 13.

confidentiality in the case of exchange of information.¹¹² Because of the existence of several exchange of information Instruments a question can be which instrument has precedence and whether they can exist in parallel. For example if the Multilateral Convention is applied it is still possible to apply another instrument. It is then up to the tax authority of the applicant state to decide which instrument provides for the most effective assistance. When it comes to a country both member of the OECD and the EU it will only apply the Multilateral Convention if it is providing for a wider cooperation than the one under the EU-instrument.¹¹³

5.4 Public vs. confidential

The main purpose of the CbC-reporting is to facilitate for the tax authorities in assessing TP risks through the exchange of information. The information reported to the authorities by the MNEs is information necessary to create an overview over the MNEs activities and entities. It is then up to the authorities to use the information collected to assess potential risks.¹¹⁴ This is the underlying aim of action plan 13 and the question is whether public CbC-reporting could have an effect on the outcome? Would an implementation of public CbC-reporting go further than the aim of Action plan 13? (See 5.4.2)

There are existing argumentation that there are no particular reasons why the CbC-reporting should *not* be made public. On the other hand it can be discussed if there is any good argumentation for public disclosure. If the MNEs do not have anything to hide than they should not have any problems with publicly dispose the information requested. However, this is information that can potentially be sensitive and that could damage the MNE in question. This is information that is actually only relevant for the tax authorities, but could easily end up in the wrong hands, if made public. It could be interesting for other companies or tax havens to take part of this type of information and this is a potential risk for the MNE with the information published.

It is not that clear what the actual benefits to publicly dispose the reported information are.¹¹⁵ The argumentation, mostly held by NGOs, is based on increased transparency and that public disclosure is the only way to reach that. With an existing “threat” of making information public could possibly

¹¹² OECD, *Keeping it safe, The OECD Guide on the protection of confidentiality of information exchanged for tax purposes*, 2012, p. 7.

¹¹³ Pross, Achim, Russo, Rafaele, *The Amended Convention on Mutual Administrative Assistance in Tax Matters: A powerful Tool to counter Tax Avoidance and Evasion*, Bulletin For International Taxation, July 2012, p. 365.

¹¹⁴ OECD/G20 BEPS Project, 2015 final reports, Executive Summaries, p. 37.

¹¹⁵ Evers, Maria Theresia & Meier, Ina & Spengel, Christoph: *Transparency in financial reporting: is country-by-country reporting suitable to combat international profit shifting?*, Bulletin for International Taxation, Journals IBFD, 2014, p. 301.

affect MNEs and their way of thinking. On the other hand it can also have the effect that countries choose not to implement the CbC-reporting. There must be such positive effects that it is worth that the information reported could consist of sensitive information. If that was to be the case then making the information public would not be as questioned as it is. At the moment there are not enough convincing reasons as to why the CbC-reports should be made public. If no clear benefits of public disclosure are provided for it is difficult to determine whether the benefits will exceed the increased costs.

The main argument for making the CbC-reporting public is to increase transparency and in that way facilitate in finding MNEs that are not paying the tax that they are supposed to. Subsequently, the information could also have other positive affects, which are not particularly convincing. What is argued for is for example that publication of this kind of information could locate situations of corruption. As mentioned in 5.2, transparency is actually the key tool appropriate to combat BEPS. Although, this does not mean that the reports need to be made public. What was discussed in that chapter was the fact that by giving the tax authorities overtake they could obtain information that would help them assess potential risks. This demonstrates that it is actually only the tax authorities to whom the information should be available and not the public.

5.4.1 Does public disclosure go further than the purpose?

By analysing the arguments for public disclosure it is difficult to determine whether the benefits actually would exceed the costs or if it actually goes further than the purpose of Action plan 13. Will the effects of a public CbC-reporting improve the fulfilment of assessing TP risks or is it redundant. The purpose is to enhance transparency for the tax authorities, and how will making the reports public fulfil that purpose?

According to Brauner, public disclosure is necessary for the existence of the CbC-reporting.¹¹⁶ Making the reporting public would increase the number of people that will have insight in an entity's business and transactions, which could facilitate assessing any potential risks. This is especially important in developing countries, and in this type of situation it might be necessary to make the reporting public.¹¹⁷ When this is not the case it might go beyond the purpose, therefore it does not exist any reasons as to why it should be made public.

If the CbC-reporting were to be made public changes will have to be made in both the guidelines and implementation package. They are now advocating confidentiality and would still have to do so but in a different

¹¹⁶ Brauner, Yariy, What the BEPS, Florida Tax review, vol. 16 no. 2, 2014, p. 105-106.

¹¹⁷ Joint civil society, Why public Country-by-Country Reporting for Large Multinationals is a Must – Questions and answers, 2016, p 5 & 6.

manner. No one still knows how the potential public disclosure would look like. In other words, would there be exemptions for information that will not be made public due to risk of damage for a specific MNE. There does still exist question marks on the actual functioning of the public disclosure.

Making the CbC-reports public could be seen as going outside the main purpose of action plan 13, namely assessing TP risks. Transparency is important for the BEPS project as a whole but by making the CbC-reporting public would not fulfil the aims set out under Action 13.

5.4.2 Possible effects of public disclosure

The main negative effect of making the CbC-reporting public is the spread of potential sensitive information, such as trade secrets and scientific secrets. Information about MNEs organizational structure would then be available to competitors, and this is information that typically would not be available to them. One of the risks with introducing an obligation to publicly dispose this type of information could potentially affect a MNEs willingness to participate in the BEPS project at all.¹¹⁸ It is possible that some entities would try to find ways so that they do not have to file the CbC-report. One of the effects of public disclosure could lead to an overload of information.

If there are not strong enough reasons to publicly dispose some type of information it should be kept confidential. The question you have to ask is whether the fact that the reports being public is going to have an effect on the work to combat BEPS or if it just going to be a burden on the tax authorities and the taxpayers.

A problem with publicly dispose the reported, potential sensitive information, is the fact that not all MNEs are obliged to file the CbC-reporting, which would be a disadvantage for the MNEs that actually are obliged to. In this way one company could take part of other companies' information without the obligation to provide for any such information itself.¹¹⁹

5.5 Can the EU go further than the OECD?

The question is whether the EU can go further than the OECD and if they are already doing that? OECD provides for confidentiality in action plan 13, but as mentioned before, they are only guidelines. This means that there is nothing preventing the EU from going further than the OECD and provide for a public CbC-reporting. In March 2015 The Commission launched its tax transparency package, where they provided for an increasing

¹¹⁸ Blank, D. Joshua, *Reconsidering Corporate Tax privacy*, Law & Economics Paper Series working paper no. 14-37, p. 107-108.

¹¹⁹ Evers, Maria Theresia & Meier, Ina & Spengel, Christoph: *Transparency in financial reporting: is country-by-country reporting suitable to combat international profit shifting?*, Bulletin for International Taxation, Journals IBFD, 2014, p. 301.

transparency that goes further than those provided for by OECD under the BEPS Action plans.¹²⁰ There is an existing example of the fact that the EU has gone further than the OECD. This is demonstrated in the Capital Requirements Directive IV, which provides for a public CbC-reporting for the banking sector.¹²¹

Both at EU and OECD level exists the work to combat BEPS. EU is influenced by the work by the OECD but have at the same time chosen to go further than the OECD regarding some aspects of the TPD. Due to the transparency package introduced by the European Commission EU is aiming at a wider transparency, by giving the proposal on public CbC-reports.¹²²

Even though the EU tends to follow the argumentation of the OECD to a great extent there are still examples of when the EU has chosen to go in another direction. Since the OECDs work mainly are guidelines it is in the end of the day up to for example the European Commission to take the decisions that is affecting the Member states of the EU. By proposing a suggestion on public CbC-reporting the EU is making a statement that clearly is not in line with the work of the OECD.

5.6 Final remark

By analysing Action plan 13 in the light of confidentiality and providing for the argumentation for public CbC-reporting it is now possible to discuss the actual impact of publicity on Action 13. The discussion on publicly disclosing the reports tends to happen outside the OECD and outside the guidelines and recommendations. It is the NGOs and also the European Commission that is leading the discussion, but it does not really have an effect on the work of the OECD. If the European Commission were to implement the CbC-report as public, through the Anti tax avoidance package, it would probably still not have an effect on either the recommendations or guidelines from the OECD. In that way it is possible to say that one of the results of this thesis is that the argumentation on public disclosure of the CbC-reports is not that important since it would not affect the way in which the Action 13 is outlined and how confidentiality is one of the cornerstones in the work of the OECD.

¹²⁰ http://ec.europa.eu/taxation_customs/taxation/company_tax/transparency/index_en.htm.

¹²¹ Joint civil society, Why public Country-by-Country Reporting for Large Multinationals is a Must – Questions and answers, 2016, p. 13.

¹²² Ibid. p. 13.

6 Conclusion

The purpose of this thesis was to analyse BEPS Action plan 13 in the light of confidentiality. One of the questions asked was whether the CbC-reports should be kept confidential or be disclosed to the public. It is clear throughout OECDs work that they are advocating confidentiality, and also when it comes to CbC-reporting. Action Plan 13 has been introduced as a step to increase transparency and facilitate for the tax authorities in their exchange of information with other countries.

Action plan 13 can be seen as a tool to combat base erosion and profit shifting, but the benefits have to exceed the costs that comes with the administrative burden for filing the reports. By making the CbC-reporting public the burden would increase even more. There are not any strong reasons as to why the reports should be made public and it would probably go beyond the actual purpose of Action plan 13. The actual purpose is to facilitate for the tax authorities and they are the only ones who should be able to take part of the information reported. It is not necessary for the public to receive the information in question to be able to fulfil the aim of Action 13. If that were to be the case, then public disclosure could be appropriate, but at the moment it is not. Also, public disclosure would not change the behaviour of the MNEs; it will always be possible to find potential loopholes. Making the TP rules tougher does not mean that the tax aggressive behaviour is going to change. This is an overall argument for not making the Cbc-report public. At the moment the Member States of the OECD have agreed to follow the conditions of confidentiality and provide for provisions concerning the protection of sensitive information. Although, since the EU can go further than the OECD, we will have to wait and see if the reported information potentially could be made public in the near future, at least concerning the EU member states.

Transparency is the key word in the work to combat BEPS and with the MNEs providing the relevant information to all the relevant governments; the authorities can easier cooperate and create an overall picture of the MNEs. On paper Action plan 13 is an appropriate tool to combat BEPS and could possibly increase the transparency between the different countries through the exchange of information between the relevant authorities. The future will tell how the plan actually is going to work in practice, which will be easier to discuss when a majority of the countries actually have implemented the CbC-reporting. In 2020 there will be a review on the BEPS project and especially Action plan 13 and the CbC-reporting.

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