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debt and development



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International



# Why Public Country-by-Country Reporting for Large Multinationals is a Must

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*Questions and Answers*

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## Questions

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## Introduction

Abusive tax planning by transnational enterprises is a global problem. A major part of global cross-border trade happens between related parties in a transnational enterprise and almost 1/3 of global corporate investment stocks passes through offshore investment hubs.<sup>1</sup> This type of trade is susceptible to abusive exploitation of gaps and loopholes in domestic and international tax law that allow for 'profit shifting' from country to country, with the intention of reducing the taxes paid on profits.

A lack of transparency makes this kind of tax planning difficult to quantify. Enhancing transparency in the way transnational enterprises report and publish their accounts, would help tackle tax avoidance at very low cost.

Despite publishing their accounts as if they are unified entities, transnational enterprises are not taxed in this way. Each business entity within the transnational enterprise is taxed individually, making it difficult to establish an overview of what is happening within a group of companies for tax purposes. This would be different if reporting was done on a 'country-by-country' basis.

The European Parliament's JURI committee is currently discussing a compromise proposal that would bring an existing country by country reporting (CBCR) obligation for large financial institutions to transnational enterprises in all sectors. This measure would require companies that qualify under the criteria to report yearly and on a consolidated basis on the following items, among others: 1. the name(s) and nature of their activities in each jurisdiction where they operate, 2. the turnover, 3. profit or loss before tax, 4. tax on profit or loss, 5. number of employees and 6. public subsidies received.

If adopted, this measure would strengthen efforts by tax authorities, investors, journalists and concerned citizens around the world to better assess the risks related to tax payments, world trade flows, corporate governance, and even corrupt practices of transnational enterprises. However, the political debate on this issue has made it clear that MEPs and other stakeholders have a number of outstanding questions, and we address a range of those in this briefing.

### 1. Is this only important for tax transparency?

**Short answer: No, the information that large transnational enterprises are asked to produce is the bare minimum to be able to conduct a meaningful risk assessment in terms of tax contributions owed in the different jurisdictions of operation. There is, however, a range of other benefits.**

**Long answer:** Fully public country by country reporting (CBCR) would serve a number of functions beyond being a risk identifier for tax dodging.

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<sup>1</sup> <http://investmentpolicyhub.unctad.org/Upload/Documents/FDI%20Tax%20and%20Development.pdf>

Firstly, it would make transparent data that is useful to assess the impact of governments' tax policies. By seeing how company performance changes over time, we would be in a better position to assess the efficacy of government policies, in taxation and other areas. Whilst some government data can be used for such analysis, it is only by seeing corporate data over time that we can really see where the choices for investment, divestment, etc. have been made and how governments' decisions affect corporate actions. The upshot should be more effective policy-making by governments, as well as more informed civil society.

Fully public CBCR could also be an important tool to increase governments' accountability. By creating transparency on all the tax payments of transnational enterprises (not only for corporate income tax), it would allow citizens to keep their governments accountable for the funds they receive from companies. This information is particularly relevant in countries where misappropriation of public funds is a major problem. Public CBCR can help to flag up corruption risks by shedding light on any special arrangements between companies and governments. It can also improve the oversight exercised by authorities. The

Extractive Industries Transparency Initiative (EITI) has clearly shown the demand and usefulness of such information for the extractives sector, and there seems to be no reason why other sectors would be wholly different

CBCR could also include a requirement for transnational enterprises to publish the public subsidies they receive – as is currently the case in the EU for large resource extracting companies and for financial institutions. The aims would be to give citizens the information they need for balanced debate on the contributions of transnational enterprises, and to re-establish public trust that sufficient transparency exists in the wake of massive bank bailouts since the financial crisis that have resulted in sweeping austerity measures for workers, unemployed persons, pensioners and voters to endure.

The CBCR requirements currently cover a bare minimum of data needed to assess a company's tax payments. If a single element is left out, the full scope of a company's operations can be easily distorted. The prime concern should be to make sure that the information needed to see the whole picture is published. Disclosing anything less than the minimum CBCR requirements set out in our proposal will not achieve this.

THE RECENT LUXLEAKS SCANDAL ONCE AGAIN SHOWED THE PUBLIC'S LACK OF TOLERANCE FOR TRANSNATIONAL ENTERPRISES' AGGRESSIVE TAX AVOIDANCE. FULLY PUBLIC CBCR WOULD MEAN THAT TRANSNATIONAL ENTERPRISES HAVE TO BE ABLE TO PUBLICLY DEFEND THEIR TAX PLANNING PRACTICES. MAKING THE REPORTABLE INFORMATION ONLY AVAILABLE TO TAX ADMINISTRATIONS WOULD MEAN THAT THEY ARE ONLY LIKELY TO NEED TO DEFEND THEIR MOST BLATANT SCHEMES. CLEARLY, THE DETERRENT EFFECT AGAINST ENGAGING IN AGGRESSIVE TAX AVOIDANCE IS MORE POWERFUL WHEN THERE IS PUBLIC SCRUTINY.

## 2. Is this only relevant to tax administrations?

**Short answer: No, CBCR serves many functions, which is also why it should not be put in the hands of tax administrations only. Moreover, publishing CBCR reports is most likely cost-beneficial for both transnational enterprises and tax administrations.**

**Long answer:** CBCR reports will provide tax authorities with a global rather than a purely national dataset through which to make comparisons of the behaviour of transnational enterprises in their jurisdictions.

While tax administrations often have highly competent staff when it comes to assessing the tax payments of transnational enterprises, the number of such staff is limited. For example, according to the Organisation for Economic Cooperation and Development (OECD) the Irish tax authority has 201 members of staff in its office for Large Taxpayers, which covers more than 12,000 companies of both domestic and foreign origin.<sup>2</sup> Among these companies, almost 1,000 are foreign transnational enterprises.<sup>3</sup> Even with the best of systems and procedures, it seems unlikely that 201 staff members will be able to effectively scrutinize and assure the accuracy of these companies' tax returns.

Under fully public CBCR, companies would simply publish, file, and record the location of the

information in the online, machine-readable register<sup>4</sup> rather than sending data privately to individual contacts at the tax authorities of each country in which the transnational enterprise operates (or sending to a 'home' tax authority and requiring them to pass it on to the relevant others). This would almost certainly reduce costs for each transnational enterprise in terms of employee time.<sup>5</sup> A recent (2014) poll by PWC of business leaders found 59% in favour of publication<sup>6</sup>, suggesting that there is limited concern about non-trivial additional costs to business.<sup>7</sup>

Public CBCR would also save on time and resources for tax authorities (which would have no role in passing on data) by allowing for a simple query of the data instantly via the register,

rather than their having to record and compile different sets of files sent by various transnational enterprises and other tax authorities.

Making the CBCR reports public would ensure that more sets of eyes, across different stakeholder groups, could help digest the mass of data filed by companies and flag any indicators of risk to appropriate tax authorities. This advantage would be most keenly felt in countries that have weak capacity in their tax administrations, including developing countries.

THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (ICIJ), AND A HOST OF INTERNATIONAL MEDIA ORGANISATIONS FROM LE MONDE AND THE INDIAN EXPRESS TO THE BBC AND CBS BROKE PUBLICLY A LEAK OF DOCUMENTS FROM HSBC'S SWISS BANK, DATING TO 2005-2007.

THE LEAKED 'SWISSLEAKS' DATA PROVIDED PRIVATELY TO (MAINLY EUROPEAN) GOVERNMENTS IN OR AROUND 2010 SIMPLY FAILED, IN DIFFERENT WAYS, TO DELIVER ACCOUNTABLE AND EFFECTIVE TAXATION SYSTEM RESPONSES. SINCE RECEIVING DETAILS OF MORE THAN 1,000 CASES IN 2010, THE UK HAS UNDERTAKEN 1 PROSECUTION.

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<sup>2</sup> <http://www.oecd.org/site/ctpfta/taxadministrationdatabase.htm> - Large taxpayers in Ireland refers to companies with a turnover that exceeds €162 million or tax payments above €16 million

<sup>3</sup> <http://connectireland.com/reasons.aspx>

<sup>4</sup> By way of example, IATI uses the CKAN platform for aid donors to publish their data, which is also used by the UK government for its data.gov.uk website, among others.

<sup>5</sup> [http://www.copenhagenconsensus.com/sites/default/files/iff\\_assessment\\_-\\_cobham\\_0.pdf](http://www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf), p. 25.

<sup>6</sup> <http://andrewgoodallcta.com/2014/04/24/is-pwcs-survey-a-turning-point-in-the-tax-transparency-debate/>

<sup>7</sup> [http://www.copenhagenconsensus.com/sites/default/files/iff\\_assessment\\_-\\_cobham\\_0.pdf](http://www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf), p. 25.

Beyond the advantage of having ‘more eyes’ analyzing the data, public CBCR would have an important deterrent effect. Tax administrations can pursue action against transnational enterprises if they suspect that a company has dodged its tax obligations but, because winning a case against a transnational enterprise can be a long and highly complicated matter, tax administrations prefer to pursue a limited number of cases that they consider they are very likely to win.

A recent survey from the UK shows citizens are infuriated by tax avoidance as they are with tax evasion, with 59% of British respondents agreeing that legal forms of tax avoidance are morally wrong.<sup>8</sup> The challenge for tax administration is the grey zone between illegal tax evasion and quasi-legal tax avoidance. These cases are more difficult to pursue but not less relevant, and public CBCR would bring a lot more transparency to corporate tax regimes across the EU.

### 3. Will transnational enterprises incur an undue cost burden?

**Short answer: No, the costs associated with making CBCR public are “negligible”.**

**Long answer:** It is inevitable that there will be some modest costs incurred by transnational enterprises to prepare data for CBCR, but this should not be overstated.

Her Majesty’s Revenues & Customs (HMRC) in the United Kingdom did an assessment of the implementation costs for businesses of CBCR and found that *“one-off costs are estimated as negligible, with annual costs to businesses affected by the measure of £0.2million”*.<sup>9</sup> These are not significant costs for most transnational enterprises and rate as insignificant when compared to the likely benefits of increased transparency.

The low costs reflect the reality that any competent tax director of a transnational enterprise should already have the information required for public CBCR readily available. It is almost inconceivable that tax directors, and therefore the companies that employ them, do not know their sales (both source and destination), employee headcounts and costs, profits, tax provision and tax paid, assets employed and intra-group transactions by state.

Recording and compiling such data is essential to company tax directors fulfilling their duties to their companies and, crucially, to ensuring that all necessary books and records are available to companies to ensure tax liabilities are capable of being fairly recorded at any point in time, which should be the requirement of all statutory demands for internal control systems (e.g. under the US Sarbanes-Oxley Act). Any additional cost would relate to the preparation of data for presentation purposes, which is unlikely to impose a significant cost burden on any transnational enterprise.<sup>10</sup>

### 4. Will trade secrets be disclosed?

**Short answer: No, public disclosure will level the playing field and discourage unhealthy tax competition without revealing trade secrets.**

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<sup>8</sup> <http://economia.icaew.com/news/march-2015/majority-says-unacceptable-to-avoid-tax>

<sup>9</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/385161/TIIN\\_2150.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385161/TIIN_2150.pdf)

<sup>10</sup> <http://www.oecd.org/ctp/transfer-pricing/volume1.pdf>, p.168.

**Long answer:** While it may affect a company's ability to outcompete others, tax planning could only be considered a trade secret if tax is considered a business cost and that it is fair game to compete on reducing that. However, tax is not a cost and should not be seen as a competition parameter. In the words of the Tax Justice Network:

*"One of the great strengths of market capitalism and market competition is that it puts pressure on directors to innovate and improve the efficiency of production, including by bringing down costs and improving the quality of the goods or services they produce. But tax is entirely different: it is about overall profitability, not about production costs. A company that uses a tax loophole may be able to use that to bring down its prices and steal a march on its competitors - but in the process it has done absolutely nothing to improve its efficiency or the quality of what it provides. The company has cut its tax bill, but the economy overall has seen no net gain in efficiency or productivity. The company has more profits, but that is offset by what the country loses in terms of fewer teachers or whatnot."*<sup>11</sup>

Competition on the base of tax planning distorts the functioning of the market and breeds complex and opaque business structure. Making CBCR public would ensure that competition once again centres on the delivery of the best product at the best price, rather than who can hire the most tax planners and think up the most complex structures of shell companies. In fact, discouraging aggressive tax avoidance and evasion is one of the main arguments for making CBCR public.

Companies that only operate in one country already disclose similar information to what is included in the CBCR format. This indicates that the type of information is not sensitive and that public CBCR will level the playing field in terms of reporting requirements between transnational enterprises and purely national companies.

However, financial reporting by large enterprises on a country-by-country basis is likely to be strongly indicative of the most aggressive type of tax planning techniques that transnational enterprises use to drive down their tax liabilities. These structures may become more risky for corporations to use if they are made public. For those transnational enterprises that have built their business success substantially on aggressive tax planning rather than better products or lower cost structures, public CBCR may affect their business models.

## 5. Will transnational enterprises become less competitive?

**Short answer: No. On the contrary, public CBCR will increase competition in the marketplace.**

**Long answer:** Transnational enterprises have an advantage over national companies. This is not a competitive advantage; it is an artificial one. Public CBCR would serve to level the playing field between transnational enterprises and national companies, who often are already obliged to make publicly available the type of information required for CBCR. As such, small and medium sized enterprises will be in a better position to compete.

Upon close analysis, we consider that nothing in the public CBCR proposal for large enterprises can be considered to reveal trade secret, so that public disclosure will not put European transnational enterprises in a worse position than non-EU competitors. Since the costs of preparing CBCR are

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<sup>11</sup> <http://taxjustice.blogspot.be/2007/11/is-tax-cost.html>

negligible, neither do they present any significant effect on the cost structure of a company. On both counts, it is evident that public CBCR will not affect a European transnational enterprise's ability to compete.

The results of the European Commission's 2014 impact assessment of public CBCR for large financial institutions that fall under the Capital Requirements Directive supports this view. Indeed, it even highlights positive economic effects when it states that making CBCR public for banks "*is not expected to have significant negative economic impact, in particular on competitiveness, investment, credit availability or the stability of the financial system. On the contrary, it seems that there could be some limited positive impact*".<sup>12</sup> The positive effects for a European company of public CBCR could include attracting more investment, since the risk profile of the company would be lowered with the release of more information compared to competitors not engaged in public CBCR.

## 6. Are transnational enterprises too complex for public CBCR?

**Short answer: No, most transnational enterprises are going to start country by country reporting regardless of EU legislation. The questions are: when will they start, and will the information that emerges be fully utilized?**

**Long answer:** Many transnational enterprises will start reporting on a country by country basis before long anyway, as part of the OECD requirements that G20 countries are likely to endorse. This means that companies will collect and report the data to tax administrations, so making this information public should be relatively straightforward. Some companies have already started the public reporting process in response to growing demand from citizens, consumers and other stakeholders for open and transparent business practice.

In recent years, some sectors of the economy have already started to publicly disclose country by country reports. As a result of the fourth European Capital Requirements Directive and the Accounting and Transparency Directives, large financial institutions (banks) and resource extracting companies are obliged to provide a yearly overview of their operations, specified per jurisdiction. Although the reporting requirements are different for these two sectors, the existing financial reporting requirements prove that the standards are workable and beneficial.

Lastly, the high degree of complexity in some transnational enterprises is, in some cases, the result of companies' own strategies to aggressively reduce their tax liabilities. The establishment and maintenance of these complex structures is resource intensive, with additional accounting, legal, and advisory costs. Public CBCR is likely to serve as a disincentive for firms to engage in establishing overly-complicated group structures.<sup>13</sup>

## 7. Will more information create confusion and instability?

**Short answer: No, the current lack of information is a source of confusion and all too often leads to instability due to sudden releases of big datasets through leaks.**

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<sup>12</sup> [http://ec.europa.eu/internal\\_market/company/docs/modern/141030-country\\_by\\_country-cr-report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/141030-country_by_country-cr-report_en.pdf)

<sup>13</sup> BEPS Monitoring Group, <https://bepsmonitoringgroup.files.wordpress.com/2014/03/bmg-cbc-response1.pdf>, p.9



**Long answer:** Public CBCR offers a basis for better understanding of transnational enterprises, and the prospect that controversies and misunderstandings arising from patchy information can be avoided. Irrespective of whether or not financial information is made publicly available, the debate about transnational enterprises' tax payments is likely to continue in years to come. Greater disclosure can actually be beneficial for companies to avoid misunderstanding and speculation.

Having only partial access to information – related to a company's presence in jurisdictions with no or very low tax, for example – may lead to public confusion and accusations of tax dodging if other matters, like a company's profitability, tax credits, costs and other factors relevant to the assessment of its taxable base, are not taken into account.

In a recent survey of business executives, KPMG found that the tax profiles of 25 percent of the companies surveyed had been the subject of a news media or press report within the previous 12 months. For the largest companies (revenue of more than \$10 billion), that figure rose to 40 percent.<sup>14</sup> Debates on corporate tax liabilities, payments and avoidance often revolve around speculation and qualified guesses as things stand. This neither serves the interest of business nor the general public.

Even though CBCR is technical, its value lies in providing information that can contribute to a more informed debate. This is not only the case for politicians, journalists and citizen groups, but also for investors and shareholders. By having access to more information and a better risk profile, shareholders will be better equipped to make informed investments, avoiding panicky inflows or outflows of capital based on scandals and the lack of transparency. By facilitating this transparency and risk management, public CBCR can help to increase investments, FDI, and growth.<sup>15</sup>

Also worth remembering is that transnational enterprises already put out public reports with very technical information about their accounts. For example, Royal Dutch Shell's annual report for 2013,

ONE OF DENMARK'S LARGEST MOBILE PHONE NETWORK PROVIDERS WAS RECENTLY ACCUSED OF DODGING ITS TAX RESPONSIBILITIES THROUGH THE USE OF A SUBSIDIARY IN LUXEMBOURG. A PROMINENT DANISH NEWSPAPER REPORTED THAT THE COMPANY PAID NO INCOME TAX DESPITE MAKING AN APPROXIMATE PROFIT OF \$200 MILLION OVER A FIVE-YEAR PERIOD AND SPECULATED THAT THE PROFIT COULD HAVE BEEN SHIFTED TO LUXEMBOURG.

FOLLOWING THE PUBLICATION OF THE ACCUSATION, THE COMPANY REVEALED THAT THE ABSENCE OF TAX PAYMENTS WAS THE RESULT OF AN ACCRUED TAX CREDIT FROM MASSIVE INVESTMENTS IN TELE-INFRASTRUCTURE IN THE EARLY 2000S, SO THAT ITS PROFITS WERE NOT LEGALLY TAXABLE YET. THE DAMAGE WAS ALREADY DONE, HOWEVER, AS THE STORY MADE HEADLINES ON NATIONAL NEWS AND MOST MEDIA PLATFORMS, LEADING TO A CONSUMER CAMPAIGN TO BOYCOTT THE COMPANY. AN ANALYST ESTIMATES THE LOSS FOR THE COMPANY FROM THE BAD PUBLICITY AT UP TO €400,000<sup>1</sup>. HAD THE COMPANY PROVIDED FOR A PUBLIC COUNTRY BY COUNTRY REPORT, THE MISUNDERSTANDING COULD EASILY HAVE BEEN AVOIDED, AND THE STORY WOULD MOST LIKELY HAVE BEEN DISCARDED IN THE EDITORIAL NEWSROOM.<sup>1</sup>

<sup>14</sup> <http://www.kpmg-institutes.com/content/dam/kpmg/taxwatch/pdf/2014/kpmg-tax-transparency-survey-report-2014.pdf>

<sup>15</sup> Richard Murphy, <http://www.taxresearch.org.uk/Documents/CBC2012.pdf>, p.4.

freely available online, is 200 pages long, with more than 70 pages of financial reporting<sup>16</sup>. No one argues that Shell should not put out 70 pages of financial reports in case it confuses the public.

In short, any claims that public CBCR will confuse citizens are disingenuous as well as incorrectly implying that existing company reporting is simple. The reports are already complex. Public CBCR would not change whether big transnational enterprises release complex company reports: instead, it would ensure the presentation of a true picture of companies' operations.

## 8. Can the European Union go further than the OECD?

**Short answer: Yes, the OECD recommendations are voluntary guidelines, and the EU already has gone beyond some OECD recommendations on taxation.**

**Long answer:** In 2015, the OECD is putting its final touches on its reform of international taxation through the Base Erosion and Profit Shifting (BEPS) project. The OECD's recommendations are non-binding, voluntary, and include transnational enterprises reporting on a country by country basis. Crucially, the OECD considers that tax administrations are the relevant users of the information, not politicians, academics, the media or the wider public.

As the OECD's plans are voluntary, there is nothing that prevents the EU from going further than the BEPS proposals. The European Commission has acknowledged this in its March 2015 tax transparency package, in which it set more ambitious transparency requirements on the exchange of tax rulings than those recommended under BEPS. The Commission noted on that occasion that, while BEPS has brought progress, *"further measures are needed"*.<sup>17</sup>

In fact, in terms of country by country reporting, the EU already has regulation that goes beyond BEPS requirements in some cases. For example, the Capital Requirements Directive IV makes country by country reports for the banking sector public and includes reporting on categories that beyond the scope of the BEPS proposal.

There also, seems to be strong support within the College of Commissioners for the EU going further than voluntary OECD requirements – Commissioner Moscovici has stated that he is personally in favour of public full disclosure, for example – and the European Parliament has supported the need to move to public country by country reporting in the past.

## 9. Can we rely on information exchange between governments?

**Short answer: Public CBCR would allow for more scrutiny and increase incentives for companies to disengage in aggressive tax planning.**

**Long answer:** Because the OECD is currently recommending that country by country reports need only be sent to the country where the transnational enterprise is headquartered, a key question is how other countries will access the reports if they are not in the public domain. The OECD proposal is to have

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<sup>16</sup> [http://reports.shell.com/annual-report/2013/servicepages/downloads/files/entire\\_shell\\_ar13.pdf](http://reports.shell.com/annual-report/2013/servicepages/downloads/files/entire_shell_ar13.pdf)

<sup>17</sup> [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/com\\_2015\\_136\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/com_2015_136_en.pdf)

reports shared through the existing system by which tax administrations exchange tax information. However, this is likely to be a recipe for a cumbersome and ineffective system.

The OECD would like the system for exchanging country by country reports to be automatic, with the reports that tax administrations receive exchanged with other relevant tax administrations without exception at set intervals. The OECD acknowledges, however, that the legal framework to allow this to happen does not currently exist. While there is an aspiration on the OECD's part to create that legal framework, it is unclear how and when that might happen.

LUXEMBOURG PROVIDES A TELLING EXAMPLE OF HOW CUMBERSOME AND UNRESPONSIVE THE SYSTEM OF EXCHANGE OF TAX INFORMATION CAN BE. IN ITS LATEST ASSESSMENT OF LUXEMBOURG, THE OECD NOTES THAT ONLY 45% OF THE INFORMATION REQUESTS THAT LUXEMBOURG RECEIVES WERE RESPONDED TO WITHIN 90 DAYS, AND 25% STILL HAD NOT RECEIVED A RESPONSE AFTER 180 DAYS. ACCORDING TO THE REVIEW, MANY COUNTRIES DID NOT RECEIVE ANY UPDATE ON THE STATUS OF THEIR REQUEST DESPITE THE LONG WAITING TIME. THE OECD REVIEW ALSO NOTED THAT IN SEVERAL CASES, LUXEMBOURG SIMPLY DENIED SHARING THE REQUESTED INFORMATION WITHOUT CITING VALID REASONS.<sup>1</sup>

Also, there have been considerable developments in international automatic exchange of financial information and the OECD's corresponding legal framework. The organisation's Multilateral Competent Authority Agreement has been endorsed by a few dozen 'early adopter' countries. It is unclear if there is willingness among all these to immediately revise the standard to include provisions for the exchange of country by country reports. In many cases, the initial legal framework is not yet in place. Since we cannot assume that these barriers to automatic exchange will be overcome any time soon or satisfactorily, the process of getting any CBCR information filed with taxing authorities is likely to place a large burden on both the country that requests the

information and the country receiving such a request.

There is also another important barrier to requesting information from another tax authority: under the terms of information exchange agreements, the country requesting information must have identified a reason for the information request, i.e. they must have identified a 'risk' that a tax liability may not have been paid. This policy poses enormous problems in the context of CBCR: when their very purpose is to identify potential risks, it would be paradoxical indeed to have to present an identified risk to access the CBCR data – and this would prevent many country-by-country company filings from ever being shared.

Finally, even if all these problems could be resolved, the majority of the world's countries are at risk of being left out of the system of information exchange. The tax administrations of developing countries generally have weak capacity to exchange information in reciprocal arrangements with industrialised OECD countries, so these jurisdictions are often not allowed as partners in the exchange of information system. Furthermore, some countries such as Switzerland and the Bahamas have publicly stated that their exchange of information will apply only to their major political and trading partners, among which developing countries are not likely to be included.<sup>18</sup>

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<sup>18</sup> <http://www.christianaid.org.uk/images/information-for-the-nations.pdf>

If, on the other hand, the financial reporting of large enterprises was to be made public in an online system, the country by country details could be exchanged almost instantaneously – including among developing countries, who have a considerable interest in the details – with a minimum of red tape.

## 10. Has the US ruled this to be ‘unconstitutional’?

**Short answer: No, the country by country reporting element in the Dodd-Frank Act has never been challenged on constitutional grounds. It has been vacated (set aside) on narrow procedural grounds and is expected to be reintroduced with a more thorough justification.**

**Long answer:** Section 1504 (extractive industries payment transparency) or the Cardin-Lugar Amendment of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires any oil, gas, or mining company filing an annual report to the Securities and Exchange Commission (SEC) in the US to disclose their country and project-level payments to host governments each year.

The American Petroleum Institute, the US Chamber of Commerce, and two other trade associations sued the SEC claiming that it had made a number of procedural errors in promulgating the rules, as well as that Section 1504 violates oil companies’ First Amendment free speech rights. The DC District Court declined to rule on the First Amendment challenge noting that the ruling could change upon SEC review.

However, the court did decide to vacate (set aside) the SEC rule on narrow procedural grounds, so the SEC is currently in the process of rewriting the rule. The SEC can write the same provision as long as they provide a more thorough justification as required under a US law called the Administrative Procedure Act.<sup>19</sup>

This case should not be confused with another court case on section 1502 (the conflict minerals provision), of which a provision that requires companies to say if they are "DRC conflict free" was struck down in 2014 by the U.S. Court of Appeals for the District of Columbia Circuit as violating companies' First Amendment constitutional rights. Right now, appeal courts in the US are reconsidering that part of the decision and may reinstate the DRC conflict free section of the law based on the outcome of a recent constitutional case that gives the US government greater leeway to require companies to label their products with particular words. Most of the reporting requirements of the conflict minerals provision were upheld as being completely constitutional. The Section 1502 law is currently being implemented and companies submitted their first reports this year.

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<sup>19</sup> [http://s127054.gridserver.com/sites/default/files/PWYP\\_Fact\\_Sheet\\_District\\_Court\\_Decision\\_Sept2013.pdf](http://s127054.gridserver.com/sites/default/files/PWYP_Fact_Sheet_District_Court_Decision_Sept2013.pdf)