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Corporate tax avoidance: is tax transparency the solution?

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Corporate tax avoidance has been a matter of considerable public attention, particularly since the 2008 global financial crisis. The nature of calls for tax reform and increased regulation, advocated most prominently by tax activists and NGOs, has revolved around transparency as a possible corrective to unacceptable tax avoidance, although there is no consensus as to what the term tax avoidance encompasses and when it becomes unacceptable. We examine two responses to calls for increased transparency about the tax affairs of multinational entities: firstly, country by country reporting that provides information to tax authorities, and secondly the UK requirement for publication of tax strategies, whereby large companies put information into the public domain. We find considerable misunderstanding about the benefits of transparency in this setting. By failing to consider the limits of transparency initiatives there is a risk of dysfunctional consequences, for example additional costs in providing and processing additional information, the prospect of increased disputes as new information generates new misinterpretations and uncertainty in determining the final tax position. There is a risk that greater disclosure will not effectively address concerns about unacceptable corporate tax avoidance.

Keywords: tax avoidance; tax transparency; country by country reporting; tax strategy

Introduction

This paper explores the relationship between unacceptable corporate tax avoidance and tax transparency. We consider these two issues in turn, observing the conceptual and definitional difficulties associated with the former, and the complexity and limits of the latter. To illustrate our arguments, we consider two recent developments in tax disclosure requirements: country by country reporting and the publication of tax strategies. Reflecting on the potential impact of these new requirements, we conclude that the costs and benefits of tax transparency are not well understood, and the potential dysfunctional consequences of greater transparency need to be considered carefully before changing policies to require even more transparency. The demand for more transparency often centres on the demand for more information but this is

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problematic because information does not automatically become translated into understanding or result in behaviour change. In this particular context, an added complication is the multiple understandings by different people as to what is meant by the term tax avoidance.

In order to consider whether transparency can be a corrective to unacceptable tax avoidance, we first need to clarify what is meant by the term tax avoidance.[1] Tax liabilities are determined by reference to tax law: the content and effect of which vary from state to state. The design of the tax rules applicable to companies is a matter of national sovereignty, albeit constrained in some cases by supranational laws as in the case of European Union (EU) member states. Like most legislation, tax laws are indeterminate. Picciotto (2015) suggests three levels of indeterminacy, the first being linguistic – the meaning of the words used depends on social context and is therefore fluid and dynamic. The second level of indeterminacy relates to liberal legality – law generally comprises general rules that leave individuals free to make decisions. In the context of laws relating to economic activity, such as tax law, differences between legal form and economic purpose exacerbate indeterminacy. The third level relates to the normative character of law – decisions about its application entail value judgements. This indeterminacy gives rise to differences of opinion as to the effect of laws. As Gribnau (2017, p. 15) notes 'once the legislature has created [a] legal obligation and translated in legal written rules, the rules will inevitably appear to be imperfect, ambiguous, lagging behind societal, economic and technical developments.' Laws in respect of the taxation of company profits determine whether or not a tax liability arises, 'something happens, and a tax liability is crystallised, something else might happen and a different tax liability, or even no tax liability, is crystallised' (Hasseldine and Morris 2018, p. 437). Tax laws offer choices of action that must be appraised, and then once a choice is made, implemented. The tax consequences of the options available may not be certain, as a result of the indeterminacy of the law previously mentioned. Importantly, this decision-making activity takes place before the tax liability is crystallised. As will be shown below, whether a particular tax-related decision constitutes unacceptable tax avoidance, which is conceptually distinct from tax evasion, is a highly contested issue.

Transparency has been associated with good governance for the last twenty or more years (Hood 2007; Hansen et al. 2015) and with enhanced democracy (Neyland, 2007). There is no limit to the number of calls for more transparency and there is an unsurpassed demand for more information, from general pleas to specific freedom of information requests, in the quest to achieve greater transparency. Transparency has a somewhat mythical status in contemporary society (Christensen and Cornelissen 2015), a status that 'insulates it from fundamental critique' (Hansen et al. 2015, p 125). While recognising that some commentators such as O'Neill (2002) question the value of transparency, Hood (2007, p. 192) nonetheless suggests that it is one of those 'banal' notions that are pervasive yet unexamined; 'taken as unexceptionable' (p. 192). Certainly there are fundamental questions in relation to what is meant by transparency and what it is capable of achieving. On one level, transparency by companies involves providing information that allows society to evaluate their activities, and is often mobilised as a means to some other end, rather than a goal in itself (Nielson and Madsen 2009).

Writing from this information provision perspective, Schnackenberg and Tomlinson (2016) conclude that transparency has three dimensions: information disclosure, clarity and accuracy. They identify three issues of concern: (1) 'the meaning of information quality, (2) the effects of transparency on organization – stakeholders relationships and (3) mechanisms that influence transparency perceptions' (2016, p. 1789). Additionally, the authors identify an association between organisational transparency and stakeholder trust, although the evidence is mixed as to how transparency influences trust and perceptions of trustworthiness (2016, p. 1790). Other, more critical, scholars of transparency view it as going beyond the provision of information

and having a performative role. We draw on both views of transparency in our analysis of tax transparency initiatives.

Returning to the opening question of whether tax transparency is a possible mechanism constraining unacceptable tax avoidance, there first needs to be improved understanding of what constitutes unacceptable tax avoidance. The recent insertion of 'aggressive' into the debates (discussed below) has fuelled demands for increased tax transparency. The increased focus on unacceptable tax avoidance in recent years has led to considerable interest in the phenomenon beyond the confines of tax specialists. For example, effective tax rates, which look to the ultimate tax liability of companies rather than the statutory rate of tax, are now being used by a wider range of stakeholders, no longer only investors, in an attempt to discover whether unacceptable tax avoidance is taking place.

Transparency is a costly regulatory strategy, not only for the providers of the information but also for those required to process it. Burdening tax authorities with additional information processing requirements may not be effective at a time when they are operating under severe resource constraints. The costs of complying with and monitoring tax transparency initiatives will ultimately be borne by society by placing strain on tax authority resources and by MNEs seeking to recover the cost, for example, through higher prices for the products and services they supply. As Freedman (2018) notes, excessive information may obscure and may even become a smokescreen to disguise company activities. A further question which arises, however, is whether transparency is capable of achieving what the public wants. Is transparency being used to solve the wrong problem or has the issue not been sufficiently problematised? If either of these is the case, the call for greater transparency will not satisfy societal demands that companies pay their fair share of tax.

Tax transparency is a fast-moving field with numerous players seeking to assert dominance in the debate, not only NGOs but also supranational bodies and national governments. In both public and scholarly debates about regulation and in particular regulatory failures, the mantra is often invoked that 'sunlight provides the best disinfectant', implying that through transparency, opening up the decision-making of regulatees, accountability is enhanced and the regulator's hand is strengthened. But this must be balanced against the idea that transparency in itself may only produce an illusion of regulatory control. Sunlight may disinfect, but it also fades; information overload can create resource problems for all those concerned to hold companies to account and may lead to misunderstandings. Transparency measures force disclosure of otherwise hidden information, but with increased visibility, the capacity of recipients to distinguish relevant from irrelevant information, to sort the wheat from the chaff, may be impaired and transparency may not achieve the aims sought by its proponents.

The remainder of the paper is organised as follows. In the next section, we come back to the thorny question of what tax avoidance is, and how we can decide whether or not it is unacceptable. Following that we probe the concept of transparency drawing on a range of academic scholarship before considering in some detail the two tax transparency initiatives identified above – country by country reporting and publication of tax strategies. We conclude with reflections on the relationship between tax transparency and unacceptable tax avoidance.

Tax avoidance

At its simplest and broadest, the avoidance of tax means to choose an option that leads to a lower tax liability than would otherwise apply had another option been chosen. However, in recent years tax avoidance has become a complex term, meaning different things to different parties. As noted by Hasseldine and Morris (2018), many conversations take place about tax avoidance as if it were a singular concept, when actually the participants are talking about different things; it is, as they

observe, polysemous, or as Freedman (2006, p. 361) terms it, 'a definitional quagmire' (see also Christians 2018). Most agree, however, that tax avoidance is conceptually distinct from tax evasion, notwithstanding that they are frequently elided in contemporary discourse. The difference has two aspects, first the relationship with the legislation and second temporal. In relation to the first of these, tax evasion is a breach of the law and can involve intentional non-disclosure that may or may not be fraudulent (Gribnau 2015). Tax avoidance in its widest sense encompasses 'all arrangements to reduce, eliminate or defer a tax liability' (Freedman, 2004, pp. 335–6). Payne and Ralborn (2018) state that tax evasion is illegal and also unethical because it entails deception and concealment. They bifurcate 'tax avoidance' into rational business planning on the one hand, and avoidance that takes advantage of a legal 'loophole', the latter being cast as morally questionable. Many domestic tax laws seek to prevent tax avoidance by looking to the purpose of the legislation and the subjective intentions of taxpayers, but both of these concepts are also elusive (see Piantavigna 2018 in the context of the EU Anti Tax Avoidance Directive).

In relation to the second aspect of the difference between avoidance and evasion, that of temporality, tax evasion is *ex post* activity, that is, occurring after the crystallisation of a tax liability. Tax avoidance, however, is *ex ante* activity, occurring prior to the crystallisation of the tax liability; in the appraisal and implementation stage. Running these two aspects together results in mixing quite different behaviour and leads to confusion (Panayi 2014).

In the past ten years or so, we have witnessed an exponential increase in public attention being given to 'tax avoidance', in connection with the tax affairs of large multinational entities (MNEs). The heightened awareness of tax avoidance in the context of MNE activities has been fuelled by attention from the media (e.g. Bergin 2012, Brooks 2014), NGOs (e.g. Action Aid 2011, Christian Aid 2009, 2014, Oxfam 2016; Oats and Onu 2016) and politicians (e.g. PAC 2013). MNEs are now 'expected to behave in a certain way not only by tax authorities but also by civil society' (Panayi 2014). Morrell and Tuck (2014) describe the emergence of new narratives in the UK in the 2000s using the metaphor of folk tales to help understand the dynamics between the various groups of actors, casting them as characters, such as heroes, villains and helpers, within a fairy tale performing functions that provide conceptual tools to make sense of 'tax tale' developments. Care must be taken, however, in evaluating the validity of the increase in public attention, in particular as a result of media coverage of alleged malfeasance of specific MNEs. A number of studies have been shown to lack robustness (Forstater and Christensen 2017) and there is a danger that appeals to public 'outrage' may in fact refer to manufactured indignation based on deliberate misinformation (Oats and Morris 2018).

Notwithstanding the increased attention paid to tax avoidance, little progress has been made in terms of defining the term tax avoidance, and arguably attempts to do so are largely futile. In a report produced by the Oxford Centre for Business Taxation for the National Audit Office,[2] three categories of legal tax avoidance are distinguished: (1) ineffective avoidance, which can be countered by existing legislation, (2) effective tax avoidance, that cannot be corrected by the courts and requires legislative change and (3) using the tax legislation to one's advantage, for example leveraging opportunities to reduce tax that are provided for in tax legislation, commonly referred to as tax reliefs or tax concessions. Examples include research and development credits and accelerated depreciation. An international example provided by the authors is where companies have a high turnover in the UK but make tax-deductible payments such as royalties to other jurisdictions resulting in a low UK corporate tax liability. For the purposes of this paper, we use the term 'unacceptable' tax avoidance to denote tax related behaviour that falls short of societal expectations. For some commentators this will include all three categories identified above; for others it will be confined to the first two, sometimes with an additional rider that only behaviour that entails artificial and contrived arrangements is unacceptable.

On the international stage, the G20 summit on 5 November 2012 was a significant turning point, when Finance Ministers called for a report on the causes of 'base erosion and profit shifting' (BEPS), enthusiastically taken up by the OECD and delivered in February 2013 (see Russo 2016). The OECD BEPS project is profoundly political, and arguably should be more accurately described as base *expansion* and *power* shifting (Oats and Morris 2018) given that it has led to an expansion of the tax base of many countries and a shift in the balance of tax raising capacity among jurisdictions. In the years following the release of the initial OECD BEPS action plans in 2015, allegations of unacceptable tax avoidance by multinationals have continued to grab the headlines and continue to do so after the publication of the BEPS Action final reports in October 2017. In addition to a misguided blurring of tax avoidance and tax evasion, tax avoidance now also becomes blurred with 'artificial' profit shifting, and we have subsequently seen further redefinitions of tax avoidance based on alleged departures from economic substance. 'Profit shifting', like 'tax avoidance' is an ambiguous term that means different things to different people. Somewhat pessimistically, Picciotto (2015, p. 179) says in relation to BEPS that '[t]he patch-up approach to reform of the rules will inevitably increase uncertainty and conflict, both between states and enterprises and among states asserting tax claims'.

Much of the media coverage asks that MNEs pay their 'fair share'; a term that is also subjective, arbitrary and incomplete (Lamberts 2017, p. 49). In this regard, Datt (2014, pp. 417–8), writing in an Australian context notes that

> [t]o suggest that because some corporate taxpayers have an effective tax rate of 20 or 10 percent as opposed to the headline rate of 30 percent, they are not paying their fair share is meaningless unless one knows how the tax is calculated and whether this is in accordance with the law. If in accordance with the law, the reference to 'fairness' is redundant.

As Freedman (2018, p. 122) observes, fairness is 'a perception and so may be shaped and manipulated' and is used by various groups 'to convey a sense of dissatisfaction with the current system'.

Campaigning by civil society groups has been an important factor in propelling unacceptable MNE tax avoidance 'from a complex issue that was largely the preserve of tax lawyers and accountants to an issue that sparks political debate and controversy' (Dallyn 2017, p. 336). Some commentators (e.g. Dowling 2014, Knuutinen 2014, Lanis and Richardson 2012, Yliönen and Lane 2015) attempt to frame tax avoidance as an issue of corporate social responsibility. Bird and Davis-Nozemack (2018, p. 1010) note that 'under this view, tax avoidance represents a socially irresponsible practice that is inconsistent with a firm's obligations to society'. Panayi (2014), however, argues that to say that companies engaging in unacceptable tax avoidance are socially irresponsible is based on too many generalisations and assumptions. She goes on to say (2014, p. 556) '[t]he international tax system is all about choices … why should a company be deemed socially irresponsible for benefitting from certain choices?'. Laying some of the responsibility at the feet of nation states, De Wilde (2015, p. 22, cited in Gribnau and Jallai 2018) says '[f]airness in corporate taxation is not a corporate responsibility; it is the responsibility of nation states'. In an analysis of the Australian experience with disclosure of MNE tax information, Berg and Davidson (2017, p. 96) go so far as to suggest that the 'corporate tax avoidance debate has many of the hallmarks of a moral panic … dramatic, sudden, characterised by rhetorical similarity across media and politics'.

Supranational bodies have attempted to provide some clarity in relation to definitions, adopting the adjective 'aggressive' to denote unacceptable behaviour. In the OECD (2008) Intermediaries Study, for example, considerable attention was given to identifying and requiring disclosure of unacceptable tax avoidance, described as 'aggressive tax planning'. The report defined two types:

- Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences; and
- taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law.

This identification was the result of a failed attempt to reach a consistent definition of 'unacceptable tax minimisation arrangements'; the term used in the Forum on Tax Administration 2006 Seoul Declaration which initiated the Intermediaries study. Freedman et al. (2009, p. 75) see the OECD definition as contentious and assert that the relevant test of acceptability is 'what the legislation says as interpreted by the courts and not what the tax authorities suppose it was intended to say'. In 2014, the revised draft text of the OECD Guidelines for Multinational Enterprises makes reference to aggressive tax planning in relation to the responsibility of board members, endorsing the recent trend to place tax within corporate governance (Panayi 2014).

The United Nations Committee of Experts on International Cooperation in Tax Matters in 2011 state that:

> Tax avoidance occurs when persons arrange their affairs in such a way as to take advantage of the weakness or ambiguities in the law. Although the means employed are legal and not fraudulent, the results are considered improper or abusive.

Arguably, however, terms such as 'aggressive', 'improper' and 'abusive' are not helpful in providing guidance to those required to make judgements about tax behaviour (Hasseldine and Morris 2018). Scheffer (2013, p. 366) suggests that to ameliorate corporate tax avoidance, an eleventh 'fair taxation' principle should be added to the United Nations' Global Compact to include 'non-resort to tax avoidance schemes'.

There has thus been a recalibration of the scope of tax avoidance in recent years and 'new visions of the types of behaviour' (Oats and Morris 2018, p. 459) captured by the term tax avoidance have emerged. Christians (2014) argues that ongoing media coverage of the effective tax rates of household brand companies has moved the notion of tax avoidance conceptually closer to tax evasion, in part fuelled by various offshore leaks. In this sense, there has been a narrowing of the term to largely exclude from debates tax planning that consists of responding to tax incentives deliberately provided by governments (type 3 above) and focusing on behaviour that is considered to be unacceptable (types 1 and 2 above). This paved the way for the introduction of the notion of 'aggressive' tax avoidance to signal active steps to reduce a tax liability in a manner that can be considered to be irresponsible or even immoral. At the same time, there has been a widening of scope in the context of international transactions and arrangements. Some commentators, such as the Tax Justice Network,[3] suggest that, even though nation states have the sovereign right to choose what to tax and how, the establishment of arrangements that include attribution of profits to low tax jurisdictions constitutes 'aggressive tax avoidance'. Thus, in this view, taking advantage of different options afforded within domestic tax laws is viewed as non-aggressive tax avoidance (or tax planning), whereas taking advantage of the options afforded by different countries' tax laws is viewed as aggressive.

This recalibration is not universal. In the case of the US, for example, Bank (2017) explores the question of when tax avoidance became 'respectable' and concludes that a shift occurred after WWII observing that what is remarkable in modern times is that the public reaction to the various 'scandals' revealed in the media is muted; they are viewed as relatively non-scandalous. The US experience therefore appears to be different to that in Europe in particular in that anti-tax avoidance campaigns by civil society activists and NGOs have had less traction there. This is similarly reflected in the stance of the US towards BEPS; largely disengagement and pursuit of an independent programme of reform of international tax rules within the US tax code.

The tax advisory profession has not been quiescent in the face of heightened concerns about tax avoidance and allegations of impropriety by tax advisors (e.g. PAC 2015). Although there is no formal requirement in the UK for tax advisors to be registered, they are usually members of one of several professional bodies. In 1995, seven professional bodies, including ICAEW, came together to produce a document entitled Professional Conduct in Relation to Taxation (PCRT).[4] The document sets out guidance for members on how they should act in relation to the tax work that they do. In 2016 the guidance was updated to incorporate a set of Standards for Tax Planning to deal with the provision of advice to clients on tax planning arrangements. The new standard states:

> Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

The new standard responds to the Government's challenge to the profession in March 2015 (HMT 2015, p. 3):

> Asking the regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good.

The wording of the standard for tax planning was apparently tested in discussions with HMRC as to how it would apply in illustrative situations to ensure that only abusive behaviour would be subject to sanction. The current PCRT came into effect from 1 March 2017.

In summary, tax avoidance has morphed from being an arcane phenomenon, the parameters of which were reasonably well understood by tax specialists and large business taxpayers, to something more politically charged, with a proliferation of definitions, variations, interpretations and understandings. Given the current lack of agreement about the scope of the term unacceptable tax avoidance, the quest for policy prescriptions to tackle it has become increasingly complex.

The clarion call among activists and others who are dissatisfied with the apparent prevalence of tax avoidance by MNEs is for greater transparency. Calls are not only for transparency from MNEs themselves about their tax affairs, but also transparency from governments, asking them to provide more information about the tax concession and arrangements made to accommodate MNEs. The provision of special legislative and administrative concessions is, of course, part of the political backdrop to international profit shifting; providing ex ante choices about where to locate activities and transactions so as to reduce worldwide tax liabilities. The focus of this paper is, however, on attempts to constrain unacceptable corporate tax avoidance rather than the enablers of avoidance such as government sanctioned reliefs and concessions. In the next section, we discuss the academic literature dealing with transparency in a regulatory setting.

Transparency

The concept of transparency has been studied from a variety of perspectives. For the purposes of this paper, we draw primarily on work within the organisation and management literature and focus on transparency projects requiring company disclosure. The term transparency refers to a 'wide array of objects, uses, technologies and practices' (Hansen et al. 2015, p. 118). Albu and Flyverbom (2019), in their meta analysis of extant literature, identify two paradigmatic positions, *verifiability* approaches that focus on transparency as provision of information for accountability

purposes, and *performativity* approaches that emphasise the ways in which transparency projects do more than just passively provide access to information, but also actively shape the information itself, the providers and the recipients of information. We use this distinction to first consider arguments framed under the verifiability approach, before turning our attention to performativity aspects.

In line with the verifiability view that transparency is primarily concerned with the provision of information, there is a common belief that transparency can address the asymmetric aspects of information (Nielson and Madsen 2009). The receiver has less information than the supplier of that information. Information is also produced for a purpose tailored to fit the transparency criteria (Neyland, 2007). Consideration of both the provider and recipient of information allows us to then consider how information is received as well as how it is presented. Highlighting accountability, Drew et al. (2004, p. 1462), for example, define transparency as 'information that allows all people who are interested in a decision to understand what is being decided, why and where'.

The verifiability view is also concerned with the quality and quantity of information, which is something companies can tactically manipulate to influence perceptions of transparency (Schnackenberg and Tomlinson 2016). Transparency here is viewed as shining light on organisational realities. It is seen as a mechanism for the provider of information to demonstrate trustworthiness and the recipient to evaluate legitimacy, it assumes that recipients of information are willing and able to interpret it, and is most commonly assumed to have positive consequences (Albu and Flyverbom 2019).

Scholarship within the performativity strand pushes back on studies that confine transparency to a flow of information and conceptualise transparency as a more complex social process, shot through with conflict, tension and power, that is capable of producing socio-material effects. Transparency then is not merely a nominative term but has the capacity to act or precipitate action; it is 'an active process of translation, mediation and mutation' which may lead to unintended consequences (Albu and Flyverbom, 2019, p. 280). Hansen et al. (2015, p. 120) note, that even when transparency is able to achieve 'noble objectives', it may nonetheless produce unintended side effects, including increased uncertainty and suspicion; even where there is a genuine desire to achieve clarity through transparency, there will be hidden dimensions that frustrate these aims.

In this view the information provided by transparency projects is itself not neutral, it is produced for a purpose and the choice of information will reflect that purpose (Tsoukas 1997). Roberts (2018, p. 54.) suggests that a problem of transparency in organisational practice is that 'we act as if we believe in the adequacy and completeness of what is disclosed … while knowing that it is not'. Transparency is a mediated concept through which various disclosure devices are employed to give the impression of transparency (Hansen and Flyverbom, 2015).

The extent of disclosure is also important. There are arguments that too much transparency leads to overwhelming detail (cf. McBarnett, 1991) and obscures underlying activities. Stohl et al. (2016, p. 133) refer to this as 'inadvertent opacity' to describe the situation where 'visibility produces such great quantities of information that important pieces of information become inadvertently hidden in the detritus of the information made visible'. Visibility and transparency are often conflated, but contrasting transparency and visibility allows us to call the mythical status of transparency into question: increased transparency can reduce visibility. Zyglipopoulos and Fleming (2011) describe the determination of what is made transparent and what is not as the 'politics of visibility' (p. 693) and remind us of the need to question the assumption that the corporate world has been made more visible and accountable as a result of globalised information flows.

The fact that we do not know what we are not seeing results in the demand for more information: 'Scandals and misconduct have been exposed in the raw light of information and

communication for decades without producing a marked increase in our ability to *see* into the complexities of organizational behaviour' (Christensen and Cheney 2015, p. 82). This final point calls into question the efficacy of demands for increased transparency. More information may actually lead to less understanding (Tsoukas 1997). In addition, common interpretations of transparency focus on the information itself and tend to neglect the underpinning reasons for the creation and use of that information (Christensen and Cheney 2015).

Much of the scholarship dealing with transparency is normative, 'dominated by policy and management-oriented scholarship looking for solutions to problems associated with globalization' (Hansen et al. 2015, p. 120). In governance terms, transparency requirements increasingly appear as soft law, that is codes of conduct and guidelines. In our view, however, transparency is multidimensional, complex and does not always lead to neat solutions. Flyberbom (2015, p. 173) suggests '[t]ransparency is best understood as an ambiguous, partial and impermanent 'script' that is circulated, edited and translated'. Ananny and Crawford (2016, p. 6) go so far as to say that 'transparency can do great harm' and that if not implemented carefully can 'inhibit honest conversation'. Roberts (2018, p. 54) describes transparency as 'an alluring but deceptive ideal'.

Specific to the tax context, and linking corporate tax avoidance and tax transparency, Forstater (2017, p. 569) notes that:

> '[t]here is broad agreement that companies should not practice "aggressive avoidance," but little clarity in the public debate about what that means.' … 'Business leaders, tax professionals, and organizations representing a range of interests continue to talk past each other, contributing to the public growing ever-more cynical (and ever more confused). Data alone may not solve the problem. It is not clear whether the disputed information would allow stakeholders to assess whether a particular company has stepped over the line or, conversely, allow companies to defend their reputations through transparency.'

Gribnau and Jallai (2018, p. 15) echo these sentiments, noting that 'access to public data as such does not guarantee public understanding. Moreover, it should not be taken for granted that people will use the information they obtained to make rational judgements and decisions.' Freedman (2018) links transparency and trust, noting that if transparency is increased but justified trust in institutions is not, the aims behind transparency will not be served.

In summary, transparency without discernment or understanding may not be an effective regulatory tool. In light of this, in the next section, we consider two recent attempts to achieve greater transparency in the MNE tax setting.

Disclosure initiatives

In order to explore the relationship between tax avoidance and transparency we consider two specific forms of disclosure initiatives, one requiring limited disclosure to tax authorities only and the other requiring public disclosure. The first is country by country reporting, currently enacted in most jurisdictions as limited disclosure to tax authorities but facing strident calls for public access to such information. The second is the UK requirement for publication of tax strategies by large companies. Whilst not comprehensive, in that other countries have implemented or are planning similar measures (see for example Hoopes et al. (2018) regarding Australia), these two forms of disclosure serve to highlight the complexities associated with identifying the target of the policy intervention and the limits to transparency as a mechanism for achieving policy goals.

The early initiatives designed to increase disclosures by corporates were largely voluntary and also targeted at specific industries, for example, the Extractives Industries Transparency

Initiative.[5] Over time, some of these initiatives have developed into mandatory requirements. The change, which started to accelerate around 2012, can be attributed to the growing voice of civil society as the impact of austerity put pressure on tax administrations to tackle, and be seen to be tackling, tax avoidance. Indeed, as Christians (2012) notes, the quest for tax transparency has grown from a campaign by a small group of anti-corruption activists, to a global movement.

Country by country reporting

Country by country reporting requires disclosure of various indictors of activity by reference to the geographical location in which they take place, for example, the number of employees and turnover. The perceived need for country by country reporting arises as a result of two specific features of the international tax system as it relates to taxing MNE profits. The first is the separate entity principle, under which each part of an MNE is treated as a separate entity for taxing purposes. MNEs operate in different countries in a variety of ways, both as subsidiaries, whose sales, purchases etc. will be separately disclosed to tax authorities and for company law purposes, and also as divisions (permanent establishments) of other companies located in different territories. In the latter case, the results of the activities in one particular territory may or may not be disclosed to tax authorities in another territory, depending on whether there is a taxable presence according to domestic tax law, in which case the results would not generally be separately disclosed for company law purposes.

The second arises from the need to allocate MNE profits to the jurisdictions in which it operates. The separate entity principle results in the need to take into account intra-MNE transactions in order to achieve a more accurate inter-nation allocation of profits. The current international norm is the arm's length principle, by which each subsidiary or permanent establishment is treated as if it were an independent entity and transactions between these entities valued at an arm's length price (effectively market value, if available). In a world in which there is considerable divergence between countries in terms of tax rates and the definition of the tax base, there have long been concerns that the process of determining arm's length prices provides MNEs with too much latitude to allocate group profits judiciously so as to minimise the overall worldwide tax liability (Oats et al. 2017; Picciotto 1992; 2017).

Calls for country by country reporting arise because of these features of the international tax system as it currently operates, and they ostensibly seek to provide increased accountability of MNEs in terms of how the overall group profits are allocated to countries for tax purposes. This issue has been made more pressing in light of recent concerns about international profit shifting as a form of unacceptable tax avoidance. Wójcik (2015, p. 1175) observes that the idea of country by country reporting emerged 'out of concerns of [civil society organisations] about corruption, corporate power and environmental sustainability'.

The Tax Justice Network (2003) proposal to the International Accounting Standards Board (Murphy 2003) called for a new standard requiring reporting of sales, purchases, value of resources used, value added, profits and tax for each country in which MNEs operate. Longhorn et al. (2016) describe the approach promulgated by the Tax Justice Network and taken up by other civil society groups as 'maximalist', referring to its detailed reporting requirements. The International Accounting Standards Board did not take up this proposal, nor a subsequent joint proposal (Publish What You Pay and Tax Justice Network) in relation to segment reporting in 2005. The campaign for country by country reporting was given impetus by the global financial crisis and new organisations joined, leading to the US Dodd-Frank Act in 2010 and action in the EU (see below). Lesage and Kaçar (2013) trace the 'journey' of the idea of country by country reporting, noting the significant influence of civil society organisations in pushing the idea into the public consciousness and reflecting on the obstacles to full realisation of public country by

country reporting. More recently, the Tax Justice Network has called for a public database to account for the economic activities and tax contributions of MNEs (Cobham, Gray & Murphy 2017), believing that it will reveal the extent of 'profit misalignment'.

The expressed motivations for advocating country by country reporting vary. For some advocates such as tax authorities, it is seen as strengthening the armoury of tax authorities in their analysis of transfer pricing under the current arm's length principle. For others, such as the Tax Justice Network, it is a step along the path to a more radical overhaul of international tax rules for MNEs (Baden and Wigan 2017; Christians 2012; Picciotto 2017). This latter group have long bemoaned deficiencies in arm's length pricing as the standard mechanism for allocating profits of MNEs between different taxing jurisdictions.

Country by country reporting first appeared on the OECD agenda of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Christians 2012), providing a catalyst for transparency activists to bring it to the attention of the public. The issue subsequently became part of the BEPS project and the OECD's BEPS Action 13 final report recommends mandatory country by country reporting to provide tax administrations with information they need to be able to conduct informed transfer pricing risk analysis, to ensure taxpayer compliance with the arm's length principle and to provide tax administrations with information to inform audit strategies. The country by country report requires disclosure of revenues, earnings before income tax, income tax paid, the current income tax charge, stated capital and accumulated earnings, number of employees, and tangible assets other than cash. This provides information about the global value chain of the MNE and a crude measure of the distribution of aspects of various elements of economic activity across countries. Importantly, what the country by country reporting does not do, is provide all of the data to verify transfer pricing based on arm's length pricing, for example, information related to hard-to-value intangibles. Baden and Wigan (2017, p. 134) explore the 'constellation of and dynamics between professional organisations' involved in the development of country by country reporting, showing how activist and market agendas intersect in this particular transnational issue.

The OECD version of country by country reporting does not consider user groups other than tax administrations who are recommended to use them for risk assessment purposes and not as a basis for audit adjustments (Hanlon 2018). Importantly, however, country by country reports are to be shared with other tax authorities, which raises additional concerns about the protection of confidentiality. The requirements recommended by the OECD have been implemented unilaterally by a number of jurisdictions. Indeed, as of January 2018, some 60 jurisdictions had introduced country by country reporting filing obligations.[6] The implementation of country by country reporting is subject to peer review by OECD members and the first annual peer review report was released in May 2018. The terms of reference for peer review were released by the OECD in February 2017 (OECD 2017) and the reviews focus on three key aspects:

- The domestic legal and administrative framework;
- The exchange of information framework; and
- The confidentiality and appropriate use of country by country reporting documents

In parallel with the OECD's deliberations on BEPS leading to recommendations on country by country reporting, the European Commission has been working towards increased transparency in order to tackle unacceptable tax avoidance by MNEs. In March 2015, the European Commission launched a Tax Transparency Package. This was followed by endorsement of an Action plan on a Fair and Efficient Corporate Tax System in the EU in June of the same year. The European Commission's version of country by country reporting goes further than the OECD by proposing that large companies publish tax-related information for every EU jurisdiction in which

they operate. In 2016, the Commission conducted a public consultation on transparency in which some 422 respondents participated, comprising firms, industry associations, private individuals and NGOs. The results of the consultation demonstrate a significant divide between the opinions of businesses and their advisers on the one hand, and trade unions and NGOs on the other. The business group were clearly of the view that the EU should rely on international initiatives, whereas, unsurprisingly, the NGO group advocated the EU going beyond the BEPS recommendation to extended disclosure requirements.[7]

While the disclosure of information to relevant tax authorities is accepted as enabling tax authorities to fulfil their task, the view of the International Chamber of Commerce (ICC) and others (Cockfield and MacArthur 2015) is that it is imperative that the information remain confidential and not be made available to the wider public.

The UK was one of the first countries to commit to country by country reporting on a formal basis in February 2016, giving Treasury power to make regulations in relation to country by country reporting. The subsequently enacted 2016 regulations[8] require MNEs to provide HMRC with information to 'help HMRC better assess international tax avoidance risks'. Approximately 300 UK headquartered MNEs are required to complete the template annually. Updates to regulation were released in 2017 to reflect subsequent guidance issued by the OECD and the commitment by the EU to a Directive to implement country by country reporting.

Wójcik (2015) notes that country by country reporting, as introduced in the US and the EU, would not have been possible without an unprecedented engagement of civil society organisations, and a degree of convergence of their development, tax justice and environmental agendas. Publish What You Pay and the Tax Justice Network mobilised numerous civil society organisations and coordinated their activities across the Atlantic in a struggle against established norms of accounting. However, without the global financial crisis, which made politicians, media, and the public much more receptive to the country by country reporting idea, new legislation might have never occurred. Certainly, in its mandated form, country by country reporting provides additional information to tax authorities to allow them to better risk assess the allocation of profits between jurisdictions (Christians 2012).

Hanlon (2018) outlines several advantages and disadvantages of country by country reporting. Potential benefits include forcing companies to articulate their transfer pricing strategies and structure, so as to generate positive behavioural change as these issues are brought to the attention of corporate management. Potential costs include additional compliance costs relating to the need to gather and analyse additional data, as well as new risks associated with increased disputes resulting from the tax authorities having access to additional information. In addition, Hanlon notes that the limitations of the country by country reporting data may not be well understood, leading to misuse by tax authorities. Evers et al. (2017) argue that the benefits of country by country reporting lack a theoretical foundation and do not appear to outweigh the costs. They contend that legislative solutions dealing with the gaps in tax law are preferable as a strategy for constraining unacceptable tax avoidance.

This first example of a new disclosure requirement is motivated by a desire for increased transparency, but its effectiveness may be limited because the information is only provided to tax authorities, despite continued calls for wider dissemination. In the next example, we look at a transparency initiative that resulted in public disclosure.

Tax strategy disclosures

In the UK, since 2016, all large companies are required to publish a board-approved tax strategy statement that is consistent with the overall strategy of the business and is made available to the

public. Many large businesses were already voluntarily publishing strategies in some form or another prior to the introduction of a legislative requirement to do so, ranging in length from 'haikus to epics' (Forstater, 2016, p. 10). Many were based on tax principles published by bodies such as the UK's Confederation of British Industry or the OECD business group, BIAC. A PwC report (PwC 2016) found that 64 out of the FTSE 100 companies in 2015 were voluntarily disclosing their approach to tax. The report noted that companies declared their compliance with applicable tax laws and payment of tax based on the tax laws in the jurisdictions in which they operate, reflecting reporting of form and a lack of engagement with substance.

Freedman and Vella (2016) describe the transition of the tax strategy requirement from the initial consultation document in which the idea was floated to the final legislation. They observe that the measure appears to be based on an assumption that forcing disclosure of a tax strategy will somehow reduce the tax risk appetite of the businesses concerned. The rules apply to MNE groups, regardless of where the parent is located, with turnover of £200 m or more or £2bn of assets. HMRC has issued guidance for qualifying groups, specifying that the tax strategy must be published online and as either a separate document or a self contained part of a wider document (without necessarily using the term 'strategy'). The strategy should contain the following, in relation to UK taxation:

- Approach to risk management and governance arrangements;
- Attitude towards tax planning;
- Level of risk the group is prepared to accept; and
- Approach towards its dealings with HMRC.

Approximately 2000 large companies are required to publish their tax strategies and strategy statements began to appear in 2018 with varying degrees of informativeness. As Forstater (2016, p. 11) notes in relation to mandated disclosure as a policy tactic, '[t]he thinking is that disclosure can work in three different ways: pressuring companies to achieve basic compliance; enhancing governance and management; and consolidating and rewarding leading practice'. Requiring statements from all large corporates is consistent with the UK approach to managing this segment of the taxpaying population more broadly i.e. that the same principles apply to all large corporates irrespective of whether it is, in some cases, redundant.

The fifth edition of PwC's tax transparency series (PwC 2018) reveals an increase in disclosures and observes that a few companies are now making more innovative disclosures. Some 14 FTSE 100 companies published a stand alone tax strategy report in 2017.

By way of example, the transparency statement in Vodafone's published Tax Risk Management Strategy document (Vodafone 2017) demonstrates the tension arising when willingness to providing information proactively to tax authorities are not reciprocated:

> Transparency goes beyond the observation of all applicable laws, rules, regulations and disclosure requirements. It requires the proactive consideration of the provision of information to tax authorities in respect of tax relevant facts and circumstances if they will aid the resolution of the matter under discussion. For example if information not available in a territory is requested, Vodafone will not 'hide' behind territorial borders or the absence of legal obligations but will take reasonable efforts to provide the relevant fact based information. This is a fundamental element of our aim to develop and foster good working relationships with tax authorities. There is however a limit to proactive transparency where over time a relevant tax administration does not show it is willing to make its own contribution to a good and professional working relationship with Vodafone.

For this particular MNE, then, transparency is a two-way street. The Vodafone document makes a further statement in relation to artificial tax arrangement as follows:

> The tax code of conduct provides that we will enter into tax planning where the financial benefit is tax related but we will not engage in artificial tax arrangements. The test of artificiality is generally aligned with the existence of commercial purpose.

In an overview of extant published strategy statements, Forstater (2018, p. 18) observes that '[i]t does not seem possible to robustly score or rank companies based on their published strategies. Short and simple strategies do not necessarily correspond with higher risk, or more aggressive tax planning. Longer tax strategies can simply reflect wordier statements and fancier graphics'. Such is the case with all disclosure initiatives, be they voluntary or mandatory. Lavermiccoca and Buchan (2015, p. 6) suggest 'the requirement to disclose information places pressure on company decision makers to consider the implications of the disclosure on their relationship with stakeholders'. On the other hand, Holland et al. (2016) study more general corporate tax disclosures over an 11 year period and conclude (p. 314) that that the 'increased tax related disclosures are by themselves unlikely to change tax decisions made by all managers.' There is certainly resistance to tax transparency and some suggest that it will not necessarily lead to increased revenues, but rather will change the tax competition landscape between countries (Alexander 2013).

Discussion and conclusion

Some of those calling for increased transparency are not solely motivated by a desire to improve the international taxation of MNE profits and that there are power struggles at play, for example, NGOs using the issue to promote other agendas (Oats and Morris 2018). Observing a lack of empirical evidence as to the effects of greater transparency, Christians (2012, p. 12) notes,

> [t]hose in favour of protecting privacy argue that increased disclosure of tax information would provide taxpayers with both incentive and a roadmap to decreasing their own taxes, while impeding the ability of governments to maintain an image of the tax system as an even-handed instrument of the rule of law. Those in favour of more transparency argue that tax information disclosure either increases or has negligible effects on compliance.

There are two separate issues here, one is the content of disclosure and the other is the audience for the disclosures. It has been argued that for MNEs, '[i]ncreased transparency and disclosure are the price for increased border flexibility' (Ring 2018, p. 2), suggesting that there is an inevitability to increased transparency. However one of the initiatives outlined above calls for the disclosure of information that is not necessarily informative as a means of identifying wrongdoing, in particular the publication of tax strategy statements. Freedman (2018, p. 130) cautions against assuming that transparency will be a panacea stating 'we have to be careful about seeing transparency as universally good'. Drawing on O'Neill (2002), she notes that a flood of unsorted information can create confusion and uncertainty and may even create incentives for dishonesty.

In terms of the audience for disclosures, the danger of misinterpretation of information is real, as a consequence of transparency without visibility. Forstater (2017), for example, explores the case of the Greens-European Foreign Alliance Group report into the Spanish headquartered fashion company group Inditex and demonstrates that simplistic calculations and unrealistic assumptions can lead to accusations of wrongdoing that do not hold up to close scrutiny. In this case, the report suggests that Inditex having a Swiss holding company constitutes 'aggressive avoidance', yet many countries legislate to attract holding companies.

It is not just the public, or the media, however that may misinterpret transparency disclosures. In the context of understanding the import of leaked data, Oei & Ring (2018) note that there is significant variation in tax authorities in terms of their willingness to use, or ignore, the data.

These different priorities and capabilities among tax authorities similarly constrain their ability to absorb and process mandated disclosures under the auspices of transparency initiatives. A potential consequence of increased disclosure of information to tax authorities, such as through country by country reporting, is increased audit pressure and disputes. Compliance costs for MNEs can be expected to increase as they not only have to gather, frame and disclose additional information to wider audiences, but also deal with conflicting demands from different tax authorities and increased regulatory scrutiny as more jurisdictions turn their attention to enforcement against MNEs (e.g. Tennant and Tracey 2019). New systems and processes will be required to better integrate tax data with other information systems within organisations. Finally, the performativity of transparency will most likely lead to changed behaviour, but not necessarily in the form desired by those who call for greater transparency. Whether these costs, not all of which are quantifiable, are outweighed by the benefits of greater knowledge about the activities of MNEs remains to be seen.

Notes

1. We do not purport to provide an exhaustive analysis of what 'tax avoidance' is, but rather draw on a number of relevant studies to highlight that it is a contested phenomenon, the scope of which has changed over time and continues to change.
2. The Oxford Centre for Business Tax Report for the National Audit Office, entitled *Tax Avoidance*, dated 3 December 2010 is no longer available online but is on file with the current authors.
3. For numerous reports and commentaries on the subject of corporate tax avoidance see https://www.taxjustice.net.
4. The PCRT can be obtained from various sources including https://www.icaew.com/technical/tax/pcrt.
5. Following Global Witness' publication of 'A Crude Awakening' https://www.globalwitness.org/en/archive/crude-awakening/ in 1999, the Publish What You Pay network began campaigning for transparency in the extractive industries leading to the Extractive Industries Transparency Imitative launched in 2002.
6. For current information about country by country reporting information, see https://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm.
7. The manner in which the EU country by country reporting requirements are to be implemented by way of amendment to the Accounting Directive, rather than a tax measure, has been the subject of investigation. The Legal Service of the European Council gave an opinion in November 2016 disagreeing with the approach of the EC, stating that the matter falls under Article 115 of the Treaty on the Functioning of the European Union (TFEU) thereby requiring unanimity among member states. In January 2017, however, the European Parliament's Committee of Legal Affairs gave an opinion that the legal basis must be Article 50(1) of the TFEU, under which only a qualified majority of member states is required. In February 2017 the European Parliament Rapporteurs put forward amendments to the proposed directive amending directive 2013/34/EU to broaden its scope to require public disclosure.
8. The Taxes (Base Erosion and Profit Shifting) (Country by Country Reporting) Regulations.

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