Nueva fiscalidad
Estudios en homenaje a Jacques Malherbe

New Taxation
Studies in Honor of Jacques Malherbe

DIRECTORES
CATALINA HOYOS JIMÉNEZ - CÉSAR GARCÍA NOVOA - JULIO A. FERNÁNDEZ C.

Incluye referencia bibliográficas


Homenaje a Jacques Malherbe / Fiscalidad / Doble Imposición Internacional / Convenios para la eliminación de la doble imposición / BEPS / Unión Europea
Editora
Mónica Montes Ferrando
Diseño de pauta y cubierta
Alejandra Giraldo Nieto
Diseño ePUB
Ediciones Digitales S.A.S.

Primera edición, mayo de 2017
© Instituto Colombiano de Derecho Tributario
Calle 75 n.° 8 - 29
Tel: (57 1) 317 04 03
Fax: (57 1) 317 04 36
www.icdt.org.co
c.investigacion@icdt.org.co


El material incluido en esta publicación está protegido por la legislación vigente de derechos de autor. Está prohibida la reproducción parcial o total por cualquier medio, sin el permiso previo, expreso y por escrito del ICDT. Se permite incluir citas y transcribir partes del texto, siempre y cuando se cite la fuente en forma completa. Los escritos representan la opinión personal de los autores y no necesariamente reflejan la opinión del ICDT, o la de las instituciones a las cuales ellos se encuentran afiliados.

Estudios en homenaje a
Jacques Malherbe
The Limitation of Tax Transparency of Multinational Companies

Prof. Dr. Roman Seer

Summary

1. Introduction

At the 2014 congress of the European Association of Tax Law Professors (EATLP) in Istanbul, Jacques Malherbe has realized a “new era of exchange of information”. Indeed, in breathtaking speed the international exchange of information in tax matters is on the way towards global transparency. The OECD and the EU aim to increase the transparency of cross-border group interconnections and performance relationships in the international fight against tax structuring of multinational companies. The BEPS initiative of the OECD and G20 states aims to address the exploitation of mismatches in tax legislations. 15 Actions were endorsed by the G20 in 2013 and the final BEPS package was finalized and published in 2015. The G20 leaders committed themselves to the implementation of the BEPS package at their summit from 15-16 November 2015 in Antalya. One of the steps tackling the disadvantageous exploitation of tax rules by international company groups Action 13 of the BEPS initiative which addresses transfer pricing documentation and a country-by-country reporting (CbCR). On 28 January 2016, the EU provided a proposal of an amendment of the Directive on Administrative Cooperation 2011/16/EU (DAC1) lastly amended by
Directive 2015/2376/EU (DAC 3) in order to include the CbCR which was adopted on 25 May 2016 by Directive 2016/881/EU (DAC 4). Member States have to adopt DAC4 into their domestic law by 4 June 2017 and it shall be applicable as of 5 June 2017. In addition to this extension of the automatic exchange of information, the Commission of the European Union proposed an amendment to the Accounting Directive 2013/34/EU which requires the publication of reports on income tax information (COM [2016] 198). These reporting requirements solely concern large Multinational Entity (MNE) groups whose interests conflict with the increasing transparency requirements initiated by the OECD and the EU. The provision and even publication of business information is subject to the confidentiality requirement of the respective regulations. Besides this, the EU-Regulation on Data Protection 2016/679 of 27 April 2016 repealing Directive 95/46/EC provides protection of natural persons regarding the processing of personal data. The regulation is not overall applicable to businesses. This article will describe the new and proposed reporting requirements for multinational operating entities (see 2) and present the protection mechanism currently in place to protect the interest of companies to protect sensitive data which may disclose business secrets (see 3).

2. BEPS Action 13: Country by Country Reporting (CbCR)

Action 13 of the BEPS initiative provides for a three-tiered approach in order to increase the transparency of transfer pricing documentation. First, "master files" prepared by multinational enterprises (MNEs) shall provide information of their international business operations and transfer pricing policies. Second, "local files" shall provide a detailed transfer pricing documentation specified for each country. The third tier represents the obligation of large MNEs with a consolidated group revenue of at least EUR 750 million to file CbCRs annually which include among other things the amount of revenue/profit before income tax and the income tax paid and accrued for each tax jurisdiction in which they do business. The parent company shall provide the CbCR to the respective authority of its residential jurisdiction and the latter is obliged to share the reports with other authorities automatically via means of the multilateral Convention on Mutual Administrative Assistance in Tax Matters 1988/2010, bilateral tax treaties or
Tax Information Exchange Agreements (TIEAs). This extensive reporting shall facilitate the authorities’ ability to identify artificial allocation of income into tax-advantaged areas and ensure a taxation where the respective income is actually generated.\(^{(12)}\)

2.1. The Country by Country Reporting Concept at its implementation

The final report of Action Plan 13 does not only contain a recommendation for a unilateral implementation of a CbCR, but also an additional Implementation Package.\(^{(13)}\) Besides the model for the national implementation of CbCR, there are different models for a bi- and multilateral implementation of an automatic exchange of information between states in which group parent companies are obliged to file a CbCR and every other state in which group companies or permanent establishments are tax resident or situated:

— Multilateral Competent Authority Agreements - MCAA\(^{(14)}\)

— Competent Authority Agreements based on Double Tax Conventions (DTC CAA)\(^{(15)}\)

— Competent Authority Agreement based on Tax Information Exchange Agreements (TIEA CAA)\(^{(16)}\).

The mentioned MCAA is linked to the Multilateral Convention of the Council of the European Union/OECD regarding mutual administrative assistance in tax matters 1988/2010 in the way that the involved states conclude a multilateral exchange of information for the different case groups of the CbCR by utilizing the opening clause of Art. 6 of the Council of Europe/OECD Convention on Mutual Administrative Assistance. The detailed reporting requirements of the CbCR containing a model template and general instructions are included in Annex III to Chapter V in the final report of Action 13\(^{(12)}\) which were adopted into EU Law by Annex III Section III of the new DAC 4. Furthermore, DAC 4 introduced a new Art. 8aa which defines the scope and conditions of the automatic exchange of the CbCR information. Similar to the implementation of the OECD Standard of automatic exchange of financial account information by Art. 8 para 3a of Directive 2014/107/EU\(^{(18)}\) (DAC 2) further detailed definitions and
instructions are included in the Annex (Sections I and II of Annex III). The CbCR shall ensure the collection and sharing of information that contains the allocation of income and taxes paid of the MNE group and where economic activity is conducted within the MNE group.\(^{(19)}\) The OECD report recommends to file the first CbCR for fiscal years beginning in 2016 by the end of 2017.\(^{(20)}\) It can be stated that the CbCR requirements included in the new DAC 4 do not differ from the provisions and definitions of the model templates, the general instruction and the model agreements of Annexes II and IV to Chapter V.\(^{(21)}\)

According to Art. 8aa para. 1 requires Ultimate Parent\(^{(22)}\) or other Entities according to Section II of Annex III of an MNE group to file a CbCR within one year after the MNE group’s end of the fiscal year. This only applies to MNE groups with consolidated group revenues amount to EUR 750 million or more in the previous fiscal year (No. 3 and 4 of Section I of Annex III DAC 4). The competent authority which received the CbCR shall automatically forward the report within 15 months after the end of the MNE group’s fiscal year to every Member State in which Constituent Entities\(^{(23)}\) of the respective MNE group are tax resident or have permanent establishment (Art. 8aa para. 2 and 4 DAC 4). The first automatic exchange of CbCRs prepared for fiscal years starting in 2016 is allowed to be conducted within 18 months after the end of the fiscal year of the MNE group (Art. 8aa para. 4, sent. 2 DAC4).

Art. 8aa para. 3 lit a DAC4 requires the MNE group to provide the following aggregated information with respect to each jurisdiction in which the MNE Group operates:

a) revenue,

b) profit (loss) before income tax,

c) income tax paid,

d) income tax accrued,

e) stated capital,

f) accumulated earnings,

g) number of employees and

h) tangible assets other than cash or cash equivalents.
Furthermore, Art. 8aa para. 3 lit b DAC4 requires the determination of every Constituent Entity of the MNE group including the respective jurisdiction of tax residence, the jurisdiction under the laws of which the Constituent Entity is organized if that differ from the tax residence jurisdiction and the nature of the main business activity.

The collected data under CbCR shall be used for "assessing high-level transfer-pricing risks and other risks related to base erosion and profit shifting, including assessing the risk of non-compliance by members of the MNE Group with applicable transfer-pricing rules, and where appropriate for economic and statistical analysis" (Art. 16 para. 6 sent. 1 DAC 4, Sec. 5 para. 2 sent. 1 MCAA). It should be noted that specific transfer pricing adjustments shall not be conducted based on the information exchanged by the CbCR, but that such data may be an incentive for further requests referring to the MNE group’s transfer pricing documentation or also other tax relevant issues regarding tax audits which may cause respective adjustments (Art. 16 para. 6 sent. 2,3 DAC4, Sec. 5 para. 2 sent. 3, 5 MCAA).


The European Commission proposed a new directive amending Directive 2013/34/EU on Accounting in order to strengthen transparency and public scrutiny regarding public income tax. The proposal contains a new Chapter 10a dealing with a ‘Report on Income Tax Information’. Comparable to the CbCR described above in 2.1, the report on income tax information shall be prepared by ultimate parent companies and non-affiliated companies (the directive uses the term ‘undertaking’) resident in a member state with a consolidated net turnover exceeding EUR 750,000,000. Furthermore, medium-sized and large subsidiaries resident in a member state whose controlling ultimate parent company fulfills the size requirement of Art. 48b para. 1 COM (2016) 198, but is not subject to the European Directive on Accounting shall also be required to prepare income tax reports in order to ensure the preparation of such report within the European Union (Art. 48b para. 3 COM [2016] 198). The difference to the CbCR is the mandatory publication of such reports. The proposal requests that the reports on income
tax information have to be accessible to the public and requires the respective publication on the respective company’s website immediately once it is published (Art. 48b para. 1, sent. 2, para. 3 sent. 2 COM [2016] 198). The information to be included in the report on income tax information shall cover the annual information relating to the activities of the reporting company and its ultimate parent including the activities of each consolidated affiliated company (Art. 48c para. 1 COM [2016] 198). Explicitly, this information shall contain:

(a) a brief description of the nature of the activities;
(b) the number of employees;
(c) the amount of the net turnover (including the turnover with related parties);
(d) profit or loss before income tax;
(e) income tax accrued (current year);
(f) income tax paid and
(g) accumulated earnings.

It can be seen that this required reporting information is similar to the information which shall be included in the CbCR (see above 2.1). However, as mentioned above, the CbCR data is reported to tax authorities and not publicly disclosed in any way. It shall support tax authorities during respective tax audits and ensure a sufficient knowledge base for tax authorities to safeguard tax compliance. The proposal amending the Accounting Directive aims at obliging MNEs to publish “certain items of the information submitted to tax authorities”.\(^{22}\)

3. Automatic Exchange of CbCR Data and the Protection of Business Secrets

An automatic exchange of information between states is designed to provide certain abstractly defined data without any individual examination at certain fixed dates within legally defined abstract general case groups.\(^{23}\) The automatic exchange of information therefore fits to the mass procedure and the transmission of easily accessible, electronically available data like capital income, account balances, salary, pension and contribution payments. This
corresponds to the OECD Standard for automatic exchange of financial account information in tax matters.\(^{(20)}\) Accordingly, Art. 3 No. 9 lit a) DAC 4 defines the automatic exchange of information as the "systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals." Automatically exchanged information can therefore be seen as part of a cross-border electronical risk management, as it provides the receiving state with information which can be used for an automatic control of the data provided with tax declarations. In comparison, spontaneous exchange of information, e.g. according to Art. 9 para. 1 lit. c) and d) DAC, requires a certain event that triggers the (unrequested) provision of information.\(^{(20)}\)

### 3.1. Multi-, Bilateral and European Protection Clauses

The above mentioned MCAA is linked to the Multilateral Convention of the Council of Europe/OECD regarding mutual administrative assistance in tax matters 1988/2010 in the way that the involved states conclude a multilateral exchange of information for the different case groups of the CbCR by utilizing the opening clause of Art. 6 of the Convention on Mutual Administrative Assistance 1988/2010 and also obliging to Art. 21 and 22 of the Convention on Mutual Administrative Assistance 1988/2010 (CMAA). Art. 22 para. 1 of this convention contains the international tax secret after which the obtaining state shall treat the received information at least as secret as it is provided by the domestic laws of the supplying state. The obtaining state is only authorized to use the received information for tax or tax crime purposes including the respective court proceedings (Art. 22 para. 2 CMAA). According to Art. 22 para. 4 CMAA, the utilization of such received information may be extended if it is allowed by the domestic law of the supplying state and if the supplying authorizes such use. Herewith, the automatic exchange of information according to the Implementation Package is based on the prerequisite of safeguarding the respective tax secret of the supplying state.

As an additional safeguard, the OECD report requires the CbCR information to only be used for auditing purposes regarding transfer pricing and BEPS risks as well as for connected economic and statistical analysis. Furthermore, the information may not be used as a basis for concrete transfer
pricing adjustments, but rather serve as an indicator for further enquiries and examinations (see. 2.1 above).\textsuperscript{[11]} The MCAA contains a detailed questionnaire on confidentiality and data safeguards about the measures of safeguarding the tax secret taken in the respective contracting state.\textsuperscript{[32]} By answering this detailed questionnaire, the participating contracting states shall mutually assure the protection of the tax secret. It may be concluded that a state therefore may refuse the automatic provision of CbCR data to such contracting states of the MCAA where specific doubts regarding the tax secrecy provisions exist. As well as Art 17 para. 4 DAC, Art. 26 para. 3 lit. c) OECD-MA, Art. 21 para. 2 lit. c) CMAA contains a clause to protect trade, business, industrial, commercial and professional secrets as well as trade processes. This means that states may also refuse the provision of CbCR data in so far as they contain trade, industry or other business secrets.

3.2. Automatic exchange of information vs. the protection of business secrets

According to the OECD Model Commentary, business or trade secrets are defined as economically important information/data of which the unauthorized usage can cause significant damage to such businesses. However, information like financial books or records is not generally considered to be subject to business or trade secrets.\textsuperscript{[43]} The necessity of an effective design of the international tax secret exists in order to assure the taxpayers that their financial data will only be used for tax purposes in the foreign state. The preceding problem of a possible violation of business secrecy is usually not existent here. The international legislation on information exchange does not rely on the adherence of the international tax secret as far as business secrets are concerned. Regarding the background that the legal systems of some states have breaches of tax secrecy that are extensive and difficult to calculate, the national economies as well as the affected companies shall be protected against the risk of industrial espionage.\textsuperscript{[44]} If certain business data gets automatically transmitted, in the course of the transparency initiative pursued by the OECD as well as by the EU, the instrument of automatic exchange of information latently conflicts with the protection of business secrecy in Art. 17 para. 4 Directive 2011/16/EU as
well as in the MCAA and in the DTC/TIEA due to the aforementioned reasons.

Furthermore, with the Data Protection Regulation (EU) 2016/679 of 27 April 2016 repealing Directive 95/46/EC\textsuperscript{351} a separate data protection mechanism for natural persons exists which is explicitly applicable for the exchange of information according to the Directive on Administrative Assistance (Art. 25 para. 1 DAC). The new data protection regulation addresses the changes of the digital sector and provides binding corporate rules for multinational group companies which shall safeguard the protection of transferring personal data to group companies in countries where no adequate data protection rules are in place (Preamble No. 7, Art. 47 EU-Regulation 2016/679). According to Art. 2 para. 1 EU-Regulation 2016/679 the data protection applies to exchange of information by automatic means. The Data Protection Regulation, however, only refers to the protection of natural persons with regard to the processing of personal data which enables to identify natural persons directly or indirectly (Art. 1 para. 1, Art. 4 para. 1 EU-Regulation 2016/679). This means such information which leads to conclusion about “the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person“ (Art. 4 lit. a] EU-Regulation 2016/679). In order to be allowed to collect and process personal data, a specific purpose has to be existent for which the respective data has to be adequate and relevant and the data collection and storage shall be limited to the necessity for such purpose (Art. 5 para. 1 lit. b], c] and e] EU-Regulation 2016/679). The processing of personal data is only allowed if a requirement of Art. 6 para. 1 EU-Regulation 2016/679 is met. The applicable case is depicted in lit. e) and refers to the processing of data being necessary for tasks subject to the public interest or in the exercise of official authority. As it is explicitly mentioned by the Regulation on Data Protection, this extensive protection only holds for natural persons, but not for businesses whose data is collected, e.g. via CbCR.

In this respect the case law of the CJEU has to be considered. It distinguishes between natural and legal persons whereas the latter are only subject to the protection of the Data Protection Regulation as far as the name of the legal entity enables the identification of one or more natural persons.\textsuperscript{356} Generally, Art. 52 para. 1 of the EU-Charter\textsuperscript{371} allows limitations to the
protection of personal data of Art. 8 of the EU-charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and are necessary and meet the general interest of the European Union with regard to the principle of proportionality. The CJEU provides a three-step approach in order to determine the justification of an interference with the right to protection of personal data.:\(39\)

1. Is a law in place that allows the limitation of the fundamental right?
2. Does a public interest acknowledged by the European Union exist and does this public interest justify the limitation of the fundamental right?
3. Is the limitation of the fundamental right proportional with regard to the pursued aim?

The third step represents a general principle of European law and shall ensure that the collection and publication of personal data is limited to the necessary minimum regarding the fulfillment of the respective purpose.\(39\) However, this strict protection of personal data is limited with respect to legal persons whose name refers to a natural person. The CJEU argues that legal persons are already subject to more extensive publication requirements regarding their personal data. Furthermore, it is stated that an examination of every legal person in order to determine whether the names may identify natural persons represents an unreasonable administrative burden.\(40\)

3.3. Protection of Business Secrets with respect to CbCR

With respect to the transmission of the collected and transmitted data according to CbCR (Art. 8aa para. 3 lit. a) DAC 4, see above 2) it can be stated that such data may not be subject to data protection of the EU-Regulation as it contains data which in a way is already subject to certain publication requirements. Furthermore, preamble 22 of DAC 4 explicitly states that the exchanged information under CbCR “does not lead to the disclosure of a commercial, industrial or professional secret [or] a commercial process“. In comparison to this, the information exchanged according to DAC 3 regarding cross-border advance rulings and APA limits the automatic exchange to keyword terms of the promised object in order to secure business secrets (Art. 8a VI lit. b) DAC 3)\(41\) whereas the preamble of the directive explains that the provision of information regarding advance
rulings and APA should not lead to the disclosure of such secrets.\textsuperscript{42} ECOFIN/OECD may erase this conflict by ordering that the limitations of the exchange of information ensuring the secrecy protection remain unchanged. But this only shifts the problem to the fiscal authorities of the respective member/contracting states which have to judge the relevance of the provided data for the protection of business secrets in order to decide if they make use of the right to refuse the provision of information free from discretionary errors. As the CbCR only addresses multinational companies with the considerable magnitude of EUR 750 million of consolidated group revenue, it does not affect mass procedures. Therefore, it should be possible and reasonable to let fiscal authorities examine before an "automatic" provision of CbCR data if these contain knowledge which shall only be accessible, economically usable for a certain group of people and are suitable to provide a third person with an advantage compared to the person whose interests are protected by the secret in case of disclosure. As mentioned above, the unauthorized use of these protected information has to cause a significant damage for the secret bearer.\textsuperscript{43} Besides this, the respective company, on its side, could already point out which data sets it considers to be a trade, business, industrial, commercial or professional secret according to Art. 21 para. 2 lit. d) CMAA when transmitting the CbCR.

4. Conclusion
The CbCR introduced by the BEPS initiative of the OECD generally does not violate the confidentiality provisions of the CMAA, the Model Convention on Income and Capital and the Directive on Administrative Assistance in Tax Matters as the CbCR is based on a legal provision which clearly defines the purpose and extent of the collected information. The respective international exchange of such data is applicable to the same requirements and has to be measured to the principle of proportionality which limits the utilization of such data. The exchanged information has to be relevant for the taxation of group companies and their respective permanent establishments in the receiving state where they have to be protected by confidentiality clauses similar to the level in the information providing state. Besides this, business and trades secrets are protected separately. CbCR data is not considered to be data revealing business or trade secrets. However, if the transmission of
information causes a concrete threat of a competitive disadvantage to the reporting MNE group, the respective fiscal authority who is in charge of transmitting the information to the entitled fiscal authorities in other member states where respective affiliates of the MNE group are resident shall make use of its right to refuse such provision of information according to the DAC, MCAA, DTT or TIEA.

(1) Institute for Tax Law and Tax Procedure Law, Ruhr-University of Bochum/Germany.
(3) See the fundamental work by Oberson, International Exchange of Information in Tax Matters, 2015.
(9) OJ L 146 of 3 June 2016, 8.
(12) OECD (footnote 3), p. 9 f.
(20) OECD (footnote 3), p. 20 f.
(22) The Ultimate Parent Entity owns (directly or indirectly) sufficient interest in constituent entities of an MNE group in a way that it is required to prepare consolidated financial statements according to accounting requirements, No. 7 Section I of Annex III DAC 4.
(23) Separate business units that are included in the consolidated financial statements of the MNE group or that are excluded from those due to size/materiality reasons and their
permanent establishments for which separate financial statements are prepared, No. 5 of Section 1 of Annex III DAC 4.

27. COM (2016) 198, explanatory memorandum, p.3.
30. Seer/Gabert (footnote 28), Bulletin for international Taxation 2011, p. 88 (94 f.).
31. Sec. 6 para. 1 of the CbCR Model Legislation, Sec. 5 para. 2 MCAA; see OECD (footnote 3), p. 42, 49, 62, 68.
34. Seer/Gabert, Der international Auskunftsverkehr in Steuersachen, Steuer und Wirtschaft (StuW) 2010, p. 3 (19).
35. OJ L 119 of 4 May 2016, 1.
36. CJEU of 9 November 2010, C-92/09, C-93/09, Schecke/Eifert, European Court Reports 2010 I-11063, sec.53.
37. OJ C 326 of 26 October 2012, 391.
38. CJEU (footnote 27), sec. 66 ff.
39. CJEU (footnote 27), sec. 77.
40. CJEU (footnote 27), sec. 87, citing ECtHR, K.U. v. Finland, 2 March 2009, Appl. no 2872/02, sec. 48.
41. SWD (2015) 60 of 18.3.2015.
42. Preamble no. 9, DAC 3.
43. OECD Model Commentary, Art. 26, para. 19.2.