

ANALYSIS

Leaks as drivers of policy change?

An analysis of the efforts to combat corporate tax avoidance in the EU

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LEAKS AS DRIVERS OF POLICY CHANGE? AN ANALYSIS OF THE EFFORTS TO COMBAT CORPORATE TAX AVOIDANCE IN THE EU

Outline

1. Introduction	2
2. What is corporate tax avoidance?	3
2.1 What are the consequences of tax avoidance on developed and developing countries?	3
3. The tax leaks	4
3.1 Offshore Leaks	4
3.2 LuxLeaks	5
3.3 Panama Papers.....	6
4. Country-By-Country Reporting as a tool to combat tax avoidance	6
4.1 International efforts, agenda capture and heightened salience	6
4.2 The second public consultation and the Impact Assessment	7
4.3 Meetings with corporations and NGOs and the rise of PCBCR in the policy network	8
5. Political processes	9
5.1 Intra-EU processes.....	9
5.2 Inter-EU processes.....	10
6. Concluding remarks	11
6.1 The potential of Public Country-by-Country Reporting	11
6.2 Proposal at a standstill	12

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1. Introduction

In April 2013, the Offshore Leaks opened the doors of a secret world to the public. A world of hidden money, sweetheart deals between governments and multinationals, and shockingly low tax rates for companies. From small, remote islands such as Panama and the Cayman Islands, to countries such as Luxemburg and Ireland, these places have represented tax havens for both individuals and corporations for a long time. In contrast with tax evasion, which is illegal, tax avoidance concerns “the arrangement of a taxpayer’s affairs in a way that is intended to reduce his or her tax liability”¹.

In the words of Tax Justice Network, tax avoidance “complies with the law, but it goes against the spirit of what our legislators intended”.² Not only powerful individuals, but especially multinational corporations have been using dodgy tax schemes to avoid paying the high rates of their country of establishment, and to store significant amounts of capital in tax havens. These are countries which impose a low or no tax.³ Capital thus results being denied to the rightful hands of governments and public services. In the long-term, this has only worsened social inequality and provided arguments for less powerful enterprises and individuals to pay fewer taxes themselves.⁴

Since the Offshore Leaks, data leakages started to increasingly disclose the world of such secretive practices to the public: the LuxLeaks in 2014, SwissLeaks in 2015, Panama Papers and Bahamas Leaks in 2016, and, lastly, Paradise Papers in 2017. Nonetheless, the issue was not entirely new to civil society organizations, which had been advocating for a global fight against corporate tax avoidance already in the previous decade.

In 2002, Country-By-Country Reporting (CBCR) was first advanced as a possible solution to corporate tax avoidance. It would require multi-national corporations to “report annually and for each tax jurisdiction in which they do business the information set out therein”.⁵ Although host of tax havens such as Luxemburg and Ireland,⁶ the European Union (EU) did not advance any line of action against offshore taxation by multinationals, even seldom mentioning the problem throughout the years.

This suddenly started to change in 2015 with the introduction of the Tax Transparency Package. In January 2016 the Anti-Tax Avoidance Package introduced CBCR for all multinationals.⁷ Advocacy groups however criticized the proposal as it requested multi-national corporations to publish the reports only confidentially. However, the Commission eventually proposed a Directive introducing Public CBCR (PCBCR) in April 2016 (PCBCR Proposal).⁸

Therefore, this paper seeks to examine *why did efforts to introduce public CBCR as a tool against corporate tax avoidance succeed at the EU level specifically in 2016*. Moreover, this research

¹ <http://www.oecd.org/ctp/glossaryoftaxterms.htm>

² <https://www.taxjustice.net/faq/tax-avoidance/>

³ <http://www.oecd.org/ctp/glossaryoftaxterms.htm>

⁴ <http://eurodad.org/files/pdf/4720-exposing-the-lost-billions-how-financial-transparency-by-multinationals-on-a-country-by-country-basis-can-aid-development.pdf>

⁵ <http://www.oecd.org/tax/beps/country-by-country-reporting.htm>

⁶ <http://datafortaxjustice.net/paradiselost/#appendix>

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0881>

⁸ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52016PC0198>

conceptualizes the PCBCR Proposal as an instance of “leak- driven law” following the contribution of Oei & Ring.⁹ It is argued that the scandals of the leaked data were the main, although not the sole, driving factor behind the PCBCR Proposal.

2. What is corporate tax avoidance?

Vocal Europe conducted an exclusive interview with Transparency International EU’s Ilkka Penttinen, expert on financial flows, money laundering and transparency. Transparency International defines tax evasion and tax avoidance as two sides of the same coin.

Tax evasion is the “illegal non-payment or under-payment of taxes, usually by deliberately making a false declaration or no declaration to tax authorities – such as by declaring less income, profits or gains than the amounts actually earned, or by overstating deductions”, and it “entails criminal or civil legal penalties”.

Tax avoidance is the “*legal practice* of seeking to minimize a tax bill by taking advantage of a loophole or exception to the rules or adopting an unintended interpretation of the tax code”. It refers to the “practice of seeking to avoid paying tax by adhering to the letter of the law but opposed to the spirit of the law”.¹⁰ Tax avoidance practices are illicit, but not illegal.

2.1 What are the consequences of tax avoidance on developed and developing countries?

Concerning developed countries, there are two main effects of tax avoidance. First, the distortion of level playing field for corporations, i.e. **hampering the competition** effects. This happens especially with multi-national corporations who are, as Penttinen states, “able to avoid taxes and create profitable enterprises without actually having more profitable business models. This is distorting innovation, start-ups and small enterprises.”

Second, **tax burden** represents a major issue. “Taxes need to be paid” by someone. Tax avoidance shifts the “tax burden much more [on] the individuals, the everyday tax-payers, and small and medium enterprises who are not having an army of tax experts who are enabling this sort of profit shifting or some other tax avoidance practices.”

“That tax burden, if it is not on multinationals, [which] are very wealthy and creating great profit, is it going to be on the European citizens, on the smaller medium enterprises? In the latter case, how is this actually establishing the kind of environment where we are having European economic growth, new companies and corporations coming up with well-functioning business models?”

This issue leads “to the lack of transparency for the investors’ side. If you are an investor, it will be difficult to tell if a company is actually wealthy or it looks wealthy only because it is engaging in some many tax avoidance practices, which is artificially shifting the profit itself.” Therefore, tax avoidance is not creating better chances for **investment** either.

⁹ Oei, S., & Ring, D. (2017). Leak-driven law. SSRN Electronic Journal. Retrieved from <https://ssrn.com/abstract=2918550>

¹⁰ https://www.transparency.org/glossary/term/tax_evasion

In regards of developing countries, **development aid** is one of the core issues. “The amount of taxes that are avoided in the developing world is multiple times the amount we are actually investing in the development side.

This is obviously showing that the economies are being distorted, that they are not having sustainable economic models – if the money is actually flowing away from the country instead of staying there and have the possibility to grow and build up society and its structures.” In developing countries as well, “the tax burden is shifted to the people who are in a less privileged position. This is obviously not creating possibilities for the developing world.”

There is also a crucial link between tax avoidance and **corruption**. There are wise possibilities that the “money that is not paid in taxes is going in the hands of private individuals and organizations which are abusing the systems. This is not exactly the best way to create a sustainable society or reinforce the democratic institutions and their elements.” Tax avoidance and tax haven jurisdictions are therefore also “opening up the doors for private individuals to hide their money to establish this network and flows where this money is taken away from the taxpayers.”¹¹

3. The tax leaks

(P)CBCR was tentatively introduced in the EU, without success, twice before 2016. First, in May 2013, the European Council endorsed the introduction of CBCR requirements for all EU companies.¹² The proposal, however, failed “due to a disagreement on a possible competitive disadvantage” that companies would have suffered.¹³

Second, in April 2014, the proposal to introduce PCBCR within the Shareholders’ Rights Directive was met with significant opposition. The Directive was thwarted by the incoming Commission President, Jean-Claude Juncker, and the clause was not included in the final version of the Directive.¹⁴ On 12 April 2016, PCBCR was instead successfully advanced by European Commission Directorate-General for Financial Stability, Financial Services and Capital Markets (DG Fisma). Why did such an effort succeed in 2016 but previously fail?

3.1 Offshore Leaks

The issues of (corporate) tax avoidance, tax transparency, and tax havens were scarcely mentioned within Commission documents before 2012. Moreover, the first study of the European Parliament Research Service (EPRS) mentioning “tax havens” and “offshore financial transactions” is dated April 2013.¹⁵ Such increased attention corresponds exactly to the disclosure of the Offshore Leaks. The International Consortium of Investigative Journalists (ICIJ) obtained 2.5 million files on secret offshore accounts of 12.000 companies from more than 170 countries. At the time, the leaks represented the biggest mass of inside information about the offshore system ever obtained.¹⁶

¹¹ Every quote of this section (2.1) is of Ilkka Penttinen.

¹² https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137197.pdf

¹³ Biz, C. (2015). Countering tax avoidance at the EU level after "LuxLeaks". A history of tax rulings, transparency and BEPS: base erosion profit shifting or bending European prospective solutions?. *Diritto e Pratica Tributaria Internazionale*, 12(4), 1035-1067.

¹⁴ <https://www.taxjustice.net/wp-content/uploads/2017/11/TJN2017-CBCR-Historical-Roots.pdf>

¹⁵ http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/staes_study/staes_studyen.pdf

¹⁶ <https://www.icij.org/investigations/offshore/secret-files-expose-offshores-global-impact/>

LEAKS AS DRIVERS OF POLICY CHANGE? AN ANALYSIS OF THE EFFORTS TO COMBAT CORPORATE TAX AVOIDANCE IN THE EU

This was the first *event* that *focused* the attention of EU policy-makers towards the issue of corporate tax avoidance. In June 2013, EU Commissioner Algirdas Šemeta defined the leaks as “the most significant trigger” behind the introduction of new EU measures designed to combat corporate tax avoidance (see section 2.2.1).

The release of the data, he added, “created visibility of the issue” and “triggered political recognition of the amplitude of the problem.” Corporate tax avoidance was discovered to cause a total loss of “about €1 trillion a year” in tax revenue.¹⁷ Therefore, the inside information obtained served as an *indicator* of the scale of the offshore system.

3.2 LuxLeaks

In November 2014, 28.000 pages of confidential documents describing the tax rulings granted by Luxemburg to 340 of the world’s largest multi-national corporations from dozens of countries were leaked by employees of the accounting firm PricewaterhouseCoopers. The nature of Luxemburg as a tax haven was thus globally exposed.¹⁸ Being the country at the heart of Europe, being Juncker the President of the Commission at the time and Prime Minister of Luxemburg until one year earlier, the scandal triggered a significant reaction at the EU level and represented a strong *impetus for reform*.

In particular, the LuxLeaks disclosed to the public that lack of tax transparency encourages aggressive tax planning on a significant scale. The files showed that some multi-national corporations were paying tax rates below 1 or 2%, while the statutory rate is between 10 and 35% in the Member States. Some addresses in Luxemburg were found to be home to more than 1.600 companies.¹⁹

In September 2015, the EPRS published a study which estimated that aggressive corporate tax planning leads to a loss of tax revenue to MSs of around € 50-70 billion.²⁰ These figures *indicated* the real magnitude of the issue of its consequences. As put by former-Luxemburg Finance Minister Pierre Gramegna, the LuxLeaks represented a “game changer” for Luxemburg and not only. Before the revelations, he said, “nobody really cared about this,” while now “the whole world has started to discuss [tax] rulings.”²¹

The LuxLeaks caused a storm of media, public and government response, leading to, *inter alia*, a censure motion against Juncker, although it was eventually defeated.²² An example of such *heightened response* is the letter sent in November 2014 by the French, German and Italian Finance Ministers to Commissioner Pierre Moscovici, where they urged the EU to take action against corporate tax avoidance.²³ MSs came to be faced by a considerable *public pressure* to strengthen

¹⁷ <https://euobserver.com/economic/120382>

¹⁸ <https://www.icij.org/investigations/luxembourg-leaks/about-project-luxembourg-leaks/>

¹⁹ https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transparency/sw_d_2015_60.pdf

²⁰ [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU\(2015\)558773_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf)

²¹ <https://www.bloomberg.com/news/articles/2014-12-22/gramegna-calls-luxleaks-game-changer-for-tax-deal-probe>

²² <https://www.icij.org/blog/2014/11/calls-reform-and-resignation-over-luxleaks/>

²³ https://www.economie.gouv.fr/files/files/PDF/letter-to-p_moscovici-11282014.pdf

the fight against corporate tax avoidance, mainly because the extensive media coverage devoted to the scandal²⁴ (see section 2.3.2).

3.3 Panama Papers

On April 3rd, 2016, the Panama Papers were disclosed to the public. The ICIJ once again led the investigation of the 11.5 million files leaked from the database of offshore law firm Mossack Fonseca representing “the biggest leak of inside information in history”. The documents exposed the offshore holdings of some of the world’s most prominent individuals, such as political leaders and famous public figures.²⁵²⁶ Concerning the PCBCR Proposal, the text was already at the stage of final draft when the Panama Papers suddenly were released.

This triggered a final amendment by Commission DG Fisma to the legislation, namely the introduction of the obligation of companies to disclose their operations taking place in tax havens. The 2016 Impact Assessment on PCBCR (see section 2.2.2) did not consider this element, whereas it appears in the final proposal.²⁷ This reflects how the Panama Papers “disclosures have once again *underlined the magnitude* of the problem,” as Commissioner Dombrovskis stated during the EP debate on the Proposal in 2017.²⁸

In sum, corporate tax avoidance started to receive increasing attention from EU policy-makers due to the data leakages of the Offshore Leaks, LuxLeaks, and Panama Papers. These *focusing events* which provided *indicators* of the actual scale of corporate tax avoidance and the related losses by Member States in tax revenue. The leaks thus gave policy-makers access to *free information* about the offshore system, leading to *heightened salience* due to significant media attention, and providing a strong *impetus for reform* in the EU.

4. Country-By-Country Reporting as a tool to combat tax avoidance

4.1 International efforts, agenda capture and heightened salience

On the *global level*, the first initiative against corporate tax avoidance was the Organization for Economic Cooperation and Development (OECD)’s Action Plan on Base Erosion and Profit Shifting (BEPS), prepared under the request of the G20 and launched in July 2013. Action 13 developed a standard for a confidential form of CBCR.²⁹

In the EU, PCBCR was not the only, nor the first solution taken into account to tackle corporate tax avoidance since the Offshore Leaks. The EU and the Commission were aware of the tool and had already employed it, although only in two narrow areas. After launching a **public consultation** on

²⁴https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transparency/sw_d_2015_60.pdf

²⁵<https://www.euractiv.com/section/global-europe/news/record-breaking-leak-exposes-offshore-holdings-of-politicians-and-elites/>

²⁶<https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/>

²⁷ Interviewee. An interview on tax avoidance and PCBCR was conducted with a DG Fisma policy officer in May 2018. The interviewee was treated as an anonymous source.

²⁸<http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20170704&secondRef=ITEM-003&language=EN>

²⁹<http://www.oecd.org/ctp/BEPSActionPlan.pdf>

LEAKS AS DRIVERS OF POLICY CHANGE? AN ANALYSIS OF THE EFFORTS TO COMBAT CORPORATE TAX AVOIDANCE IN THE EU

CBCR by multi-national corporations between October 2010 and January 2011,³⁰ CBCR was introduced as a legal obligation only for **banks** and for the **extractive industry**.³¹ In March 2015, the Commission proposed the Tax Transparency Package and endorsed the Action Plan on Corporate Taxation in June. Lastly, January 2016 saw the launch of the Anti-Tax Avoidance Package and of a strategy to develop a common EU list of tax havens.³² The first ever common EU list of third country jurisdictions for tax purposes, or non-cooperative tax jurisdictions, was agreed by Member States in December 2017.³³

These proposals were a response to the LuxLeaks,³⁴ reflecting how the *agenda was captured* by the *heightened salience* caused by the scandals. However, (P)CBCR still kept on being advocated especially by civil society organizations as the most effective solution to tackle corporate tax avoidance.

4.2 The second public consultation and the Impact Assessment

In June 2015, DG Fisma launched a second **public consultation** on PCBCR until September 2015.³⁵ The breakdown of respondents of the 2011 and 2015 consultations crucially differs from one another. In 2011, more than half of the respondents were companies and institutions, followed by a smaller number of NGOs and nearly no private individuals, out of a total of 73 respondents.³⁶

In 2015, out of a total of 422 respondents from 14 countries, more than half of the respondents were private individuals, followed by NGOs and companies.³⁷ Such a change of responses between the two surveys shows how the interest of private individuals and NGOs increased critically in 2015, right in the aftermath of the Offshore and LuxLeaks.

The nature of the responses to the 2015 survey was conducive to considerations relating to *value acceptability* and *technical feasibility*. *Value acceptability* is the degree of agreement among the main participants in the network; ideas that do not fit the community's dominant values are less likely to be considered. *Technical feasibility* represents how easy the implementation is; the more a proposal seems to be challenging to implement, the lower the chance it has to be considered.³⁸

Public consultations represent one of the bases on which the Commission decides on the proposals to advance, such as in this case.³⁹ Therefore, a majorly increased concern for corporate tax avoidance and higher support for (P)CBCR as an effective tool to combat the issue also led to a higher level of *value acceptability* among policy-makers.

³⁰https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/consultations/tax/double_non_tax/summary_report.pdf

³¹ https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/public-country-country-reporting_en

³² https://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF

³³ https://ec.europa.eu/taxation_customs/tax-common-eu-list_en

³⁴ <https://www.icij.org/blog/2015/03/fundamental-change-eu-tax-rules-after-luxleaks/>

³⁵ http://ec.europa.eu/finance/consultations/2015/further-corporate-tax-transparency/docs/summary-of-responses_en.pdf

³⁶ https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/common/consultations/tax/double_non_tax/summary_report.pdf

³⁷ http://ec.europa.eu/finance/consultations/2015/further-corporate-tax-transparency/docs/summary-of-responses_en.pdf

³⁸ Zahariadis, N. (2007). The multiple streams framework: structure, limitations, prospects. In P.A. Sabatier (Ed.), *Theories of the Policy Process*, 2nd edition (pp. 65–92). Boulder: Westview Press.

³⁹ Interviewee.

The level of *technical feasibility* was also examined with the **2016 Commission Impact Assessment** studying the potential for CBCR. The Impact Assessment built on the experience gained with CBCR for banks and the extractive industry in stating that CBCR “was not expected to have significant negative impacts economically” nor it did entail noticeable administrative burdens.⁴⁰ The Impact Assessment found that PCBCR could contribute to increasing public trust in the fairness of tax systems, and to incentivizing “companies to pay tax where they actually make profit”.⁴¹ Therefore, both research and *feedback* from past experiences were conducive for policy-makers to consider PCBCR as *technically feasible*.

The two assessments made it clear for policy-makers that there were two separate issues at stake, and that it would be more *technically feasible* to decouple the CBCR tool into two proposals.⁴² The first introduced CBCR only to the attention of tax authorities within the Anti-Tax Avoidance Package CBCR Directive specifically to fulfill the OECD BEPS Action 13. The second instead introduced **Public CBCR**.⁴³

The two legislations turned out to differ in two significant aspects. First, the CBCR Directive required unanimity in the Council, while the PCBCR Proposal currently requires co-decision between the European Parliament and the Council.

Second, within the PCBCR Directive, the tool was not framed anymore as a tax issue, but as an **accounting** topic.⁴⁴ Framing CBCR as a tax theme had previously proved to be an attempt to delay PCBCR, as then unanimity in the Council would be required. Because of the historic opposition by many Member States due to their protection of national companies, this requirement would have likely led to a deadlock.⁴⁵ Therefore, *framing* the issue as an **accounting** topic gave more possibilities for the PCBCR Proposal to be finalized, as it would not require consensual agreement in the Council, and it would involve also the European Parliament as a decisional actor.

4.3 Meetings with corporations and NGOs and the rise of PCBCR in the policy network

Between December 2014 and March 2016, lobbies of corporations and NGOs met with Commissioners Moscovici, Hill and Dombrovskis.⁴⁶ On the one hand, DG Fisma met with companies such as General Electric Company, Amazon Europe Core, Repsol, Business Europe, and European Issuers at least four times.

On the other hand, officers of the DG met with NGOs such as Transparency International, Eurodad, Action Aid and ONE at least three times. These meetings helped to shape the views of the Commissioners, as corporations were lobbying for no CBCR at all, while NGOs were demanding a

⁴⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0117&from=EN>

⁴¹ https://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF

⁴² Interviewee.

⁴³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0198&from=EN>

⁴⁴ Interviewee.

⁴⁵ <https://www.taxjustice.net/wp-content/uploads/2017/11/TJN2017-CBCR-Historical-Roots.pdf>

⁴⁶ Interviewee.

full version of CBCR. The main conclusion drawn by the Commissioners was that there was a need for a **balanced proposal**.⁴⁷

The PCBCR idea rose quite slowly in the policy network, due to the many impact studies undertaken to make sure that CBCR would not be a harmful tool. Moreover, policy-makers were influenced by and sought to appease both corporate and civil society lobbies, which were given access and the possibility to being persistent about their preferred policy outcome.

In sum, research and *feedback* provided policy-makers with *indicators* showing the *technical feasibility* of CBCR. The adoption of the tool was more accepted among the network due to the increased public interest and support for the adoption of PCBCR. Lastly, both companies and civil society organizations were allowed to be influential, and the concept of PCBCR slowly rose to prominence in policy network.

5. Political processes

5.1 Intra-EU processes

Ever since 2007, the EP had “continued to grasp each opportunity to adopt the language” of CBCR, publishing reports and recommendations to the attention of the Commission and the Council to move forward with the fight against tax avoidance.⁴⁸ The EP has been proving consistent willingness to keep pressuring the other EU institutions to tackle corporate tax avoidance through full PCBCR.

The trends of the Member States’ positions on (P)CBCR and on the Proposal underwent significant changes between 2013 and 2017. Member States positions slowly shifted in the years from being mostly unclear about CBCR in 2013 and 2014, to a support of a confidential CBCR in 2015 (as proposed by the OECD BEPS Action 13), to much higher support of the PCBCR Proposal in 2016.⁴⁹ As of 2017, Austria, Czech Republic, Germany and Sweden are openly against the PCBCR Proposal. Nine Member States are overtly in support of the legislation.⁵⁰

Such a significant change of *ideological balance* within the Council can be reconducted to the change of its Presidency from Luxemburg, a country “unlikely to push the issue of tax rulings to the forefront”,⁵¹ to the Netherlands in January 2016. The Dutch Presidency, attaching high priority to the issue,⁵² worked to amend the text in such a way as to gain more support from the Member States

⁴⁷ Interviewee

⁴⁸ Kaçar, Y., & Lesage, D. (2013). Tax Justice through Country-by-Country Reporting. An analysis of the idea’s political journey. In J. Leaman & A. Waris (Eds.), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (pp. 262-282). New York: Berghahn Books.

⁴⁹ <http://eurodad.org/files/pdf/4720-exposing-the-lost-billions-how-financial-transparency-by-multinationals-on-a-country-by-country-basis-can-aid-development.pdf> ; <http://www.eurodad.org/files/pdf/52dfd207b06d7.pdf> ; <http://eurodad.org/files/pdf/54625c62ebbcdb.pdf> ; <http://www.eurodad.org/files/pdf/1546494-fifty-shades-of-tax-dodging-the-eu-s-role-in-supporting-an-unjust-global-tax-system.pdf> ; <http://www.eurodad.org/files/pdf/1546667-survival-of-the-richest-europe-s-role-in-supporting-an-unjust-global-tax-system-2016-1481106817.pdf>

⁵⁰ Denmark, Finland, France, Latvia, Netherlands, Poland, Slovenia, Spain, UK. Italy has an unclear position, tilting towards a supportive one. Belgium, Ireland, Luxemburg and Norway have an unknown/unclear position.

⁵¹ <https://www.euractiv.com/section/euro-finance/news/brussels-mulls-clampdown-on-tax-avoidance-after-luxleaks/>

⁵² De Wilde, M. F. (2016). European Commission's Anti Tax Avoidance Package; A Stop Along the Route or the Final Destination? In D. Weber (Ed.), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (GREIT Series, 10) (pp. 275-306). Amsterdam: IBFD.

that were mostly against CBCR. Such countries were the ones that resulted in being the most protective of their multi-national corporations, such as Germany.⁵³ In sum, the scenario in the Council became more conducive to the proposal of PCBCR in 2016.

5.2 Inter-EU processes

The political momentum within the Commission changed between 2013 and 2016. Apart from a change in the conception of the problem of corporate tax avoidance by the part of policy-makers, there also subsisted political considerations when the Commission decided to decouple CBCR into the two Directives in 2016.

First, CBCR was included in the CBCR Directive only to the attention of tax authorities specifically to fulfill the OECD BEPS Action 13.⁵⁴ The Impact Assessment recognizes taxation of multi-national corporations as a global issue, quoting the G20 in that “international cooperation and integrity of national tax systems are key” and thus what is needed is a “global solution” to fight tax avoidance.⁵⁵

The idea of a coordinated approach to dealing with BEPS “enjoys wide-ranging international support, and the EU is no exception in this respect”.⁵⁶ Therefore, the proposal of CBCR (in either version) was driven by the **EU commitment to cooperation with the OECD** and their willingness to meet the expectations of their partners in the policy advanced in the EU.

Second, the PCBCR Proposal aimed to introduce the tool in a way that would be less detailed and sufficiently informative for the public.⁵⁷ According to EP Eurobarometer survey of 2016, 75% of EU citizens would like the EU to intervene more in the fight against tax fraud.⁵⁸ The LuxLeaks in particular caused a *European climate* of “public criticism and social dissatisfaction,” and the “perception that multinational companies can evade taxes while the average citizen is faced with increased tax burden.” Member States were “faced by considerable public pressure to act now,” preparing the ground for a radical change in positions of Member States regarding tax practices and rulings.⁵⁹

The Commission Impact Assessment lists Tax Justice Network, Transparency International, Financial Transparency Coalition, Eurodad, Christian Aid, and Oxfam as the civil society organizations campaigning for CBCR.⁶⁰ These groups have been long lobbying EU institutions, persistently advocating not only for PCBCR as a tool to adopt, but also in general for countering corporate tax avoidance. Global Witness and Tax Justice Network started to advocate for the disclosure of payments made by multi-national corporations as early as 2002.⁶¹

⁵³ <https://www.taxjustice.net/wp-content/uploads/2017/11/TJN2017-CBCR-Historical-Roots.pdf>

⁵⁴ Interviewee.

⁵⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0117&from=EN>

⁵⁶ De Wilde, M. F. (2016). European Commission's Anti-Tax Avoidance Package; A Stop Along the Route or the Final Destination? In D. Weber (Ed.), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (GREIT Series, 10) (pp. 275-306). Amsterdam: IBFD.

⁵⁷ Interviewee.

⁵⁸ [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586588/EPRS_BRI\(2016\)586588_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586588/EPRS_BRI(2016)586588_EN.pdf)

⁵⁹ https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transparency/sw_d_2015_60.pdf

⁶⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0117&from=EN>

⁶¹ <https://www.taxjustice.net/wp-content/uploads/2017/11/TJN2017-CBCR-Historical-Roots.pdf>

In particular, it was Tax Justice Network co-founder Richard Murphy who first put forward the term “CBCR” to refer to the concept of “country-level disclosure of transnational company accounts”.⁶² Other smaller initiatives were born and created in the following years exclusively to advocate for tax transparency, such as the Transparency and Accountability Initiative and Global Alliance for Tax Justice. The number of these groups shows the magnitude and the impact of such a global movement of *pressure-group campaigns* on the need to implement PCBCR as a solution for corporate tax avoidance.⁶³

In sum, four features and changes in the politics processes were identified: constant commitment and pressure from the EP; the change of ideological balance in the Council (intra-EU); higher political motivations in the Commission due to higher pressure from the public and commitment to the OECD; and, lastly, strong pressure-group campaigns since 2002 (inter-EU).

6. Concluding remarks

This research sought to examine why efforts to introduce PCBCR as a tool to combat corporate tax avoidance at the EU level specifically in 2016. The role of the leaks in the decision-making process was considered by conceptualizing the legislative proposal as an instance of “leak-driven law.”

The LuxLeaks in 2014 caused the release of *information* about the offshore system and resulted in increased *public pressure*. Such pressure triggered the political momentum within the Commission to push again for the introduction of PCBCR as the most effective tool to counter corporate tax avoidance in 2016. However, this would not have had success without a *more supportive Council* and *higher acceptability* of PCBCR as an unharmed and *technically feasible* tool.

This was due to increased information provided by *feedback from previous programs*, and multiple impact assessments and public consultations. Commissioners Hill, Moscovici, and Dombrovskis successfully *framed* the issue as an accounting issue, in order to involve also the participation of the long CBCR-*supportive venue* of the EP. *Pressure-groups* were also crucial in that they were given *access* to the decision-making process, and thus allowed to *persistently* advocate their view and finally be influential.

6.1 The potential of Public Country-by-Country Reporting

As Penttinen states, such “*leak-driven policy change* is showing that there is not enough existing transparency” at the moment. “Otherwise, if we would have [had] the necessary levels of transparency, we would have actually foreseen this before the leaks, we would have had the possibility to have *proactive* politics.

Currently, the very nature of the leak-driven policy change is very *reactive*. And this is leading to a situation where high-level secrecy jurisdictions are still enabled to keep similar structures which are hampering tax transparency, which are possibly even encouraging tax avoidance at the same time. Before [obtaining] this actual transparency, it is going to be impossible to get the full picture of how

⁶² <https://www.taxjustice.net/5828-2/>

⁶³ Kaçar, Y., & Lesage, D. (2013). Tax Justice through Country-by-Country Reporting. An analysis of the idea’s political journey. In J. Leaman & A. Waris (Eds.), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (pp. 262-282). New York: Berghahn Books.

LEAKS AS DRIVERS OF POLICY CHANGE? AN ANALYSIS OF THE EFFORTS TO COMBAT CORPORATE TAX AVOIDANCE IN THE EU

much we are talking in global terms and EU terms, how big the issue of tax avoidance is. All of these leaks, they are only showing the tip of the iceberg.”

PCBCR is not going to be a full stop for corporate tax avoidance in itself. As Penttinen comments, “tax avoidance is always enabled by the legislative loopholes which can be abused in this sort of system. PCBCR could be a tool to [obtain] more transparency to actually see how these loopholes are, how they are being abused, how legally the profits are being shifted, and what are the sort of structures that are even enabling tax evasion. We are talking of a middle layer before going into the actual policy change to tackling tax avoidance in itself.”

In this sense, PCBCR is “going to be one of the first steps to create more transparency. We need to have more disclosure, better understanding of what the nature of the issue of corporate tax avoidance is. And then that may lead into policies changing, which is creating more possibilities to tackle the loopholes, to have level playing field for European companies and organizations.

Change of policies is also creating this sort of awareness by the citizens, offering possibilities for anybody to actually see what the reality of the key financial dealings of the international corporations is. In this sense, we are only talking about one layer of changing policy in terms of tax justice, in terms of fair taxation. Tax transparency in itself is a tool for this.”

6.2 Proposal at a standstill

The PCBCR Proposal is currently at a standstill, with the last Council meeting named “Discussions within the Council or its preparatory bodies” dating back to December 2017. The Proposal is still being discussed in the context of the interinstitutional negotiations. Since then, no updates have been given regarding the talks leading to the ratification of the law. Consensus in the Council will be hard to reach, “especially where we have national governments considering the competitive harm that would be created rather than the benefits PCBCR could bring”. This is so notwithstanding the studies of the Commission, which show that competitive harm, the main argument against PCBCR, should not been an issue.

Two years ago, an open data for tax justice workshop looked into PCBCR disclosure for European banks, specifically Barclays. They discovered that Barclays “was using less tax havens, or countries that could be considered as high risk for tax avoidance, and they were also paying more tax in the operating jurisdiction. These kinds of preliminary findings are showing that there is some sort of impact” of PCBCR. Such kind of examples are showing that, at least in the banking and extractive sectors, there have not been clear samples that have escalated in terms of competitiveness, the reason why European companies they would not want to unilaterally disclose this sort of activities.

The worry over competitive harm seems to be an ongoing issue for European politicians. “We have been going through six or seven Presidencies without the Council finding a negotiation solution. They have been reluctant or not considering the issue a priority.” On paper and in public, European politicians “usually seem very committed on these issues, but on the practical level they end up blaming the EU for hampering all sorts of transparency actions.”⁶⁴

⁶⁴ Every quote of these sections (6.1 and 6.2) is of Ilkka Penttinen.

LEAKS AS DRIVERS OF POLICY CHANGE? AN ANALYSIS OF THE EFFORTS TO COMBAT CORPORATE TAX AVOIDANCE IN THE EU

The political momentum thus seems to be gone. However, as the Commission policy officer stated, “there will always be tax scandals in the future, so in one way or the other the problem will come back.” Penttinen agrees: “It is only going to be only a matter of time, it might take longer, it might come from a whistleblower or from hacking, but there will be another leak”.

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