


# A study of the democratic legitimacy of Action 13 of the OECD's base erosion and profit shifting (BEPS) Action 13.

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# A STUDY OF THE DEMOCRATIC LEGITIMACY OF ACTION 13 OF THE OECD'S BASE EROSION AND PROFIT SHIFTING (BEPS) ACTION 13

Martyn Gordon

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## Abstract

This thesis presents a mixed methods case study examining the democratic legitimacy of Action 13 of the Organisation for Economic Cooperation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Action Plan.

Taking a critically orientated philosophical position, the thesis draws data from a stakeholder consultation conducted by the OECD which is coded to allow statistical analysis. The thesis then goes on to collect data from interviews with tax practitioners with privileged insight into the manifestation in practice of Action 13.

Action 13 attempts to provide transparency over Multi-National Enterprises' (MNE) transfer pricing (TP) practices, which are criticised as enabling corporate tax avoidance. However, the legitimacy and efficacy of this intervention are questioned by diverse stakeholders; notably, MNE's required to comply, professional tax advisors and tax justice campaigners.

The thesis explores the institutional framework within which the OECD operates, highlighting the tensions which make regulating for TP at a supra-national level particularly challenging. Cognoscente of this context the thesis frames its findings around Scharpf's (1996, 1999) theory of Democratic Legitimacy in a deliberative policy making process.

The thesis utilises a mixed methods case study approach, to overcome the relative paucity of data available to tax researchers. The philosophical orientation of the research is *critique*, driven by the need for findings to be routed in a wider understanding of the policy context and power dimensions at play within the policy creation process and the manifestation of Action 13 in practice.

The first empirical chapter utilises content analysis and statistics to examine the input and throughput legitimacy of the OECD's consultation process on Action 13's creation. This chapter adds to previous studies in noting that the consultation lacked input legitimacy, being dominated by respondents from a few powerful OECD countries. However, in terms of throughput legitimacy the analysis challenges the established notion that the consultation was entirely dominated by corporate interests. Instead, it is argued that civil society activists had success in influencing the OECD where they drew on strong conceptual argumentation, suggesting aspects of effective throughput legitimacy.

The second empirical chapter explores output legitimacy by examining the manifestation of Action 13 in practice through interviews with tax professionals. The chapter presents a complex view of output legitimacy, concluding that two of the three objectives of Action 13 are ostensibly

achievable in practice but are viewed as being constrained by lack of capacity within tax authorities. The third objective of Action 13, centred on TP audit is noted as being under achieved and hence constraining the legitimacy of Action 13 overall.

The thesis contributes to knowledge by comprehensively analysing Action 13 using democratic legitimacy as a framework and by providing new empirical evidence about the efficacy of Action 13 in practice in the UK.

The thesis concludes that although Action 13 is not strongly opposed by those required to comply, it is viewed as expensive and perhaps underutilised by tax authorities. It is also true that, as part of a wider continuum shift, Action 13 may have helped align the attitudes of those in the tax profession more closely with progressive ideas emerging from civil society in the form of tax justice campaigners.

**Keywords:** OECD, Action 13, tax, transfer pricing, country-by-country reporting, democratic legitimacy

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# Glossary

## Organisations

BIAC – The official business lobby to the OECD

BIG4 – The four largest professional accounting firms; Deloitte, EY, KPMG and PWC

BMG – BEPS Monitoring Group

CTPA - Centre for Tax Policy and Administration (OECD department)

EC – European Commission

EU – European Union

HMRC – His Majesty’s Revenue and Customs

IASB – International Accounting Standards Board

OECD – Organisation for Economic Cooperation and Development

OEEC - Organisation for European Economic Cooperation (predecessor of the OECD)

PWYP – Publish What You Pay

TJN – Tax Justice Network

TUAC - Trade Union Advisory Committee to the OECD

UN – United Nations

## Legislation

Action 13 – Action 13 of the OECD’s BEPS Action Plan ‘*Transfer Pricing Documentation and Country-by-Country Reporting*’

Chapter 10 – Chapter 10 of the EU Accounting Directive 2013/34/EU

The Convention - The OECD Convention

SI 2137 – Statutory Instrument 2016 No. 2137 The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016 [UK implementation of Action 13]

## Statistics

Chi Squared ( $\chi^2$ ) – Pearson’s Chi Squared Test for Independence

Fisher’s – Fisher’s Exact Test for Independence

## **Terminology**

ALP – Arm’s Length Principle

APA – Advanced Pricing Agreement

BEPS – Base Erosion and Profit Shifting

CbCR – Country-by-Country Reporting

CIG – Coalition and influence Group

CS – Civil Society

CSO – Civil Society Organisation

DTA – Double Taxation Agreement

ETR – Effective Tax Rate

TIE - Treaty Information Exchange

TMTF – Tax Motivated Transfer Pricing

TP – Transfer Pricing

WHT – Withholding Tax (tax withheld at source)

# 1 Chapter One: Introduction

## 1.1 Background

*“Frequent revelations of aggressive tax planning, tax avoidance and artificial profit-shifting practices combined with the deterioration of public finances since the 2008 global crisis and exacerbated by the Covid-19 pandemic, have made the need for internationally co-ordinated policy responses to tackle tax injustice more urgent than ever before” (Council of Europe, 2021)*

This thesis will critically evaluate the democratic legitimacy of a recent policy intervention by the Organisation for Economic Cooperation and Development (OECD) intended to curb widespread tax avoidance through transfer pricing by Multi-National Enterprises (MNE’s).

The issue of tax avoidance by MNE’s has gained popular and political salience since the 2008 financial crisis and has become, in the views of some, a policy arena for impulsive and populist grand gestures, with little real reform (Kinder & Agyemang, 2020).

Nevertheless, there have been numerous attempted reforms to taxation in the last decade, largely led by the G20<sup>1</sup> with the assistance of the OECD (Kinder & Agyemang, 2020). For the OECD, as architects of the current international regime, successful reform is not just a question of fixing problems but may also prove crucial to maintaining their privileged position of power. The OECD has been the generator and maintainer of international tax policy since the middle of the 20<sup>th</sup> century and is increasingly facing questions of legitimacy in the wake of revelations about widespread tax avoidance under their watch (Brosens & Bossuyt, 2020)

The following chapter will introduce the problem of tax avoidance by MNE’s and the particular focus of this study, tax motivated transfer pricing (TMTP). This chapter will go on to briefly outline recent attempts by the OECD to curb TMTP through the introduction of their Base Erosion and Profit Shifting (BEPS) Action Plan. This chapter will conclude by identifying the research questions and setting out aims and objectives for this PhD thesis (‘study’).

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<sup>1</sup> G20 Members: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union (EU).

## **1.2 Tax avoidance by MNE's**

As noted by Oats and Tuck (2019) tax avoidance is a complex term with different meanings depending on your viewpoint, so much so that some consider it a '*definitional quagmire*'. Nonetheless the authors attempt to give a broad and simple definition of tax avoidance:

*"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."*  
(Oats & Tuck, 2019, p. 567)

Since the 2008 financial crash Multi-National Enterprises (MNE's) have faced sustained scrutiny from civil society (CS), academics, politicians and media commentators over their tax avoidance practices (Oats & Tuck, 2019). Increasingly the narrative around this issue casts MNE's as 'villains' who, through abuse of their powerful position, use convoluted and dishonest means to avoid their obligations to society (Morrell & Tuck, 2014). This may be something of an oversimplification, given the high degree of legal, political and moral complexity inherent in the international tax system (Morrell & Tuck, 2014). However, in the view of many, current MNE tax practices are problematic (Mikler & Elbra, 2018). Indeed, a growing body of evidence, including academic studies (Finer & Ylönen, 2017; Overesch & Rincke, 2011; Ylönen & Laine, 2015) and journalists' exposés of high profile MNE's tax avoidance practices (Bloomberg Tax, 2020) have created a high degree of outrage from citizens of countries around the world (Morrell & Tuck, 2014). This outrage coupled with the fiscal deficits facing countries following the 2008 financial crash and the COVID-19 pandemic have given politicians the impetus to act and to reform the taxation of MNEs.

What has caused considerable debate in recent years is the nature of the choices MNE's make and the level of choice seemingly available to them in avoiding corporate income tax (Avi-Yohan, 2008; Dowling, 2014). Crucially the question has become whether MNE's have a moral as well as a legal duty with respect to their tax avoidance practices (Dowling, 2014).

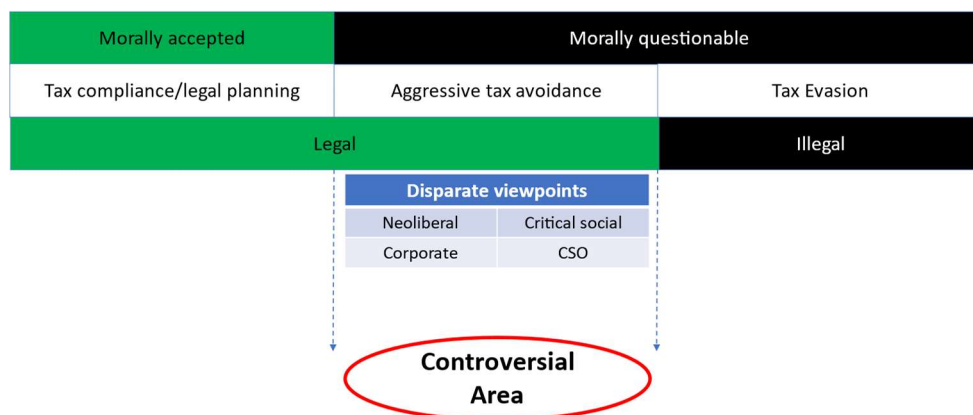
It is particularly important to be clear on terminology here given the often highly emotive and sometimes inaccurate language used in debates around MNE's tax practices. Firstly, it is important to differentiate tax avoidance from tax evasion. Oats and Tuck (2019) in their synthesis of the debate on this question offer two distinguishing factors: Tax avoidance is legal whereas tax evasion is illegal; Tax avoidance is an ex-ante activity, whereby taxpayers act to reduce their tax liability before it crystallises whereas tax evasion is carried out ex-post e.g. non-payment of a tax liability which has crystallised.

BEPS (Base Erosion and Profit Shifting) is a term adopted by the OECD to describe the types of avoidance they deem unacceptable and wish to combat (OECD, 2014a). 'Base erosion' occurs when an MNE is able to situate its taxable activities in a low tax jurisdiction. 'Profit Shifting' occurs where an MNE can move taxable income earned from a high tax to a low tax jurisdiction. Although subtly different the effect is the same in that it decreases the corporate tax bill for the MNE and deprives states where MNEs operate of fiscal revenue (OECD, 2018).

BEPS covers a wide array of practices adopted by MNE's to mitigate or defer their tax liabilities. The OECD's 15 linked actions in the BEPS Action Plan aim to tackle a substantial number of them and a good overview of these is provided by Lee Corrick in Chapter 7 of the book *Global Tax Fairness* (Corrick, 2016), more detail is also given below in 2.8.

Broadly speaking, with the BEPS Action Plan the OECD are seeking to target tax avoidance techniques which are at present legal but may be viewed as particularly aggressive or morally questionable (OECD, 2018).

Figure 1 - Author's diagrammatic representation of tax avoidance vs tax evasion



Source: Author's Own

Figure 1 is the author's diagrammatic representation of where the OECD are seeking to regulate. In essence seeking to shrink the lower green bar to bring MNE's practice more in line with the expectations of sections of society which view their avoidance as unacceptable by changing the law.

It may be too gross an oversimplification to represent the disparity in views over tax avoidance as a clear-cut dichotomy between: MNE's, who favour low taxes and will exploit loopholes; and civil society organisations (CSO's), who wish to see MNE's pay higher share of the tax burden. There are disparate views on both sides. However, it is true to say that the past decade has seen a strengthening in civil society of what is often termed

the global tax justice or global tax fairness movement (Eccleston, 2018). This movement has at its centre NGO's, academic activists and policy think tanks with a specific focus on tax, for example the Tax Justice Network (TJN), the BEPS Monitoring Group (BMG) and the International Centre for Tax and Development (ICTD). These groups are staffed at their core by academic activists and ex- tax professionals such as Richard Murphy, John Christensen, Sol Picciotto and Lord Prem Sikka. These individuals use their technical skill set alongside investigative journalists and campaigners to lobby policy makers, feed into legislative consultation processes and raise public awareness. Although these groups have been active for a number of decades their activity has recently been brought to wider public attention by the financial crash and the general media scrutiny on MNE's (Oats & Tuck, 2019; Mikler & Elbra, 2018). In addition, the interest of powerful global NGO's has increasingly turned to taxation and questionable corporate practices. NGO's such as OXFAM and Christian Aid have increased their work in the area of tax justice, forging alliances to pool their broad reach and resources with the technical skills of TJN (Mikler & Elbra, 2018). These groups have played a key role in pressuring legislators to act in order to curb tax avoidance by MNE's through lobbying, public campaigns and their involvement in policy consultation processes (Mikler & Elbra, 2018; Crawford, 2019). The activities of these groups and their relevance to the research will be discussed in more detail from Chapter 3 onwards. Firstly, however, it is necessary to expand upon the specific tax avoidance methods which will be examined in this study.

### **1.3 Tax motivated transfer pricing**

Transfer pricing concerns internal trades between entities within MNE's and can be defined as:

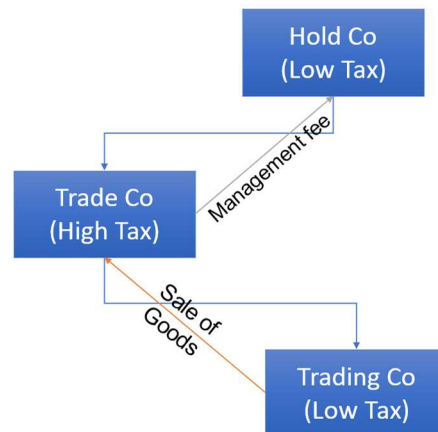
*"the monetary value for which goods and services are exchanged between different responsibility centres [legal entities] within an organisation [MNE]"* (Proctor, 2012, p. 322)

Transfer pricing is an essential component of how MNE's do business and is required to assess the performance of different companies within a group structure (Proctor, 2012). The trades between subsidiary entities of an MNE will be driven to some extent by operational concerns e.g. where to obtain the best resources at the best price and also by MNE's looking to optimise their capital structure (Margaritis & Psillaki, 2010). However, there is increasing recognition in the academic community and amongst policy makers and tax campaigners that transfer pricing is one of the most effective and prevalent ways in which MNE's engage in profit shifting and seek to avoid tax (Cobham, 2017; Klassen, et al., 2017; Sikka & Willmott, 2010). This also accords with the author's experience of working in practice in this area.



Tax savings can be affected through transfer pricing when subsidiary entities are established in different international jurisdictions. Specifically, where one entity, located in a low tax jurisdiction, sells goods or services to another in a high tax jurisdiction at an inflated price.

Figure 2 - Illustration of Tax Motivated Transfer Pricing



Source: Author's Own

Figure 2 illustrates how a trading company in a high tax jurisdiction may transfer its profits by paying for goods and services provided by fellow group companies located in low tax jurisdictions.

As highlighted in Figure 2, tax motivated transfer pricing can be employed both in trading goods and services, it is also frequently employed in relation to intangible assets such as royalties (Liu, et al., 2017).

The extent to which this occurs is such that even introductory accounting textbooks refer to international transfer pricing as a tax motivated activity:

*"international transfer pricing is usually nothing more than a device to minimise the amount of tax paid in total by international organisations. Although divisional profitability may be distorted this is usually perfectly legal."* (Proctor, 2012, p. 325)

The impact that TMTP has on the global economy is potentially very significant. Even conservative studies estimate that trade conducted within MNE's could be up to 30% of total global trade (Shaxon, 2019) with some studies quoting figures of up to 60% (United Nations, 2001). These figures highlight the potential revenue at stake for countries, should these internal transactions be mis-priced to avoid corporate income tax through TMTP. There is also significant concern amongst activists and wider civil society about the implications of TMTP for global wealth inequality and

wealth retention by the richest in society (Cobham, 2017). As awareness has been more readily drawn to TMTP by high profile cases, such as Apple's arrangements with their Irish holding company (Bloomberg Tax, 2020) tax justice groups have intensified their campaigns for reform.

Transfer pricing is therefore a major focus of the BEPS Action Plan with 4 of the 15 actions (including Action 13) devoted to tackling it<sup>2</sup>. It is also an increasing focus for tax authorities around the world for example the USA (Klassen, et al., 2017) and the UK (Liu, et al., 2017).

Despite the growing public attention and the move to regulate in this area there are relatively few academic studies which provide insight into the impact of TMTP in practice (Klassen, et al., 2017). Dharampala (2014) conducted a review of studies seeking to measure BEPS at a macro-economic level, including a critique of the methods employed. However, most of the studies cited seek to identify the existence of BEPS or quantify its impact without identifying specific BEPS techniques such as TMTP (Dharampala, 2014).

There only a few studies which focus on TMPT, of which several construct regression models to ascertain the impact of destination country tax rates on the price of exports. By using firm level data to compare exports within firms to third party export prices these studies suggest that tax arbitrage plays a significant role in intra-group pricing decisions across a number of jurisdictions (Cristea & Nguyen, 2013; Davies, et al., 2014; Liu, et al., 2017). That TMTP methods are easily employed and result in lower firm level effective tax rates (ETR's), if tax directors are willing to take on additional tax audit risk, is confirmed by the work of Klassens et al. (2017). Case study methods provide a different perspective, highlighting the artificiality of business models constructed and allowed by the current TP rules. These studies show how intermediary companies, with little or no nexus to core business activities, can be used to avoid corporate income tax (Finer & Ylonen, 2017; Ylonen & Laine, 2015).

The few studies there are provide a glimpse into the potential impact of TMTP but, by their own admission, have limited access to relevant data. The lack of accounting and tax information available means that precise intercompany prices and amounts of tax avoided are largely unobtainable. This is not a reflection on the authors' lack of voracity, indeed the authors included above employ creative and painstaking methods to obtain their results, this is rather a structural issue concerning the opacity TMTP data.

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<sup>2</sup> Action 8-10 tackle the issue of Aligning Transfer Pricing Outcomes with Value Creation (OECD, 2014a) and Action 13, the focus of this thesis, focusses on documentation and transparency.

The paucity of data available on TMTP does not only affect academics wishing to test the prevalence and magnitude of tax avoidance. The lack of good quality and readily available data also poses a significant challenge for tax authorities tasked with policing TP. This opacity or information asymmetry between MNEs and those seeking to hold them to account is a major feature of the tax avoidance literature (Oats & Tuck, 2019) and poses difficult questions for both MNEs and regulators.

This lack of transparency has been the focus of sustained campaigning by civil society advocates and academic activists, calling for the introduction of mandatory and publicly disclosed country-by-country reports (CbCR) (Murphy, 2016).

CbCR is a contested term (Chatzivgeri, et al., 2019) but at its core aims to increase transparency over how much corporate income tax MNE's pay in the jurisdictions where they operate, via disclosure of tax and accounting information on a country-by-country basis.

The potential of CbCR to overcome the opacity around MNE's TMTP is recognised by several tax justice campaign groups, including the Tax Justice Network (TJN) (Tax Justice Network, 2021) and the Publish What You Pay (PWYP) coalition (Crawford, 2019). These groups mounted high profile campaigns to persuade policy makers (and progressively minded MNE's) to adopt CbCR as a core accounting requirement.

For example, the PWYP coalition sought to influence the International Accounting Standards Board (IASB) to mandate CbCR (Crawford, et al., 2014). This campaign was fought between 2006-2008 and focussed on the IASB's consultation process in the creation of IFRS 8 'Segmental Reporting'. PWYP attempted through lobbying to influence the IASB to extend the scope of their proposed standard for IFRS 8 to encompass CbCR. The campaign mobilised moral argumentation around the potential of transparency to alleviate the harm of tax avoidance by MNE's, with a particular focus on the extractives sector (Crawford, 2019). They were however unsuccessful in persuading the IASB. IFRS 8 ending up as a standard which offers MNE's considerable latitude to follow diverse reporting practices, essentially allowing businesses to report on segments which they deem appropriate in line with their operating model. Whilst this may offer some more information to investors it had limited potential in terms of increasing transparency around TMTP (Crawford, 2019).

Advocates for a more expansive form of CbCR argue that it should include disclosure of key accounting information as well as tax payments (Murphy, 2016). Suggestions include disclosure in each jurisdiction of sales (split on a third party and intra-group basis), profits, the value of assets held (both tangible and intangible) and the number of employees.

These data points taken together with tax payment and tax accrual data would, it is hoped, be sufficient to enable an informed reader to assess the risk that an MNE is engaging in TMTP. For example; if a subsidiary of an MNE which was established in a low tax jurisdiction and derived its sales mainly intra-group reported high profits but had few assets or employees this could indicate TMTP. If such an entity was identified, tax authorities could focus their attention on it and potentially initiate a transfer pricing audit. In the absence of CbCR data tax authorities face severe challenges in identifying TMTP and focussing their limited resources to tackle it.

Campaigners also argue that CbCR also has wider potential to act by way of a deterrent if it is publicly disclosed (Murphy, 2016), forcing MNE's to moderate their behaviour for fear of censure. This argument, whilst theoretically sound and possibly practicable in other areas of corporate practice has been challenged with regards to TMTP. The complexities of national tax systems and their interaction with international tax regulations and accounting data make the transfer pricing world one which is often arcane and the preserve of experts (Christians, 2010). This begs the question of how transparency can translate to corporate accountability through CbCR if relatively few have the knowledge to make use of the information (Oats & Tuck, 2019). It could be argued that a few dedicated campaigners, journalists and public minded accountants may be able to use this data and disseminate it to the wider public. However, it is likely hopeful thinking to suppose that CbCR data would be widely read, understood, and acted on (Oats & Tuck, 2019).

It is within this policy dynamic that Action 13 (a form of CbCR) was introduced. The following section will explore what Action 13 proposes to do and set out some of the key features of its introduction which make it a pertinent area for study.

#### ***1.4 Action 13 of the BEPS Action Plan***

Action 13: 'Transfer Pricing Documentation and Country-by-Country Reporting' (OECD, 2015), aims to curb tax motivated transfer pricing by increasing transparency around MNE's transfer pricing practices.

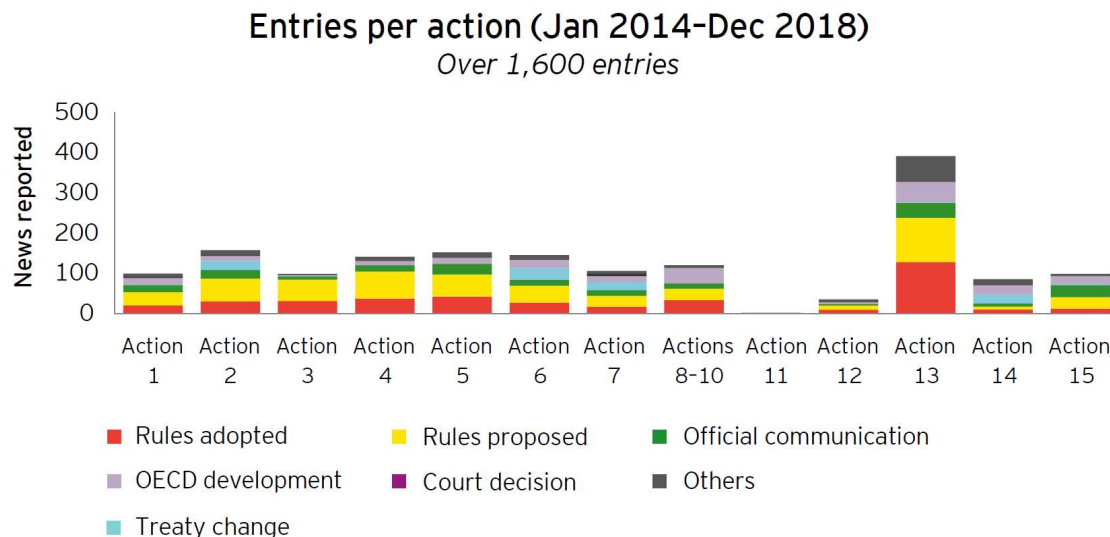
Action 13 introduces new documentation requirements, set out below, which require MNE's to file information designed to highlight TMTP with tax authorities in the jurisdictions in which they operate.

Action 13 does not include any requirement for MNE's to publicly disclose their CbCR information. Indeed, the CbCR report under Action 13 is only filed with the MNE's parent tax authority. This continued lack of transparency is a major source of disappointment for tax justice campaigners and another criticism levelled at the OECD over the

legitimacy of the Action 13 Standard (Murphy, 2016; Oats & Tuck, 2019). However, the provisions of Action 13 do afford tax authorities, in jurisdictions where MNE's operate, access to new information about MNE's TP practices.

The chart in Figure 3 prepared in 2018 by EY shows legislative adoptions across the world since the inception of the BEPS Action Plan, according to the Action to which they relate.

Figure 3 - EY Review of BEPS Implementation



Source: EY "The Latest on BEPS – Year End Review 2018"

As can be seen from the chart in Figure 3, in the first two years of full BEPS implementation, Action 13 precipitated the most legislative change of any Action. This is a clear indication that it precipitated the most widespread mandatory requirements for MNE's. Its focus on documentation and use of transparency as method to curb TMTTP also speak directly to criticisms and policy demands made by some of the most vociferous critics of MNE's TMTTP practices (Murphy, 2016).

Action 13 is also likely to have an impact on the tax profession, changing the nature of the relationship between tax advisors and tax authorities:

*"Action 13 (Transfer pricing documentation and country-by-country reporting) [requirements] have the biggest impact on tax structuring and tax advisory, will give tax administrations full insight into the transfer pricing strategies of MNEs, forcing them to have defensible tax structures and responding quickly to BEPS."* (Lankhorst & Van Dam, 2017, p. 61).

Action 13 seeks to address TMTTP by requiring MNE's with a consolidated turnover of greater than €750million (or equivalent local currency) (OECD,

2015)<sup>3</sup> to prepare information to be shared with tax authorities with the following stated aims (OECD, 2015):

1. To ensure MNE's give appropriate consideration to transfer pricing policy.
2. To allow tax authorities to carry out appropriate transfer pricing risk assessment.
3. To provide sufficient documentation to aid tax authorities in conducting a transfer pricing audit in respect of entities active in their jurisdiction.

Under this approach MNE's are required to file three types of documentation (OECD, 2015):

- A local transfer pricing file (local file). The local file is submitted in each jurisdiction where an MNE is present and contains detailed information about related party transactions between entities with a taxable presence in that jurisdiction. Local files are not shared out with the jurisdiction to which they relate.
- A transfer pricing master file (master file) which contains information about the MNE as a whole including, an organisational chart, a description of the MNE's business and value drivers, a description of the MNE's R&D and intangibles strategy along with the location of important intangible holdings, a description of the MNE's intercompany transaction and transfer pricing policies, a copy of the consolidated financial statements for the MNE and a list of any advanced pricing agreements (APA's) which the MNE has in place. The master file is filed in every jurisdiction in which the MNE has a taxable presence.
- Country-by-Country Report (CbCR). The CbCR includes a template with eleven data points<sup>4</sup> to be prepared in respect of an MNE's activities on a country-by-country basis. The CbCR is filed with the tax authority in an MNE's parent company jurisdiction and shared with other countries via Treaty Information Exchange (TIE) provisions.

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<sup>3</sup> There is scope for individual jurisdictions to adjust this de minimis. However, the threshold of €750m is recommended by the OECD and widely accepted <https://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm#cbcrequirements>

<sup>4</sup> (OECD, 2015a, pp. 29,30) Tax jurisdiction, main business activity, related party revenue, unrelated party revenue, profit/loss before tax, income tax paid (cash basis), income tax accrued (accruals basis), stated capital, accumulated earnings, number of employees, tangible assets other than cash and cash equivalents.

Action 13 has received criticism on several fronts. As well as the final output criticisms are levelled at the process undertaken by the OECD in creating Action 13. For example, criticisms made by Christensen (2018) suggest that the consultation process was dominated by corporate interests. In his analysis Christensen finds that in relation to the disclosures agreed for CbCR, at least, MNE's were successful in subverting the legislation by 'technicising' the discussion and subverting moral claims made by civil society authors (Christensen, 2018). This specific criticism of the Action 13 consultation process accords with broader criticisms as to the democratic inclusivity and legitimacy of the BEPS process in general (Burgers & Mosquera, 2017; Fung, 2017). These critiques concern whether the OECD can effectively regulate in this area and question the legitimacy of the OECD as the long-standing organ of international tax governance (Kurdle, 2014). These critiques will be explored in detail in Chapter 3. Broadly however, critics question whether an organisation which is made up of a narrow membership of developed countries and staffed by a selective group of technical experts have the legitimacy to create global policies that have the potential to affect the socio-economic outcomes of many of the world's citizens.

## **1.5 Rationale**

Action 13 was a response to a need for reform in TMTF which has been highlighted in the academic literature for several years and has recently gained widespread media attention and been the focus of CS activism.

The fact that MNE's are (or at least are perceived to be) able to effectively choose how much tax they are willing to pay (Avi-Yohan, 2008; Avi-Yonah, 2016) has the potential to cause considerable societal harm. Countries looking to raise revenue in challenging fiscal circumstances face the reality of losing out on corporate tax income and potentially having to place heavy burdens on individual taxpayers, including those with relatively low incomes (Eccleston, 2018). In addition, the behaviour of MNE's poses a threat to the morale of taxpayers across society: if it is perceived that the largest and wealthiest organisations can select to pay tax or not, this may encourage others to question the fairness of their tax burden and seek to engage in more aggressive tax avoidance practices (Avi-Yohan, 2008; Dowling, 2014; Eccleston, 2018). These threats make it essential that reforms to the taxation of MNE's are effective and address weaknesses in the current system which allow TMTF to flourish.

Action 13 is one such reform, however, concerns have been expressed as to the efficacy of Action 13 and the process by which it was created. These concerns speak to a wider criticism of the legitimacy of the OECD itself and attach importance to the BEPS Action Plan as an indication of the OECD's continuing ability to act as rule maker in the sphere of

international tax (Brosens & Bossuyt, 2020). This thesis will address these questions of legitimacy by answering the following research questions:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process to create a legitimate standard in terms of throughput legitimacy.

RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

These questions fill an important gap in the current literature. There has been one study to date on the creation of Action 13 (Christensen, 2018), however, as will be explored in Chapter 3 there is considerable scope to add nuance to our understanding of the consultation process by employing a more detailed statistical method and considering more data points from the consultation documentation. This study will undertake to do so in answering RQ1.

There have been several studies on the manifestation of Action 13 in practice (Lankhorst & Van Dam, 2017; Sawyer & Sadiq, 2019; Tran, 2020). However, these studies focussed on early adoption, dealing largely with issues of 'bedding in' the standard and were limited to data obtained in New Zealand, Australia and Vietnam. At the time of writing there was no academic study on Action 13 as a mature policy and no study which covered the UK. A study of Action 13 as a mature policy has the potential to add significantly to our understanding on whether the documentation introduced has been successful in combatting harmful TMPT and therefore legitimately meeting the needs of society. Furthermore, as will be discussed in 2.9, the UK provides a fertile context for this research, being a jurisdiction where many MNE's headquarter. Addressing RQ 2 will fill these research gaps and contribute to an overall assessment of the legitimacy of Action 13. The results of this study will be of interest to those with a stake in the reform of international taxation policies, including tax advisors, tax authorities, academics, and policy makers.

The motivation for addressing these research questions and undertaking a PhD focussed on Action 13 stem from the author's previous employment as an international tax advisor. At present the author is employed as an academic, teaching and researching taxation at the Robert Gordon University in Aberdeen. Prior to this he was a tax advisor working for EY (one of the Big 4 accounting firms), where he qualified as a chartered accountant and worked on a portfolio of large multinational clients. This work was intellectually stimulating, however, the moral value of some of the practices ongoing in the tax advice industry were brought into sharp focus after the financial crash of 2008 when public attention turned to corporate tax avoidance. The introduction of BEPS, felt at the time like a wakeup call and a turning point for the profession and (in part)



precipitated the author's move to academia where this could be studied with a degree of independence whilst still utilising the insight and knowledge gained in the profession and skills as a chartered accountant.

## **1.6 Thesis aim, objectives, and structure**

The aim of this thesis is:

To critically evaluate the throughput and output political legitimacy of Action 13 of the OECD's BEPS Action Plan

The aim will be achieved by addressing the following research questions:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

The following objectives will contribute towards achieving the overall thesis aim.

1. Understand criticisms of MNE tax motivated transfer pricing behaviour.
2. Gain an understanding of the international transfer pricing political and legal landscape including criticisms, calls for reform and the role played by the OECD.
3. To critically examine why some question the legitimacy of OECD regulatory interventions in the area of TMTP.
4. To understand the OECD's mode of policy creation and map this against models of democratic legitimacy.
5. To examine the OECD's use of stakeholder input in the creation of Action 13 with a view to evaluating the input and throughput legitimacy created by this process.
6. To gain informed stakeholder views as to the impact of BEPS Action 13 in the UK with a view to evaluating the output legitimacy garnered from this legislative change.
7. To synthesise findings on the input, throughput and output legitimacy of Action 13.

This chapter set the context and rationale for the proposed research the rest of the thesis will progress as follows:

Chapter 1 Introduction - has introduced the problem of tax avoidance by MNE's and set out why a study of Action 13 will contribute meaningfully to existing literature.

Chapter 2 Context – will provide the necessary contextual understanding of the policy dynamic required to underpin the rest of the thesis, including history and organisational structure of the OECD, the role of the OECD in

international tax governance, the BEPS Action Plan and Action 13 in particular.

Chapter 3 Literature review – will examine extant research pertinent to the thesis and introduce the theoretical lens for the study; democratic legitimacy.

Chapter 4 Methodology – will introduce the research philosophy and approach and critically evaluate the method employed to assess whether throughput legitimacy was created by the Action 13 stakeholder consultation

Chapter 5 Consultation analysis and discussion– will include detailed quantitative analysis of comment letters submitted in response to the OECD’s discussion draft on Action 13. Changes from the exposure draft to the final standard will be mapped and statistical testing will be employed to gain an understanding of whether one stakeholder group was listened to more than others. The analysis will examine the ‘responsiveness’ of the OECD to stakeholder demands and hence whether the OECD’s process enhances democratic throughput legitimacy.

Chapter 6 Interview method – will critically assess the semi-structured interview method used to analyse the output legitimacy of Action 13

Chapter 7 Interview findings – will examine the manifestation in practice of Action 13 in the UK through interviews with tax professionals. The focus will be on the efficacy of Action 13 and whether Action 13 is an output which enhances democratic output legitimacy.

Chapter 8 Combination of results – will synthesise and summarise findings from Chapters 5 and 7 relating these back to the broader context from earlier chapters

Chapter 9 Conclusion and recommendations – will conclude the findings and contribution of the thesis and make recommendations for further study

## **2 Chapter 2: The OECD in context**

### ***2.1 Introduction***

This chapter outlines the history of the Organisation for Economic Cooperation and Development (OECD) and goes on to describe the internal composition and funding of the organisation with emphasis on how these factors impact the OECD's work in international tax regulation and cooperation. The chapter then goes on to discuss the role of the OECD vis-à-vis international tax regulation and the formation and implementation of the BEPS Action Plan and Action 13 specifically.

An understanding of the history and composition of the OECD is important in appreciating the current status quo in the international tax system and the basis of some of the criticisms levelled at it. The thesis will go on to examine the democratic legitimacy of the OECD and calls to reform it. Therefore, an appreciation of the wider context in which the OECD operates and the organisation's history and positioning in the global political architecture informs the rest of this thesis.

### ***2.2 History and objectives of the OECD***

The OECD is an evolution of the Organisation for European Economic Cooperation (OEEC) which was established in 1948 to run and oversee the US led Marshall Plan, put in place to reconstruct Europe after the Second World War (OECD, 2016).

The OEEC was formed to promote better cooperation between nation states in Europe and recognise the interdependencies of economies in Europe, with the goal of promoting lasting peace (OECD, 1960). The OEEC broadened to become the globally focussed OECD when, encouraged by the OEEC's success<sup>5</sup>, Canada and the USA joined the organisation in 1960. The OECD was officially created with the signing of the Convention on the OECD (Convention) by the founding 20 member countries<sup>6</sup> on 14 December 1960 (OECD, 1960). The Convention sets out the aims and powers of the OECD and any new members ascending to membership of

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<sup>5</sup> By the early 1960's the OEEC had brokered over 50 bilateral double tax treaties addressing several of the more common double tax threats prevalent at the time e.g. taxation on dividends and intangibles (Sarfo, 2020).

<sup>6</sup> Founding Members of the OECD: the Republic of Austria, the Kingdom of Belgium, Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of Greece, the Republic of Iceland, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Portuguese Republic, Spain, the Kingdom of Sweden, the Swiss Confederation, the Turkish Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America (OECD, 1960)

the OECD are required to deposit documents of ratification to the OECD convention (OECD, 2016).

Since 1961 a number of countries have joined the OECD and permanent membership of the OECD now stands at 37 countries<sup>7</sup> (OECD, 2021) or approximately 19% of the 195 independent sovereign nations in the world (Nationsonline, 2021). Membership of the OECD is available only by invitation from existing members (Mosquera, 2015).

The OECD Convention, at the broadest level, has the primary focus of achieving the aims of the United Nations (UN) Charter, which can be summarised as: maintaining peace and security throughout the world; encouraging friendly relations between nation states; encouraging mutual cooperation in solving international problems; and the preservation of individual liberty and the increase of general well-being (United Nations, 2016).

Within the context of achieving the broader aims set out above the OECD focuses primarily on economic considerations and is empowered by its members to design and promote policies aimed to achieve the following aims per Article 1 of The Convention (OECD, 1960):

*(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;*

*(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and*

*(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.*

On entering in to The Convention, or for members joining after 1961 in ratifying The Convention, members commit themselves, jointly and individually, to furthering these goals through their individual actions and through mutual cooperation. Article 2 of The Convention sets out in more detail exactly what is expected of members working towards the aims set in Article 1 (OECD, 1960):

*In the pursuit of these aims, the Members agree that they will, both individually and jointly:*

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<sup>7</sup> Members of the OECD: Australia, Austria, Belgium, Canada, Chile, Columbia Czeck Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States (OECD, 2016b).

- (a) promote the efficient use of their economic resources;*
- (b) in the scientific and technological field, promote the development of their resources, encourage research and promote vocational training;*
- (c) pursue policies designed to achieve economic growth and internal and external financial stability and to avoid developments which might endanger their economies or those of other countries;*
- (d) pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalisation of capital movements; and*
- (e) contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing expanding export markets.*

At any one time the OECD will pursue these aims by undertaking several projects with specific goals and outcomes aimed at responding to international issues which are pertinent at the time and which impact on the aims of the organisation<sup>8</sup>. In pursuit of these aims the OECD works in a number of areas<sup>9</sup>. The focus of this thesis and therefore the latter half of this chapter will, however, be confined to the OECD's work on international tax cooperation and regulation. In this area the OECD is both powerful and frequently criticised; and is increasingly facing calls to reform its practice (Fung, 2017).

## **2.3 Internal structure and remit of the OECD**

### **2.3.1 The Council**

The OECD's internal structure is governed by Articles 8 – 11 of The Convention (OECD, 1960). The decision-making power of the organisation lies with the OECD Council (The Council), which comprises of one representative from each of the 37 member countries as well as a representative from the European Commission (OECD, 2021). It is the role of The Council to provide strategic oversight for the organisation and

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<sup>8</sup> Recent examples include the rise of the digital economy, the COVID-19 pandemic and the global financial crisis of 2008.

<sup>9</sup> Policy areas include: agriculture and fisheries; chemical and bio safety; competition, corporate governance; corruption and integrity, development, digital, economy; education, employment; environment; finance; green growth and sustainable development; health; industry and enterprise; innovation; insurance and pensions; investment; migration; public governance; regional, rural and urban development; regulatory reform; science and technology; social and welfare issues; tax; trade (OECD, 2021f)

to decide on specific areas of policy to be pursued. Permanent representatives on The Council meet regularly to discuss issues and decisions are arrived at by consensus. The Council also holds yearly Ministerial meetings where Ministerial representatives of each of the Member States meet. Ministerial meetings include discussion of the OECDs performance, setting of priorities, discussion about the global economic and trade context as well as internal matters like accession or the budget (OECD, 2021).

Permanent representatives on The Council are referred to as “Ambassadors” and are appointed in accordance with the constitutional requirements of their State. Ambassadors are typically politicians, civil servants, senior businesspeople, or scholars who have held posts in government. Ambassadors to the OECD serve at the pleasure of their governments but in practice remain in their posts for an extended term of three years on average (Lamdany & Martinez-Diaz, 2009).

Brief biographies of Ambassadors are provided on the OECD website and as at April 2021 the majority of Ambassadors (24) have experience as civil servants in senior positions and/or as members of their countries diplomatic missions, 3 are active academics, and the remaining 10 have a mix of private and public sector experience (mainly in banking) (OECD, 2021).

### **2.3.2 OECD Committees**

Committees and working groups made up of individuals from the 37 Member Countries and their partners meet regularly to discuss and advance ideas in specific policy areas. There are approximately 300 OECD Committees and working groups attended by some 40,000 subject specialists from state bodies, academia, business and civil society. These individuals request, review and contribute to work produced by the Secretariat (OECD, 2021).

Committees are created by agreement of The Council and are given a mandate by The Council, in line with Council decisions to prioritise particular areas of policy. Mandates given to committees are amended as necessary to account for changes in policy and wider influencing factors.

Committee members take on their role with the OECD alongside their normal job. Committees will meet throughout the year and will also interact with each other and with members of the Secretariat (OECD, 2021).

### 2.3.3 The Secretariat

The Secretariat performs as a central support function for the organisation and is led by the Secretary General. The Secretary General is appointed for a term of five years by The Council (Article 10 (1) OECD Convention 1960), The Council may also appoint Deputy and Assistant Secretaries-General at the recommendation of the Secretary General (Article 10 (2) OECD Convention 1960). The post of Secretary General is currently held by Mathias Cormann, who assumed office for a five year term in June 2021 and previously served as the Australian Minister for Finance (OECD, 2021). Part of the role of the Secretary General is also to chair meetings of The Council, in order to maintain the link between national delegates and The Secretariat (OECD, 2021).

The post of Secretary General and the role of the Secretariat are designed to stand independently from the political influence of Members, per Article 11 (2) of the OECD Convention 1960:

*"Having regard to the international character of the Organisation, the Secretary-General, the Deputy or Assistant Secretaries-General and the staff shall neither seek nor receive instructions from any of the Members or from any Government or authority external to the Organisation."*

As the Secretary General and other staff of the Secretariat will be selected from amongst Member States this paragraph of The Convention is in effect a statement of political independence of the Secretariat from any one Member State. Members do have the ability to influence the course of the organisation through their Ambassador to the Council however this statement in The Convention appears to formalise separation of the operational running of the organisation from the political function of individual members.

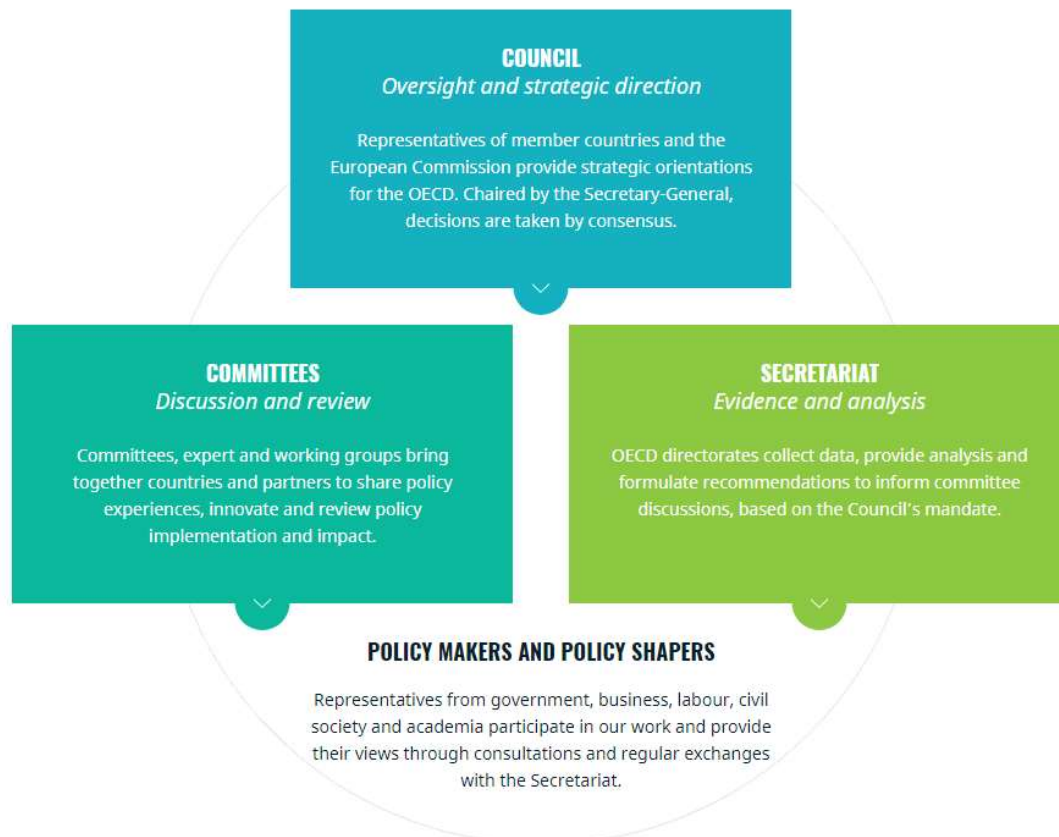
The secretariat at large consists of approximately 3,300 staff including economists, lawyers, scientists and experts from other fields (OECD, 2021). These staff support the work of the OECD Committees and continue to develop policy, research and ideas to further the aims set by The Council and operationalised by the Committees. Secretariat staff are organised into Directorates or Divisions, these broadly focus on one area of policy within the wider OECD scope and will work to support Committees developing policy within that area (OECD, 2021). Directorates or Divisions will also cooperate on larger projects where an overlap in policy area or a sharing of skills may bring benefit to a project or area of research<sup>10</sup>.

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<sup>10</sup> From the OECD website, departmental pages e.g. The Development Co-operation Directorate (<http://www.oecd.org/dac/>) department websites highlight areas of collaboration with other OECD departments and initiatives.

Figure 4 below shows the OECD's diagrammatic representation of the organisation's internal structure.

Figure 4 - OECD internal structure



Source: (OECD, 2021)

## 2.4 OECD funding

The following chapter explains how the OECD is funded using figures from the OECD's website and the latest available financial statements, at the time of writing, those of the year ended 31 December 2021 as illustrations (OECD Financial Statements, 2021).

The OECD budget is set and approved by the Council, the budget is then raised through contributions from members (OECD, 2023).

Contributions are split into three streams Part I, Part II and voluntary contributions (OECD, 2019).

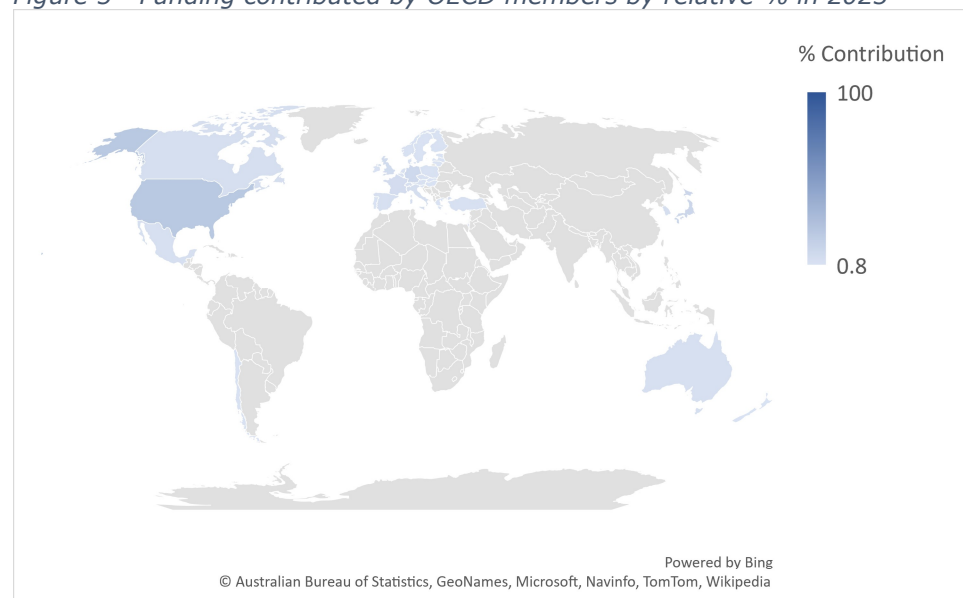
Part I contributions cover the overall expenditure of the OECD and are assessed and levied on Members based on a formula which considers the size of each Member's economy (OECD, 2019). The formula is set in the annual budget and agreed by the Council (as empowered by Article 20 of The Convention) (OECD, 2023). Part I contributions in 2023 amounted to €219.6 million; the largest Part I contributions in 2023 were made by the



USA (19.1%), followed by Japan (9%), Germany (7.5%), UK (5.4%), France (5.1%) and Italy (3.9%) meaning 50% of contributions come from these six members (OECD, 2023).

Figure 5 illustrates the percentage of Part I contributions made by members in 2023 (darker blue highlights indicate a larger % contribution).

Figure 5 - Funding contributed by OECD members by relative % in 2023



Source: Author's Own

Part II contributions for 2023 were €118.7 million, these contributions cover projects which are of interest to only a limited number of members. Part II projects cover geographic areas (e.g. the 'Sahel and West Africa Club) or particular industry or policy areas (e.g. the 'Ship Building Programme') (OECD, 2019). Part II contributions are levied on a basis agreed between countries involved (OECD, 2019).

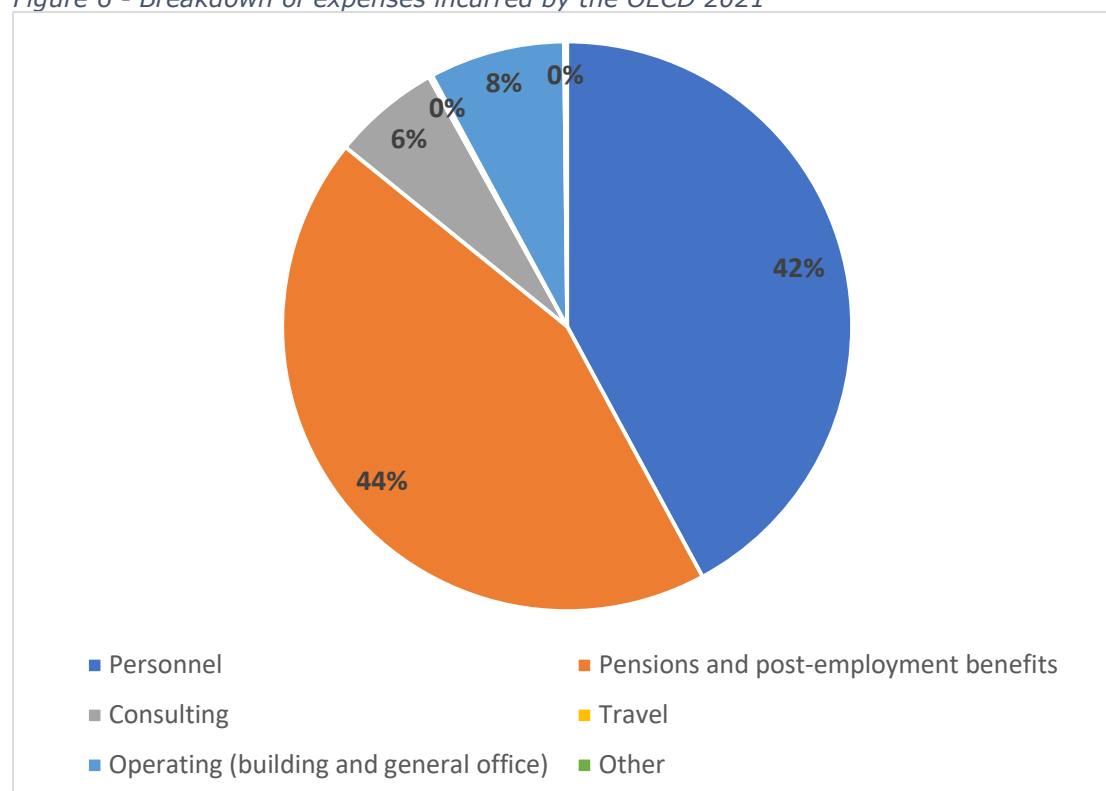
Voluntary contributions are made towards specific project and areas of the OECD's operations at individual member's discretion and with the approval of the Council (OECD, 2019). 2023 voluntary contributions are not available but the OECD's financial statements for the year ended 31 December 2021 record voluntary contributions of €236.7 million<sup>11</sup>, these are not broken down by member state (OECD Financial Statements, 2021).

The main expenses incurred by the OECD relate to staffing, in particular the 3,300 staff who make up the Secretariat, operating expenses for the

<sup>11</sup> The OECD recognises voluntary contributions when they are expensed, the figure of €236.7 million may therefore relate to projects from before or after 2021 and is not completely analogous with the Part I and II contributions presented above.

year ended 31 December 2021 (the latest year for which figures are available) were €981 million, a breakdown is shown in Figure 6.

Figure 6 - Breakdown of expenses incurred by the OECD 2021



For the financial year ended 31 December 2021 the OECD made a deficit on its operating activities of €263 million but after financial income: a gain on post-retirement benefits of €168 million and a net gain on other financial assets of €10.6 million the organisation posted a deficit of €84 million (OECD Financial Statements, 2021).

Contributions raised and expended on international tax regulation and cooperation are summarised in Figure 7:

Figure 7 - Contributions raised and money spent on international tax regulation 2021

	Part I Levies	Part I Voluntary	Part II Levies	Part II Voluntary	Total
	€000	€000	€000	€000	€000
Taxation	7,378	19,565			26,943
Global Forum on Transparency and Exchange of Information for Tax Purposes			6,653	5,296	11,949
Network on Fiscal Relations Across levels of Governments			427	258	685

Source: (OECD Financial Statements, 2021, pp. 53-54)

When taken as a percentage of the OECD's overall expenditure in the year ended 31 December 2021 the figures above represent 6.15% of all Part I levied and voluntary expenditure and 5.9% of all Part II levied and voluntary expenditure (OECD Financial Statements, 2021, pp. 53-54).

## **2.5 The OECD and tax**

Having given a general overview of the OECD the following sections will discuss the OECD's role in international tax regulation and cooperation.

*"I don't think the OECD is the key player among international organizations in any other area aside from tax."* (Sarfo, 2021: quoting a tax practitioner)

Despite the OECD's wide mandate and its significant contributions in areas such as education (Sellar & Lingard, 2013) it does wield perhaps its greatest influence in the sphere of international tax regulation and cooperation (Fung, 2017; Kurdle, 2014; Sarfo, 2020).

The following paragraphs discuss the OECD's rise to become the primary authority on international tax regulation and cooperation. Parallel initiatives carried out by the UN in this policy area are also discussed. This is because the history of the two institutions in this area is intertwined and to understand the context in which the OECD operates it is important to gain an appreciation of this shared history.

The current international tax regime has its roots in the creation of the League of Nations at the end of the First World War. The League of Nations was established to tackle the problem of double taxation, which was seen as a barrier to the stable and sustainable political and economic integration of Nation States (Rixen, 2011). The League of Nations was however disbanded at the outbreak of the Second World War and efforts to resolve double taxation were suspended until after the Second World War, when the newly created UN sought to pick up where the League of Nations had left off, by creating a global model double tax treaty (Sarfo, 2020). The UN's efforts were directed at creating a treaty which favoured giving taxing rights to countries where income was earned ('source' based taxation) rather than countries where MNEs were headquartered ('residence' based taxation). This approach would have favoured developing nations and is still a priority for the UN in the present day (United Nations, 2015). The UN's early dominance of international tax policy was however short lived as the UN's Fiscal Committee disbanded in

1954 effectively terminating their efforts to create a global model tax treaty (Sarfo, 2020).

The OEEC had started behind the UN in its efforts to create a global model tax treaty however with the disbanding of the UN's Fiscal Committee the OEEC found itself de-facto global authority on multilateral tax cooperation. Between 1956 and the mid 1960's the OEEC (evolving to become the OECD in 1961) acted swiftly to create several articles of a model tax treaty and helped to broker over 50 bilateral double tax treaties (Sarfo, 2020). From 1961 onwards, the OECD became a global and not just a European organisation, initially with the inclusion of Canada and the USA, this precipitated an acceleration on the organisation's focus on multilateral tax cooperation (Sarfo, 2020). Central to the OECD's efforts was establishment of a Committee on Fiscal Affairs which oversaw 15 separate working parties set up to create policy for multilateral tax cooperation (Sarfo, 2020).

In 1963 the OECD developed its first draft of a model tax treaty ('treaty') and this was eventually released as final in 1977 (Sarfo, 2020). The OECD's model tax treaty has been updated many times since and the OECD have issued extensive commentary and guidance on its application (OECD, 2017). Both the treaty and associated commentary have been used widely by national courts and have generated widely respected and adopted stand-alone international legal principles (Kurdle, 2014).

The international tax regime, in its current form, is characterised by bilateral cooperation between nation states who agree to allocate taxing rights or share taxable income through the operation of double taxation agreements (DTAs) (Kurdle, 2014; Rixen, 2011). DTAs are negotiated on an agreement-by-agreement basis between nation states and are adopted into national law in order to make them binding (Kleinbard, 2016). DTA's are also underpinned by globally agreed standards in areas like transfer pricing, many of which emanate from the OECD (Kurdle, 2014).

It is crucial to note that the OECD's model tax treaty favours residence rather than source-based taxation and that this approach favours countries where MNEs choose to headquarter; mainly the rich, developed, Western countries who made up the OECD's initial core membership (Kleinbard, 2016; Tanzi, 2016). Though much is made of this perceived bias (Kurdle, 2014; Tanzi, 2016) it is useful to reflect that OECD and its predecessor were created and subsequently began their work in this area with the aim of creating closer economic ties between its members and so it is unsurprising that the rules it created favour these countries (Sarfo, 2020). However, even if the bias exhibited is the legacy of the OECD's historical orientation rather than a deliberate attempt to prejudice its

members, critics rightly point out the damage it causes to developing countries is very real (Burgers & Mosquera, 2017; United Nations, 2015).

Indeed, the perceived favouring of developed countries is becoming more of a pressing issue for the OECD to address because its role as a global tax policy setter is equated by some with perpetuating and widening inequality (Fung, 2017). Particular concerns are raised when the OECD members seek to defend their dominance in spite of evidence that this may be harming other countries. For example, proposals were made by civil society and developing country representatives at high profile international conferences in 2015 and 2016<sup>12</sup> to give the UN Tax Committee intergovernmental agency status to increase developing country participation and ability to influence tax rules (Burgers & Mosquera, 2017). These proposals were rejected by developed countries who reasoned that OECD should remain the primary authority on international tax and pointed to the lack of resourcing and capacity at the UN to provide advice to developing countries and administer the international tax policy arena as the OECD currently does (Burgers & Mosquera, 2017). This issue has not, however, gone away but rather appears to have gained in strength, with similar proposals being narrowly defeated in a UN vote in 2023 (Robin & Medina, 2023).

From around 1960 onwards (Kurdle, 2014), the role of providing guidance on the operation of the international tax regime evolved from preventing double taxation to be primarily concerned with aiding nation states to police against 'double-non-taxation'. Double-non-taxation occurs when MNEs make use of loopholes or overlaps in the network of DTAs to avoid tax or to reduce their overall global liability to tax (Avi-Yonah, 2009; Kurdle, 2014). This change of role (and change of behaviour on the part of MNEs) has been facilitated in part by wider policies of integration of markets and relaxation of controls and also facilitated and accelerated by advances in information technology (Davies, et al., 2014; Fuest, et al., 2005). This pattern of behaviour and shift in the role of global tax regulation and cooperation has ultimately led to the need for wholesale reform, attempted through the BEPS Action Plan. These points are expanded on further in Chapter 3.

## **2.6 The OECD's tax functions**

The following section discusses the committee and secretariat functions within the OECD responsible for oversight and creation of international tax regulation and cooperation policies.

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<sup>12</sup> These proposals were put forward at the at the UN Conference on Trade and Development in Nairobi in 2016 and the Addis Ababa Civil Society forum on Financing for Development in 2015, see (Burgers & Mosquera, 2017, p. 39) for fuller details.

### **2.6.1 The Committee on Fiscal Affairs (CFA)**

The OECD committee with responsibility for taxation is the Committee on Fiscal Affairs (CFA). First created in 1971 the CFA's mandate has been renewed on a rolling basis and currently extends to 2024 by virtue of OECD Council Resolution [C(2013)84, Annex and C/M(2013)17, Item 173], this Resolution mandates the CFA's objectives as follows:

*"The overarching objective of the Committee on Fiscal Affairs is to contribute to the shaping of globalisation for the benefit of all through the promotion and development of effective and sound tax policies, international tax standards and guidance that will allow governments to provide better services to their citizens while maximising economic growth and achieving environmental and social objectives."*

The CFA is open to all members (as its remit falls under Part I) and is currently chaired by M. Gael Perraud, Director General of European and International Taxation for the French Ministry of Economy (OECD, 2023). The deputy chair of the CFA is Mike Williams (UK) Director of Business and International Tax at HM Treasury (OECD, 2023), the committee has three vice chairs from Canada, Ireland and Japan<sup>13</sup> (OECD, 2023). In addition to the chairs the CFA has permanent bureau members from the following OECD countries: Columbia, Finland, Germany, Korea, Poland, Spain and the USA (OECD, 2023).

A review of the other members of the Committee on Fiscal Affairs (CFA) shows that members of the CFA are officials who hold positions either within their Member State's finance ministry or tax administration (OECD, 2023). The individuals elected to the CFA do not appear to be political party figures but rather civil servants who are appointed for their skills and experience within the areas of finance or taxation or in a public policy setting context.

Non-OECD member countries can be represented on OECD committees through associate or participant membership (OECD, 2015).

Associate membership entitles a participant country to participate in the workings of a committee with the same rights as an OECD member country, associate members are however excluded from discussions on the accession of new members to the OECD (OECD, 2015).

Participants on committees are entitled to be invited to all 'non-confidential' meetings of the committee (OECD, 2015).

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<sup>13</sup> Shawn Porter (Canada) Partner at Deloitte and former civil servant; Emma Cunningham (Ireland) Assistant Secretary General for Tax Policy at the Irish Finance Ministry; Atsushi Komiya (Japan) Deputy Director-General for International Tax Policy, Tax Bureau, Ministry of Finance Japan.

Associate or participant status can be offered to countries for the entire programme of a committee's work or just to certain working groups created by the committee (OECD, 2015).

Argentina is included as a full associate member of the CFA meaning they may participate in all of the workings of the committee, China and India are included as associate members of 'Working Party No. 10 on Exchange of Information and Tax Compliance' (Committee on Fiscal Affairs, 2020).

The CFA is responsible for the implementation of the OECD's BEPS Action Plan and all countries who sign up to implement the Action Plan (currently 139 in total) are co-opted as associate members of the CFA for that project<sup>14</sup> (Committee on Fiscal Affairs, 2020).

In addition to its associates and participants the CFA has the following officially recognised observers (OECD, 2023)

- African Tax Administration Forum (ATAF)
- Exchange and Research Centre for Leaders of Tax Administrations (CREDAF)
- Inter-America Centre for Tax Administration (CIAT)
- International Monetary Fund (IMF)
- United Nations
- World Bank

## **2.6.2 Centre for Tax Policy and Administration (CTPA)**

The Centre for Tax Policy and Administration (CTPA) is the branch of the OECD Secretariat responsible for creation and oversight of tax policy. The current director of the CTPA is Manal Corwin, Ms Corwin is a US national and was employed in various positions in the US government as well as practicing as a tax advisor before joining the OECD in 2011 (OECD, 2022). The staff of the CTPA consists of around 200 civil servants: economists, tax lawyers, policy analysts, statisticians and administrative staff (OECD, 2021). The CTPA work to support the CFA by providing evidence, drafting policy and monitoring implementation.

Staff of the Secretariat, including the CTPA can be hired on one of three bases; associate staff, official staff and temporary staff. Associate staff include interns and professionals loaned to the organisation on secondment from a different organisation. Official staff are hired on fixed term 1-2 year flexible rolling contracts and temporary staff fill in roles on short term contracts, typically 3-6 months (OECD, 2021).

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<sup>14</sup> A full list of BEPS Members can be found here <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>

Normally official staff must be nationals of an OECD member state however the OECD's employment regulations<sup>15</sup> (OECD, 2020) provide an exemption for officials employed to work on the BEPS Action Plan who are nationals of Associate countries to the BEPS initiative.

## **2.7 The Base Erosion and Profit Shifting Action Plan (BEPS Action Plan)**

Sections 2.7 - 2.8 will discuss the creation and composition of the OECD's BEPS Action Plan. As set out by the OECD:

*"Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations."* (OECD, 2014e)

Following a G20 finance ministers' meeting in 2013 the governments of the G20 commissioned the OECD to create an action plan (herein the "BEPS Action Plan" or the "Action Plan") to combat this type of potentially harmful tax avoidance by multinational enterprises (MNEs) (OECD, 2014).

This type of tax avoidance behaviour is primarily undertaken by MNEs. The size and mobility of these businesses mean they have the resources to alter their global structure to enable profit shifting between jurisdictions and are also able to employ specialist advisors to facilitate tax strategies which minimises their global effective tax cost (Dowling, 2014; Sikka & Willmott, 2010; Ylönen & Laine, 2015) .

The OECD's website in its introduction to the BEPS Action Plan stresses that the Action Plan is aimed at primarily legal avoidance schemes rather than illegal tax evasion (OECD, 2014e). The Action Plan is in effect a tightening of the regulations which presently exist, to outlaw some of the more aggressive and artificial schemes employed in shifting profits (Baker, 2013).

The OECD (2014e) cite several reasons for the implementation of the BEPS Action Plan:

Firstly; the negative impact of BEPS on domestic companies unable to engage in BEPS but who nonetheless must compete with MNEs who are able to gain a competitive pricing advantage in the market through profit shifting.

Secondly; the effect that BEPS has on the voluntary and willing compliance of other tax payers in the economy who are unable to avoid

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<sup>15</sup> Title III Regulation 6(1) sub point 12



taxes and yet perceive MNEs as being able to avoid taxes relatively easily and on a large scale.

Thirdly; the impact of BEPS on developing economies, which in many cases rely heavily on corporate income taxes raised from foreign direct investment (FDI) by MNEs and who suffer disproportionately when profits are shifted.

## 2.8 The BEPS Action Plan process

Following the inception of the BEPS Action Plan project in 2013 the OECD formed several task forces to tackle different elements of the project. The task forces completed a programme of drafting and consultation with stakeholders in order to arrive at a final 15 point Action Plan, which was published in October 2015, the timeline in Table 1 illustrates the process:

*Table 1 - Timeline of OECD consultation with stakeholders in creation of the BEPS Action Plan*

July 2013	G20 Finance Ministers request OECD assistance in combating BEPS
September 2013	G20 approves the OECD 15 point Action Plan on BEPS
2013/14	The OECD organises task forces to prepare implementation guidance for the 15 Actions
2014/15	Guidance is published in draft and stakeholder input is sought through public consultations
October 2015	The final 15 point Action Plan is published: <ul style="list-style-type: none"> <li>• Two to three consultation drafts per Action</li> <li>• Consultation periods of one to two months</li> <li>• One or two stakeholder meetings</li> </ul>

The 15 separate Actions represent distinct areas of BEPS and are set out in Table 2.

*Table 2 - BEPS Actions 1 - 15*

<b>BEPS Actions</b>	
Action 1	<p><b>ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY</b></p> <p>Action 1 addresses the tax challenges of the digital economy and identifies the main difficulties that the digital economy poses for the application of existing international tax rules. The Report outlines options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation.</p>

Action 2	<p><b>NEUTRALISING THE EFFECTS OF HYBRID MISMATCH ARRANGEMENTS</b></p> <p>Action 2 develops model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effects of hybrid instruments and entities (e.g. double non-taxation, double deduction, long-term deferral).</p>
Action 3	<p><b>DESIGNING EFFECTIVE CONTROLLED FOREIGN COMPANY (CFC) RULES</b></p> <p>Action 3 sets out recommendations to strengthen the rules for the taxation of controlled foreign corporations (CFC).</p>
Action 4	<p><b>LIMITING BASE EROSION INVOLVING INTEREST DEDUCTIONS AND OTHER FINANCIAL PAYMENTS</b></p> <p>Action 4 outlines a common approach based on best practices for preventing base erosion through the use of interest expense, for example through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income.</p>
Action 5	<p><b>COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE</b></p> <p>Action 5 revamps the work on harmful tax practices with a focus on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for preferential regimes, such as IP regimes.</p>
Action 6	<p><b>PREVENTING THE GRANTING OF TREATY BENEFITS INAPPROPRIATE CIRCUMSTANCES</b></p> <p>Action 6 develops model treaty provisions and recommendations regarding the design of domestic rules to prevent treaty abuse.</p>
Action 7	<p><b>PREVENTING THE ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS</b></p> <p>Action 7 contains changes to the definition of permanent establishment to prevent its artificial circumvention, e.g. via the use of commissionaire structures and the likes.</p>

Action 8 – 10	<p><b>ALIGNING TRANSFER PRICING OUTCOMES WITH VALUE CREATION</b></p> <p>Actions 8 – 10 contain transfer pricing guidance to assure that transfer pricing outcomes are in line with value creation in relation to intangibles, including hard-to-value ones, to risks and capital, and to other high-risk transactions.</p>
Action 11	<p><b>MEASURING AND MONITORING BEPS</b></p> <p>Action 11 establishes methodologies to collect and analyse data on BEPS and the actions to address it, develops recommendations regarding indicators of the scale and economic impact of BEPS and ensure that tools are available to monitor and evaluates the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis.</p>
Action 12	<p><b>MANDATORY DISCLOSURE RULES</b></p> <p>Action 12 contains recommendations regarding the design of mandatory disclosure rules for aggressive tax planning schemes, taking into consideration the administrative costs for tax administrations and business and drawing on experiences of the increasing number of countries that have such rules.</p>
Action 13	<p><b>TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING</b></p> <p>Action 13 contains revised guidance on transfer pricing documentation, including the template for country-by-country reporting, to enhance transparency while taking into consideration compliance costs.</p>
Action 14	<p><b>MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE</b></p> <p>Action 14 develops solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, via a minimum standard in this area as well as a number of best practices. It also includes arbitration as an option for willing countries.</p>
Action 15	<p><b>MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BEPS</b></p> <p>Action 15 provides an analysis of the legal issues related to the development of a multilateral instrument to enable countries to</p>

	streamline the implementation of the BEPS treaty measures. On 7 June 2017, over 70 Ministers and other high-level representatives participated in the signing ceremony of the Multilateral Instrument.
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(Source: <http://www.oecd.org/tax/beps/beps-actions.htm>)

## **2.9 Action 13 in the UK**

This study focusses on the creation of Action 13 of the BEPS Action Plan and its implementation in the UK. The UK implemented selected provisions of Action 13 on 18 March 2016 with the introduction of Statutory Instrument 2016 No.2137<sup>16</sup> (SI 2137). SI 2137 came into force for accounting periods beginning on or after 1 January 2016 and requires MNE's<sup>17</sup> headquartered in the UK with a consolidated revenue of €750 million or greater for an accounting period<sup>18</sup> to file a CbCR report with the UK tax authority, His Majesty's Revenue and Customs (HMRC). The CbCR report is due to be filed no later than 12 months after the end of an accounting period, with a £300 statutory penalty for missing the deadline and a fine not exceeding £3,000 for delivery of an inaccurate CbCR report.

In 2016 HMRC estimated that the introduction of CbCR requirements would increase UK corporate tax take by £5m in each of the fiscal years 2016-17 and 2017-18 and then by £10m for subsequent years (HMRC, 2017). HMRC initially estimated that the requirements would bring into scope 1,400 UK headquartered MNE's but later revised this estimate down to 300 upon increasing the revenue threshold (HMRC, 2017). SI 2137 s6 allows exemption from filing when an MNE's ultimate parent entity (UPE) is headquartered outside of the UK and is required to file a CbCR in the UPE's jurisdiction, if that jurisdiction has an agreement to automatically exchange information with the UK. HMRC does however allow voluntary filing of CbCR even if an MNE's is eligible for an exemption<sup>19</sup>.

SI 2137 does not explicitly set out the detailed disclosures required under the UK CbCR requirements, instead SI2137 s7(1) confers powers on the Commissioners of HMRC (Commissioners) to issue appropriate guidance in this respect. This guidance is provided in the International Exchange of

<sup>16</sup> The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016. This Statutory Instrument operationalised powers conferred on HMRC by Section 122 of the Finance Act 2015.

<sup>17</sup> Enterprises with entities resident in two or more jurisdictions

<sup>18</sup> A standard accounting period is 12 months, the threshold is apportioned accordingly for shorter accounting periods and where a currency other than the Euro is used by an MNE the average exchange rate for the accounting period is to be applied.

<sup>19</sup> IEIM300060

Information Manual 300000 (IEIM 300000)<sup>20</sup> which states that CbCR reports must be filed according to an HMRC designed XML<sup>21</sup> pro forma. HMRC do not specify the source of data to be included in CbCR but allow companies the flexibility to source this from statutory or internal management reports<sup>22</sup> they also refer taxpayers to OECD guidance<sup>23</sup> in this respect.

The legislation above partially enacted BEPS Action 13 by way of the CbCR reporting requirements. However, when initially enacted HMRC did not adopt the full requirements of Action 13, disregarding the requirement for companies to disclose a master file or local file:

*“Whilst HMRC does not require a master file or local file to be prepared or filed with the CbCR report, it remains a requirement that the transfer pricing documentation retained must adequately demonstrate that customer transfer pricing meets the arm’s length standard”*<sup>24</sup>

This is due to change; however, with effect from April 2023 UK companies currently meeting the threshold for CbCR will be required to submit a master file, a local file and a supporting summary audit trail (HMRC, 2021).

The UK has been chosen as a suitable context to investigate the efficacy of Action 13 due to its early adoption of Action 13 into legislation<sup>25</sup> and the relatively large number of MNEs resident in the UK subject to the UK’s interpretation of Action 13 (HMRC, 2017). Furthermore, the existence of a large and powerful tax profession in the UK (Sikka, 2020) means that interviews may gain insight into the way in which regulation is shaped in practice by the tax profession (Mulligan & Oats, 2016).

Whilst the tax profession plays an intermediary role between legislators and taxpayers in many jurisdictions (Tran, 2020), the UK may prove a particularly interesting setting as many commentators have noted that the UK tax advisory profession is particularly aggressive in seeking to avoid taxes for its clients as observed by Lord Prem Sikka, addressing the House of Lords in his Maiden speech:

*“The UK is also the home of a rampant tax avoidance industry [referring to large professional firms], which enables companies to avoid taxes by*

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<sup>20</sup> The IEIM is an HMRC Manual; a guidance document for HMRC inspectors which sets out HMRC’s position on tax law and the protocols that HMRC Inspectors should follow. These manuals are publicly available and widely used by tax practitioners albeit practitioners may at times disagree with and challenge the interpretation of the law presented by HMRC in their manuals.

<sup>21</sup> Extensible Markup Language: a machine and human- readable format

<sup>22</sup> IEIM300020

<sup>23</sup> IEIM300040

<sup>24</sup> IEIM300170

<sup>25</sup> The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016

*shifting profits to low or no-tax jurisdictions through intragroup transactions.” (Sikka, 2020)*

Similar observations about the aggressive tax avoidance practices of MNE’s in the UK are offered by multiple other authors, particularly Murphy, who contends that CbCR may be a key factor in addressing the level of aggressive tax avoidance in the UK (Christensen & Murphy, 2004; Murphy, 2016; Sikka & Hampton, 2005).

## **2.10 Chapter summary**

This chapter has provided a brief overview of the history of the OECD and explored the organisation’s internal structure and funding. Understanding of the OECD’s internal make-up and the financial model under which it operates are key to understanding the way the organisation regulates and the political dynamic in which it operates. This understanding is arguably essential to allow a critical evaluation of any OECD policy and informs the approach taken in this study.

Having established a grounding in the macro-level operation of the OECD the role the OECD plays in regulating for international tax was discussed along with the internal mechanisms involved within the OECD in creating tax regulation. This thesis makes a case study of Action 13 of the OECD’s BEPS Action Plan. The formation of the BEPS Action Plan was therefore discussed in detail in sections 2.7 and 2.8. Section 2.9 then went on to outline the main features of Action 13 in the UK.

An understanding of the OECD’s positioning within the global tax system and how it creates policy in this area is central to the research. The question of whether Action 13 is a democratically legitimate intervention can only be researched with a knowledge of the policy dynamic from which it emerged and the process involved in its drafting.

The next chapter will set out the guiding theory for the thesis and offer an appreciation of the current literature pertinent to the research questions. This in depth and critical literature review will build on the knowledge in this contextual chapter, with focus on the specific research question.

## 3 Chapter 3: Literature Review

### 3.1 Introduction

This chapter will, in the first instance, critically discuss democratic legitimacy, the theory which underpins the study. The chapter will go on to discuss extant literature on Action 13, the BEPS Action Plan and the OECD, with critical reflection on how the literature has shaped the approach taken in this study.

To answer the research questions:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

It is necessary to have a critical appreciation of democratic legitimacy theory and to map this theory to the process undertaken by the OECD in creating the BEPS Action Plan. This chapter will therefore outline the theory before applying it to the case study context. The chapter concludes with a critical appreciation of extant studies in this area, highlighting the knowledge gap which the thesis fills.

### 3.2 Democratic legitimacy

Legitimacy in terms of policy maker's power to govern or regulate concerns the question '*what gives them the right to do that?*' (Mosquera, 2015, p. 7); or from a stakeholder's perspective '*why should I follow those rules?*'.

Legitimacy is achieved when:

*"Citizens believe that these [rules] are morally authoritative and they therefore voluntarily comply with government acts even when these go against their own wishes"* (Schmidt, 2013, p. 10)

Scharpf's (1997) foundational and widely cited<sup>26</sup> work examining the democratic legitimacy of the European Union (EU) has been used to understand policy making in a variety of international settings.

For Scharpf (1997; 1999) both the *input* and the *output* of a policy making process are vital:

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<sup>26</sup> 869 citations as at 18/08/2021 (Google Scholar)

*“Democracy aims at self-determination. It must be understood as a two-dimensional concept, relating to the inputs and to the outputs of the political system at the same time” (Scharpf, 1997, p. 19)*

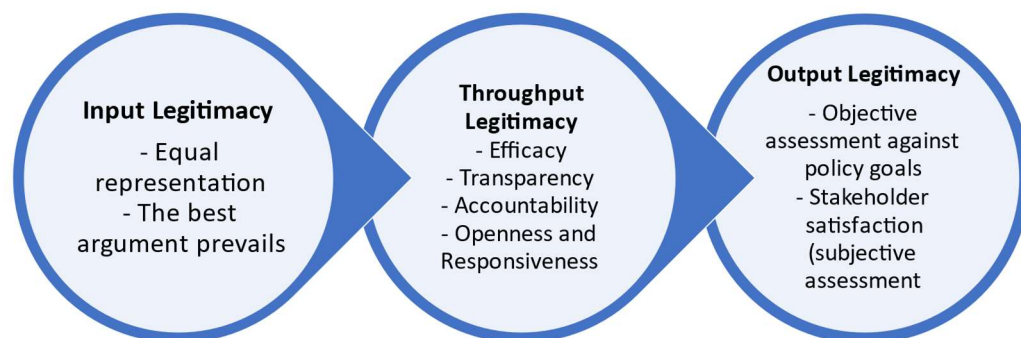
In his two-dimensional understanding Scharpf (1997; 1999) stresses the need for balance. Input must ensure that the authentic preferences of citizens are considered by policy makers when formulating policy. The output of policy creation processes must then work to achieve the collective goals of citizens by shielding them from harm and improving their welfare (Scharpf, 1997). How this balance is achieved in practice is the subject of much nuanced debate.

In order to construct an effective understanding of how the OECD may create legitimacy, important theoretical reflections on the nature of both *input* and *output* legitimacy will be explored with the added dimension of *throughput* legitimacy, as developed by Schmidt (2013); who sought to complement Scharpf’s theorising.

Throughput legitimacy concerns the ‘black-box’ of policy making and focuses on the detailed mechanisms used by policy makers to engage constituents and mediate between competing aims and world views, when making policy decisions (Schmidt, 2013).

Figure 8 illustrates key characteristics of each of the components of democratic legitimacy.

*Figure 8 - Components of Scharpf’s Democratic Legitimacy Theory*



Source: (Scharpf, 1997; Schmidt, 2013)

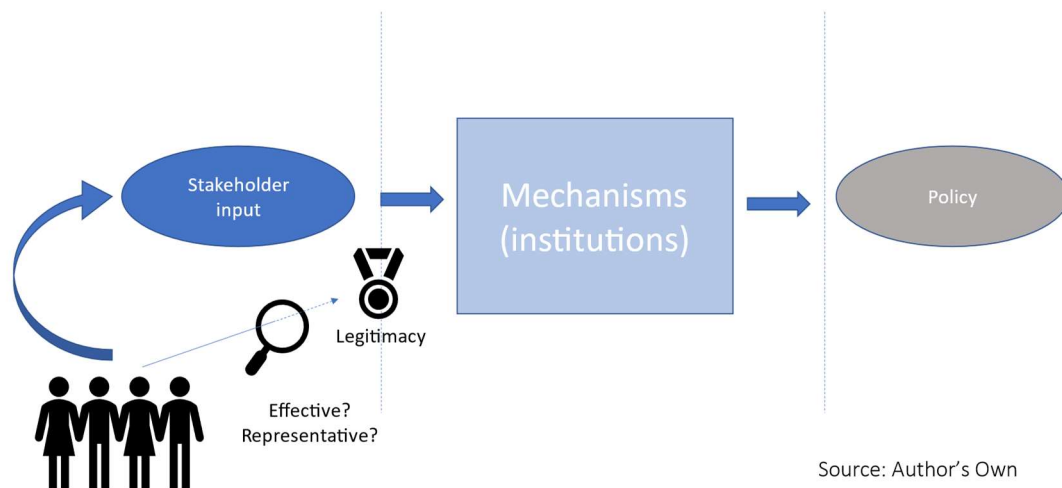
The following sections will discuss the components of democratic legitimacy and the nature of their interactions with each other, forming a base understanding of the theory underpinning this study.



### 3.2.1 Input legitimacy

Figure 9 presents the author's illustration of input legitimacy in a democratic policy making process:

Figure 9 - Author's visualisation of Scharpf's Democratic Input Legitimacy



The key focus of input legitimacy is how the will of citizens or stakeholders is considered in the policy making process. In an interactive policy making process, as undertaken by the OECD, the benefit of fostering effective input legitimacy is in the value derived from collective policy deliberation (Boedeltje & Cornips, 2004; Scharpf, 1999). This capacity for deliberation is in some ways felt to provide stronger legitimation for policy makers than participatory elections. This is because the ability to deliberate on a specific policy provides stakeholders with a *real* opportunity to influence that policy. This contrasts with voting, where choice is mediated through the electoral system, which may dilute stakeholder opinions. The discussion carried out during a policy deliberation also has the benefit of providing stakeholders with a learning opportunity, whereby they may come to understand how their preferences interact with those of others (Scharpf, 1999).

Challenges in fostering input legitimacy come in facilitating the participation of stakeholders. Input legitimacy is judged on the criterion of fairness which means stakeholders should have an equal chance to access deliberations and an equal opportunity to influence the outcome. Whilst this may mean some stakeholder interests are preferred over others this should not present a challenge to fairness if the best point of view or best compromise wins out (Boedeltje & Cornips, 2004). An important part of the input process is ensuring participants have an ability to reach enlightened understanding either as to why their argument prevailed or

why it was compromised in favour of another 'better view' (Boedeltje & Cornips, 2004).

Whilst a fair process is ideal in theory, it does not take much to imagine the practical difficulties involved in creating and mediating a perfectly fair process. Real world concerns mean it would be virtually impossible to facilitate a constructive discussion between all stakeholders interested in influencing a policy at an international level. Practical issues such as access, timing and language make this challenging enough but it is likely that in reality not all stakeholders will be willing or able to participate even if the process allows for it (Boedeltje & Cornips, 2004). For this reason, input legitimacy is often measured by way of representativeness. A process is regarded as representative if the participants in deliberations are representative of the interested population as a whole. Where this is not the case the process may be flawed as sectoral interests are likely to dominate policy making to the detriment of those unrepresented or less well represented stakeholders (Boedeltje & Cornips, 2004; Scharpf, 1999).

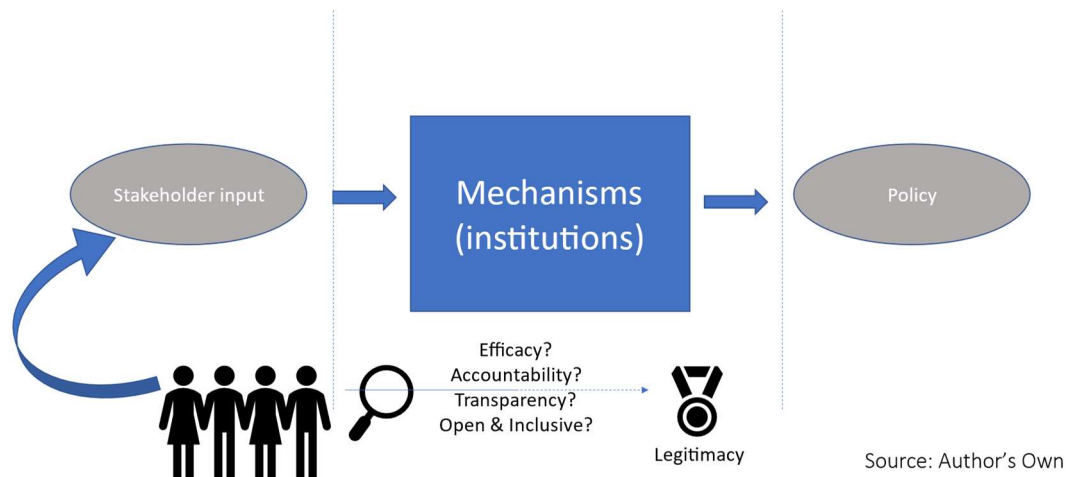
### **3.2.2 Throughput legitimacy**

*"Legislative decision-making requires a non-partisan and impartial attitude on the part of the legislatures. Competing interests should therefore be balanced in a reasonable way in order to uphold the integrity of the tax system."* (Gribnau, 2017, p. 16)

Whilst input and output (see 3.2.3) legitimisation have proved powerful normative conceptions, Schmidt (2013) perceived that equally as important is the 'black box' in which policy is formulated. Schmidt terms this 'throughput' legitimacy and introduces it to strengthen Scharpf's theorising and allow better evaluations of the governance processes involved in policy formulation.

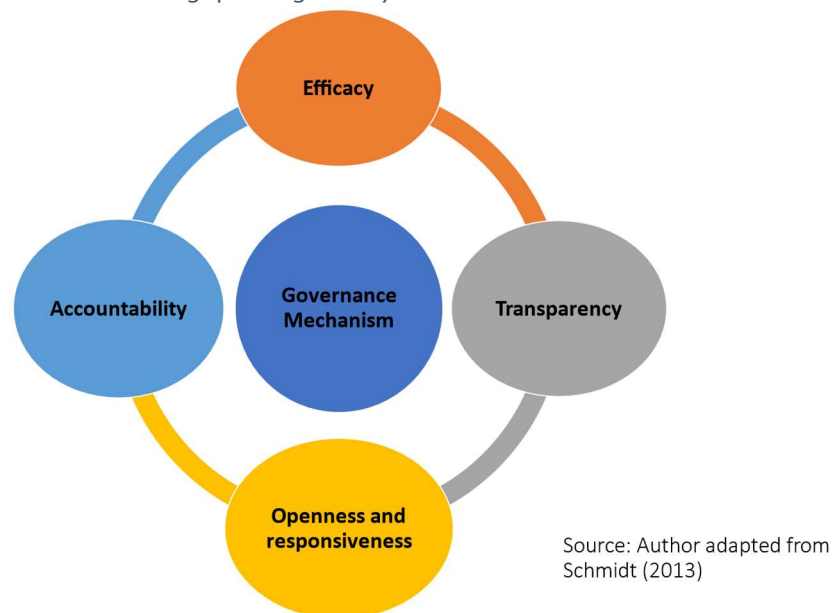
Figure 10 presents the author's illustration of throughput legitimacy in a democratic policy making process:

Figure 10 - Author's visualisation of Schmidt's Democratic Throughput Legitimacy



To conceptualise throughput legitimacy as a new component of Scharpf's evaluative standard of democratic legitimacy, Schmidt synthesises the work of other scholars concerned with what she terms throughput and also considers how throughput interacts with input and output (Schmidt, 2013). From the extant literature Schmidt identified four components of throughput legitimacy, illustrated in Figure 11:

Figure 11 - Components of Throughput Legitimacy



Schmidt (2013) believes that these four components can be understood from an *institutionalist* or a *constructionist* perspective and seeks to provide insight from both perspectives. An institutionalist view of throughput focusses on the mechanics of the decision-making process; including how stakeholders can have direct influence on policy (Schmidt,

2013). A constructionist view focusses on the quality of deliberation between interested stakeholders. This view stresses the importance of productive interrelationships between stakeholders throughout the policy making process (Schmidt, 2013). Whilst they represent different schools of thought there appear to be interdependencies between the two perspectives. For example, an excellent process which may be considered legitimate from an institutionalist perspective may be ineffective if stakeholders do not engage in meaningful deliberation. Similarly, willing, and participative stakeholders may be put off by an ineffective process. The four factors will therefore be discussed in the following sections in terms of their institutional and constructionist components, with a view to presenting a holistic understanding of throughput legitimacy.

#### 3.2.2.1 Efficacy

*"Efficacy requires that organizations and their processes are designed to produce desired results within a reasonable time frame and by making the best use of resources (people, financial means, technical means, etc.) put at the disposal of the organization"* (Brosens & Bossuyt, 2020, p. 25)

To be effective, organisational processes must be streamlined and efficient as well as adequately resourced (Schmidt, 2013). Efficiency must be balanced with input as well as openness and responsiveness. An efficient and streamlined system must not become one where expediency is gained at the expense of proper deliberation and agreement from key stakeholders (Brosens & Bossuyt, 2020). An interesting aspect of efficacy is the use of experts or specialists in the policy drafting process. Whilst technical and subject expertise may prove valuable resources in expediting discussions, the relationship of experts to other stakeholders must be considered. Experts may come from one stakeholder group e.g. professional advisors, therefore, if experts are employed to improve output legitimacy it must be recognised that there may be a negative effect on input and throughput. Whilst experts may improve the quality of deliberations this may also come at the expense of openness in the deliberative process (Schmidt, 2013).

#### 3.2.2.2 Transparency

Transparency relates to the flow of information associated with policy making processes and outcomes. Information should cover both the substance of policy discussions but equally details about the process undertaken in policy deliberation and how specific policies were arrived at through the deliberation process (Brosens & Bossuyt, 2020)

In practice transparency can be hard to concretely define and achieve but can be evaluated based on several criteria. Firstly; relevance, policy makers must consider what type of information covering which aspects of the decision-making process are relevant to which stakeholders (Schmidt,

2013). Secondly; accessibility, whilst it is easy to think of transparency as the opposite of opacity or secrecy the mere availability of information is not enough, if it is not accurate and understandable to key stakeholders (Schmidt & Wood, 2019). For example, it was found that EU policies on biodiversity were better accepted where affected stakeholders (farmers and landowners) were provided with information about how their rights and livelihoods had been considered when policies were drafted (Stupak, et al., 2021). Thirdly; comprehensibility, information should be easy to find and in practice policy makers may have to invest in a curation system or an interface for those requiring information. As Schmidt observes, availability on its own may in some cases lead to information overload and, perversely, hinder comprehensibility and hence transparency (Schmidt, 2013; Schmidt & Wood, 2019). Schmidt (2013) gives an example of the EU e-government systems where massive volumes of complex documents are deposited in an online repository, which, whilst free to access, is extremely difficult to navigate.

It can therefore be difficult to strike a balance between providing enough information and accompanying explanation to ensure that information can be understood without obscuring the important facts. Added to this, consideration must be given to confidentiality. Policy discussions may include some sensitive information and full disclosure may put potential stakeholders off from participating in policy deliberations. This is particularly true of 'early stage' discussions where participants may be exploring creative options or may be still learning certain particulars and appear to know comparatively less than others. In this sense the transparency of the deliberation process may prove difficult to manage where complex technical subjects are to be discussed (Brosens & Bossuyt, 2020).

However, whilst challenging, effective transparency can provide a counter-balance to using experts in policy deliberations and can help to defend against charges of corruption or incompetence (Schmidt, 2013)

### *3.2.2.3 Accountability*

Accountability can be described as "being subject to scrutiny by a specific forum" (Schmidt, 2013, p. 16). The purpose of accountability is to ensure that those affected by rules have a say and that those in power don't abuse their power or exercise it arbitrarily (Schmidt & Wood, 2019). In the case of international organisations not subject to direct democratic control this can be problematic. The lack of a direct relationship to citizens means international organisations must first identify to whom they are accountable and then build mechanisms to ensure this accountability (Schmidt & Wood, 2019). Accountability may be expected in terms of the use of resources, adherence to rules and norms as well as the policy outcome (Brosens & Bossuyt, 2020).

Accountability is a two-way dialogic relationship and requires action on the part of the holdee and holder (Schmidt, 2013). Policy makers must give account of themselves by providing information and answering questions. Equally those holding them to account must ask questions, assess information and provide critical assessment (Brosens & Bossuyt, 2020). Accountability has a close relationship with transparency, as those being held to account must ensure an adequate flow of information to account holders.

However, it is increasingly recognised in academic literature, for examples see Fox (2007) and Oats & Tuck (2019), that transparency does not guarantee accountability. Policy makers may endeavour to be transparent, but this will not translate into accountability in the absence of the dialogic relationship explained above.

#### *3.2.2.4 Openness (inclusiveness) and responsiveness*

Openness (sometimes referred to as inclusiveness) and responsiveness refer to the quality of the debate undertaken in arriving at a policy decision (Schmidt & Wood, 2019). Openness and responsiveness must be evaluated both in terms of the institutional mechanisms in place to facilitate constructive debate and the quality of the debate itself (Schmidt, 2013).

Openness centres on those stakeholders affected by the policy being identified and invited to participate (individually or by representatives), in meaningful debates which will influence the outcome (Brosens & Bossuyt, 2020).

Responsiveness requires policy makers to consider and respond to preferences, concerns and opinions expressed by stakeholders during deliberation process (Bamber & McMeeking, 2016; Schmidt & Wood, 2019).

There are two dimensions of openness and responsiveness: 'horizontal' and 'vertical' (Brosens & Bossuyt, 2020).

Horizontal openness and responsiveness relate to equal participation. In the context of international regulation affecting multiple states this means all states should be able to vote on regulations but as important, should have a chance to influence the outcome of policy discussions (Brosens & Bossuyt, 2020). This can be challenging in practice as less well-developed states may lack the resources and expertise to participate on an equal footing with richer countries (Fung, 2017). Added to this are the logistical challenges of engaging actors from across different cultures, with different languages and legal traditions.

Vertical openness and responsiveness relates to the potential for non-governmental stakeholders affected by the regulations (taxpayers,

campaign groups, professional advisors, trade bodies etc) to access the policy making process (Scmidt & Wood, 2019). Again, these stakeholders should be given not just a vote but the ability to express their views and genuinely influence the policy making process (Brosens & Bossuyt, 2020; Schmidt & Wood, 2019).

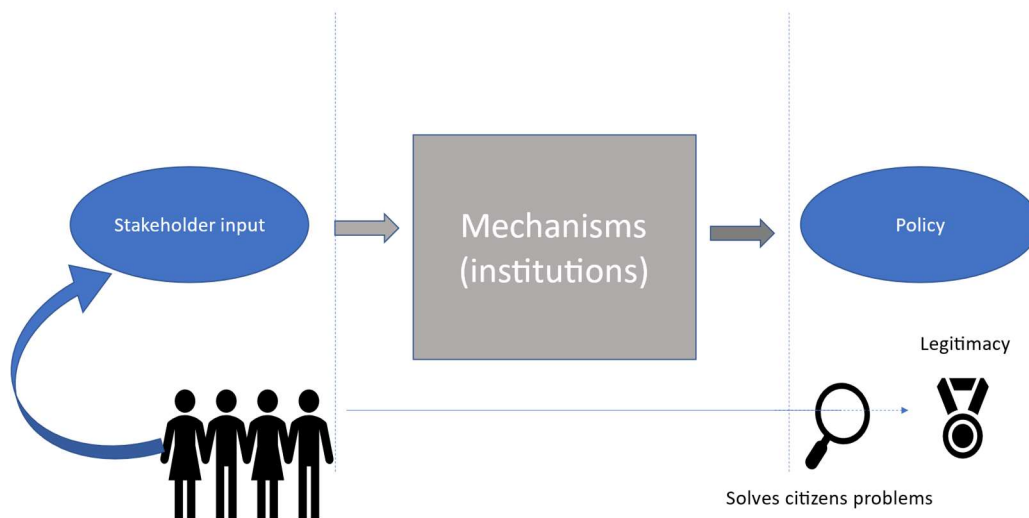
Involving more stakeholders (horizontal or vertical) may lengthen and complicate policy discussions but may also create greater transparency and may lead to greater acceptance of rules if those affected feel they are involved in the policy creation process. Vertical inclusion may also have the advantage of bringing opinions and expertise into the policy discussion which would otherwise be unavailable (Brosens & Bossuyt, 2020). This is seen as a strength of deliberative policy making but must also be balanced against the threat of discussions being dominated by corporate lobbyists, who typically have access to more expertise than civil society or even some countries (Fung, 2017). In many processes the corporate lobby is balanced by NGO's, who bring the added advantage of publicising and communicating issues to civil society (Brosens & Bossuyt, 2020). Again, however it is essential to seek balance as in some policy areas (BEPS included) powerful international NGO's may dominate discussions to the detriment of weaker stakeholders (Fung, 2017).

### 3.2.3 Output legitimacy

*"Output legitimacy is performance oriented and focuses on the outcome for the people that are affected"* (Brosens & Bossuyt, 2020, p. 23)

Figure 12 presents the author's illustration of output legitimacy in a democratic policy making process:

Figure 12 - Author's visualisation of Scharpf's Democratic Output Legitimacy



Source: Author's Own

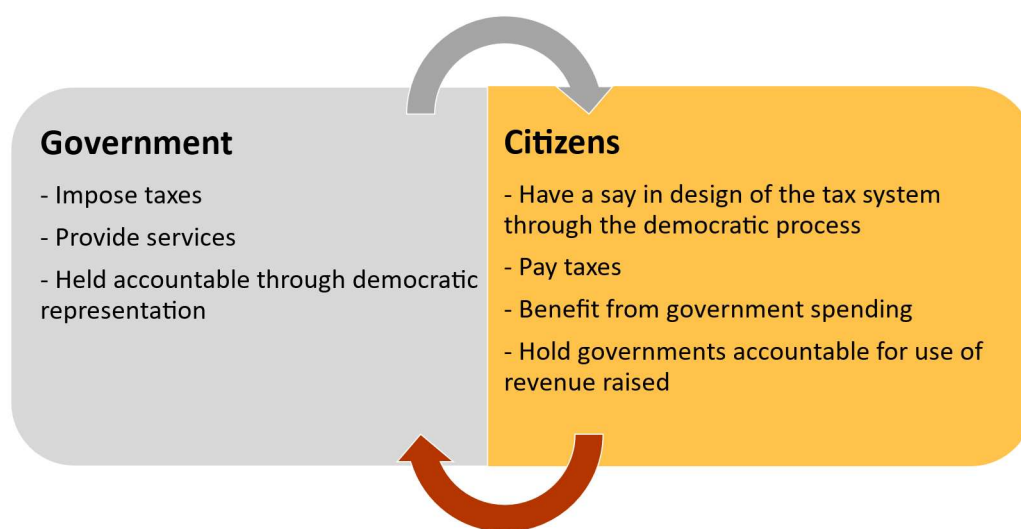
Output legitimacy is achieved if the policies address the concerns of stakeholders or shield them from present dangers (Scharpf, 1997, p. 11). Government 'for the people' is legitimised by its ability to solve problems which are incapable of being solved by individual actors cooperating or through the operation of markets (Scharpf, 1999, p. 11).

Evaluation of output has in practice two components; objective and subjective evaluation (Boedeltje & Cornips, 2004). Objective evaluation seeks to measure whether the policy has met its objective. Subjective evaluation measures whether stakeholders are satisfied with the policy outcome. A positive subjective evaluation is more likely if stakeholders recognise their own ideas or preferences in a policy outcome (Boedeltje & Cornips, 2004).

### **3.3 Democratic legitimacy in tax law – domestic level**

In terms of tax law in a domestic setting, democratic legitimacy is conferred via the relationship between governments and citizens as illustrated in Figure 13.

*Figure 13 - How legitimacy is created in a democracy at a national level*



Citizens of democracies elect political parties who set out plans for raising and spending taxation revenues and, through the election cycle, citizens hold these parties to account for their performance (Mosquera, 2015).

Whilst some citizens may be dissatisfied with either the results of an election or the performance of politicians, the existence of the election system and the ability of citizens to participate confers political authority and democratic legitimacy on those raising taxes (Mosquera, 2015).



Furthermore, for many, the idea of contributing through taxation is a fundamental part of what we understand as our obligation towards supporting the society we live in, our *'social contract'* (Castañeda, et al., 2020). Put simply we confer some authority on the state to achieve things on our collective behalf that we could not achieve alone, whilst recognising that the state must be funded for this to work (Castañeda, et al., 2020).

Whilst levels of tax *'morale'* and acceptance of taxation under the social contract may differ from state to state the concept is generally well recognised and accepted as a foundational part of modern democratic societies (Castañeda, et al., 2020).

### ***3.4 Democratic legitimacy in tax law – international level***

Difficulties arise, however, at the international level, where tax policy is increasingly being formulated by supra-national organisations, key amongst which is the OECD. Internationalisation is key to ensuring effective regulation of MNE's, given their de-territorialised operations (Tanzi, 2016), however, this internationalisation creates a remove between citizens and policy makers. At the national level the electoral process is seen to provide both input and output legitimacy, by allowing citizens choice in selecting policy makers and then, at the next election the power to hold them accountable for their output (Scharpf, 1999, p. 12). International regulation leaves citizens remote from policy creation, with national governments taking on an intermediary role between supra-national policy makers and citizens subject to their regulation (Christians, 2009).

As Christians puts it:

*"Major theoretical developments in tax policy are now arising not through solely national political and legal processes but through the interactions of non-governmental actors in transnational settings."* (Christians, 2009, p. 99)

This regulatory dynamic calls for a different conception of democratic legitimacy, one based on deliberative policy making processes conducted through open networks, where:

*"policy agendas are defined, and policy options introduced, clarified and criticised, in open ended and largely informal processes in which private individuals, interest groups, public-interest organisations, and governmental actors are able to make contributions to policy formation and policy implementation"* (Scharpf, 1999, p. 19)

In practice this means that trans-national organisations such as the OECD must create their own processes for garnering stakeholder *input* and transforming this (*throughput*) into legitimate policy *output* (Brosens & Bossuyt, 2020). They must do this effectively to justify their power and defend against the various challenges levelled against them and the power which they wield in the current global governance structure. These legitimacy challenges will be explored in further detail below.

### **3.4.1 Questions of legal mandate**

One of the main legitimacy challenges the OECD faces is that its policies frequently become mandatory despite the OECD having no formal legal mandate (Christians, 2009). Whilst the lack of a legal mandate means the OECD cannot arbitrarily exercise its will, in reality the organisation's position as the primary source of international regulation gives it a privileged position of being able to issue regulation without the checks and balances which national governments would face when making law (Christians, 2007).

As explored in the previous chapter, the OECD has historically taken on the role of policy advisor and creator of pro-forma agreements for international tax cooperation and regulation (Kurdle, 2014). Many of the OECD's key outputs, therefore, come in the form of guidance, for example; the OECD's 'criteria to identify harmful tax competition' is widely complied with and upheld by nation states, who are both members and non-members of the OECD (Christians, 2007). There is a considerable body of research investigating and critically commenting on the legal basis on which OECD tax policies and guidance become adopted, in this literature the concept of 'soft' law is often introduced as the source of the OECD's power (Christians, 2007). Christians (2007) seeks to provide clarity as to the nature of this term and gives the following definition of soft law:

*"the selective supranationalization of particular tax norms by key players working within transnational networks"* (Christians, 2007, p. 10)

In practice soft law may become influential in a number of ways: Firstly, states may directly adopt OECD guidance into their national tax code (BEPS Action 13 for example); Secondly, national courts may refer to OECD guidance in coming to decisions (possibly even setting precedent in doing so); Thirdly, states may contract with each other using OECD pro-formas, such as double tax agreements; Lastly, disputes between national tax authorities may be settled based on OECD principles (Kurdle, 2014; Christians, 2007). Christians' (2007) definition above is evocative in pointing out where this process may leave gaps in accountability to citizens: 'key players' in this scenario are members of the OECD's

governing and executive bodies, the council, CFA and CTPA. As described in the preceding chapter, these officials are most often professionals in the fields of taxation, economics and trade appointed as representatives of their home countries - the OECD member states. These 'key players' therefore represent a small and arguably insular group who may be remote from democratic accountability. This therefore raises questions as to whether the OECD can be said to have democratic input legitimacy (Christians, 2010)

### **3.4.2 Parliamentary scrutiny**

This deficit in direct democratic control may arguably be mediated in the case of OECD members states whose governments fund and control the OECD's activities (Mosquera, 2015). However, there are questions as to whether the high-level oversight exercised by member state governments really compensates for a lack of direct democratic input from citizens. Some question for example whether the governance of the OECD by its members ever involves robust parliamentary scrutiny at the national level. Brosens & Bossuyt (2020) for example argue that national representatives on the OECD's CFA and Council exercise considerable power in shaping OECD policy but are often unsupervised by their national parliament. Whilst parliaments may ratify some OECD policy into law they are not involved in scrutinising the creation of policy at the early stages (Brosens & Bossuyt, 2020). The authors note that parliamentary decisions in this area are often characterised by a lack of strong debate and that this may stem from the lack of knowledge about international taxation. In effect therefore, subject specialists are appointed to the OECD to represent their countries and trusted to develop policy with little oversight or scrutiny (Brosens & Bossuyt, 2020). This professionalisation of policy setting, draws on the expertise of specialist professionals, which to some may represent a strength. However, for those concerned about representation and democratic control it does appear to put considerable power in the hands of a few members of a select group. There is an argument therefore that the policy creation model adopted by the OECD lacks democratic input and subsequently legitimacy (Brosens & Bossuyt, 2020; Fung, 2017).

### **3.4.3 Lack of global representation**

As noted in Chapter 2 the history of international tax regulation can be charted through the rivalry between the UN and the OECD (Sarfo, 2020). This rivalry has been characterised by some as a conflict between the OECD; representing developed economies and the UN; fighting for a fairer system for developing nations (Baker, 2013). These criticisms centre on the perception that the OECD is a closed group (Burgers & Mosquera,

2017), and one which is focussed on maintaining the dominant hegemony in which the most economically powerful western economies dominate global commerce (Christians, 2010; Fung, 2017; Rixen, 2011). In recent years these criticisms have been amplified with widespread attention on MNEs' tax avoidance practices following the global financial crash. Given the apparent ease with which MNEs can avoid taxes activists have called into question the legitimacy of the international tax system which the OECD were key architects of (Dowling, 2014; Elbra & Eccleston, 2018). This criticism again goes back to the question of whether the rules are made to benefit powerful MNEs and the relatively few rich countries where they headquarter themselves or the global population as a whole (Burgers & Mosquera, 2017).

Brosens & Bossuyt (2020) suggest that the OECD may overcome some of the legitimacy challenges levelled at it through several strategies. Firstly, by increasing transparency and public dialogue around its key decision making; secondly by increasing parliamentary scrutiny of the OECD at a national level; and finally, by fostering broader international cooperation, especially with developing countries (Brosens & Bossuyt, 2020).

If the OECD cannot respond to these criticisms, its long-term future may be under threat and its power may be curbed. Whilst some authors do call for radical reform to remove or re-allocate the power of the OECD (Fung, 2017). It is noteworthy that others, although critical of the OECD, tend to recognise the instrumental role that it plays in this policy arena. Indeed, many wish to see the OECD succeed and seek to make recommendations as to how the OECD can improve its legitimacy with its diverse stakeholders (Avi-Yonah & Xu, 2017; Brosens & Bossuyt, 2020; Floris De Wild, 2017).

It is important to understand this dynamic within which the OECD works to understand what will constitute success in terms of fostering legitimacy. This not only sets the context for the research but has a direct impact on the BEPS Action Plan as well. The BEPS Action Plan was, at its time of its release, the largest ever concerted global effort to tackle tax avoidance by MNEs (Floris De Wild, 2017; OECD, 2014a). As well as tackling the problem this was felt by some to be an attempt by the OECD to defend its legitimacy as regulator in this space (Baker, 2013) and so carries an extra weight of responsibility and expectation.

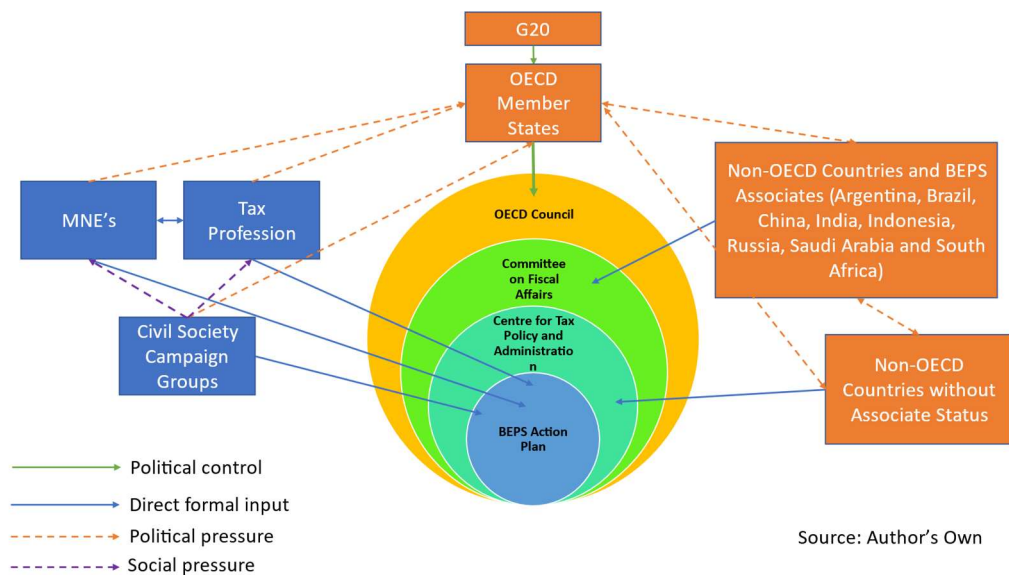
### ***3.5 Democratic legitimacy and BEPS***

If the OECD is to succeed with the BEPS Action Plan and achieve its aim of making the current tax system fairer and more effective, it may be able to partially counterbalance the wider legitimacy challenges it faces. Success may, however, be judged on more than just the tax impact but also how

stakeholders were involved and hence the extent to which the OECD created democratic legitimacy. The following section will explore at a more granular level the creation of BEPS Action Plan and the stakeholder engagement undertaken to legitimise this process. Figure 14 below maps out the key stakeholders in the BEPS process and the influence they have on the OECD.

Referring to Figure 14 below, the section above explored the political legitimacy of the OECD and mainly dealt with interactions pertaining to stakeholders coloured orange and political and legal power represented by orange arrows. The following section narrows in to look at the interactions of the stakeholders coloured blue and the input they had in the BEPS Action Plan Process.

Figure 14 - Stakeholders in the BEPS Action Plan with relative influence on the OECD illustrated



The stakeholders identified on the left of Figure 14 are those who will be directly impacted by the policies of the BEPS Action Plan: MNEs will bear the economic cost as taxpayers; advisors will be responsible for interpreting and ensuring compliance with the Actions by their clients; and members of civil society should reap the benefit of a fairer tax system.

As established in Chapter 2, the OECD is not a participatory democracy, rather a networked organisation providing governance at a supranational level. To foster democratic legitimacy from this model the OECD has created processes for input which foster dialogue in an interactive policy making forum to arrive at output. The following sections will therefore consider the applicability of input, throughput, and output legitimacy in the BEPS Action Plan creation process. Particularly whether the perceived lack of input legitimacy at the macro-level may be partially counterbalanced by an effective policy creation mechanism: one which

fosters inclusive and responsive throughput legitimacy and produces output which legitimately addresses the concerns of all stakeholders.

The remainder of the chapter will set out a theoretical foundation for understanding legitimacy in the context of international tax and describe the processes undertaken by the OECD to create legitimacy. This section will go on to discuss some of the criticisms levelled at the OECD's legitimacy as a policy setter in international tax.

### **3.5.1 Input legitimacy and BEPS**

In terms of input legitimacy in relation to the BEPS Action Plan, there is concern expressed by non-G20 OECD Members that they are being left out of key decision-making processes at the highest level (Fung, 2017), and therefore lack the opportunity to input. Whilst all OECD Members have the right to participate on the OECD Council, the Council was given its mandate to address BEPS by the G20, a group which some would argue is dominated by the interests of its wealthiest members (The USA and a few select European countries) (Fung, 2017; Christians, 2010). Both Fung (2017) and Christians (2010) argue that the policy agenda of the G20 is centred around maintaining the current hegemony which favours the interests of Western capitalist states who advance neoliberal ideologies. Fung (2017) makes particular reference to the USA, whose position on the G20 and status as the single largest contributor to the OECD's budget (see Chapter 2.4 OECD Funding) give it a privileged position of influence over OECD policy (policy which the USA does not always adopt internally if it is viewed as conflicting with US interests).

The concern around the lack of democratic input legitimacy is amplified for non-OECD members and civil society actors who are not represented on the OECD's decision-making bodies at all (Mosquera, 2015; Fung, 2017). For these stakeholders the question 'why should we follow rules which we have very little power to influence' is pertinent and raises significant challenges to the OECD's democratic legitimacy (Burgers & Mosquera, 2017). Mosquera (2015) finds the BEPS Action plan process lacking in *input* legitimacy as it concedes, at most, a consultative role and in some instances no power at all to the UN, developing country and civil society actors (Mosquera, 2015). Building on this work Burgers and Mosquera (2017) provide further insights into developing country perspectives on the BEPS Action Plan and highlight that although the OECD sought developing country views through regional forums, that developing countries had a consultative rather than a decision-making role. The authors view this a problematic in the context of global tax fairness as they highlight that developing countries have, often significantly, different aims and face different challenges from developed countries with regards to corporate income tax and BEPS (Burgers & Mosquera, 2017). The

challenges faced by developing countries in raising tax are well documented see for example (Durst, 2014; Jansky & Prats, 2015). For the purpose of this chapter, it is sufficient to note that developing countries rely on corporate income tax raised from inbound investment to a greater extent than their developed counterparts, meaning they are more vulnerable to economic deprivation as a result of BEPS (Hearson, 2018). In concluding, Burgers & Mosquera (2017) suggest that the BEPS Action Plan is unfit for many developing countries as the scope of the plan and its outputs are not suited to meet the challenges faced by developing countries. These authors suggest that this could have been addressed with fuller participation from developing countries and the UN in the planning and implementation stage of the Action Plan (Burgers & Mosquera, 2017). Fung (2017) goes further and is scathing in her criticism of the OECD as 'the rich man's club' (Fung, 2017, p. 80) which is first and foremost concerned with looking after the interests of its members, even to the detriment of other countries.

There is, however, evidence that the OECD have sought to address these perceived deficiencies in the legitimacy of their interactions with non-member states. As set out in the previous chapter, for the purpose of creating the BEPS Action Plan the OECD invited non-member countries to participate as 'Associates' of the CFA, on an equal footing<sup>27</sup> (OECD, 2016). Associate countries were required to commit themselves to full implementation of the BEPS Action Plan as well as paying a membership fee to cover costs associated with the Action Plan (OECD, 2015). Fung (2017) is sceptical as to whether Associates will be accorded 'equal status' and notes that the expense of membership and costs associated with full implementation of the BEPS Action Plan may have proved prohibitive to many countries and therefore precluded their participation as associates. Fung (2017) points out that Associate countries were only involved once the agenda for the BEPS Action Plan had been set by the OECD Council and therefore their influence was limited. Whilst other countries were 'consulted' by the CTPA in several outreach events and rounds of consultation Fung (2017) opines that this falls far short of the equal participation required for the process to be deemed politically legitimate at a horizontal level between states.

The results of the above studies suggest that the OECD may not have paid adequate attention to the needs of developing nations in formulating the BEPS Action Plan. This therefore poses questions as to the democratic input legitimacy of what is intended as a global initiative.

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<sup>27</sup> Countries given Associate status: Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia and South Africa

It is important to note, however, that the BEPS Actions are not hard or even 'soft' law and most only become operative when they are adopted into the national law of jurisdictions (OECD, 2014a). For this to happen jurisdictions (whether they are members of the OECD or not) must approve the measures through their parliamentary processes. This parliamentary approval or 'state consent' is seen by some to overcome the perceived challenges listed above and to lend political and democratic legitimacy to the regulations (Brosens & Bossuyt, 2020). Even critical authors recognise that whilst it would have been desirable to have more input from citizenry, the practicalities of implementing international law, make this challenging (Fung, 2017). Some would argue that it is impossible to replicate the functions required to garner true democratic input from citizenry at the level of state's contracting with states internationally. Yet these authors still contend that international law may be democratically legitimate if it is justified and fairly mediated (Buchanan & Keohane, 2008). Whether 'state consent' provides this mediation, and therefore legitimacy is however highly contested (Wolfrum, 2008).

In addition to the inequity between countries at a nation state level the state consent model also raises questions around the ability for civil society actors to meaningfully participate. Some raise concerns about the power of NGO's (as well as corporate actors) to influence the outcome the BEPS Action Plan (Fung, 2017). Others perceive limitations on participation, in terms of lack of input and tight timelines for debate and consultation, as ultimately, limiting citizens ability to get rules which work for them of (Mosquera, 2015). Whilst it is necessary to balance the practical needs of getting things done against the need to maintain legitimacy (Buchanan & Keohane, 2008), the findings of the studies noted above appear to question the extent to which effective stakeholder input was considered.

### **3.5.2 Throughput legitimacy and BEPS**

Section 3.4 explored the literature which challenges the democratic legitimacy of the OECD in terms of how it receives its mandate and creates policy, including how citizens and taxpayers are often remote from the process. Despite these criticisms (and perhaps in response to them) the OECD did carry out a programme of stakeholder consultations when creating the BEPS Action Plan, which included stakeholder meetings and the release of discussion drafts for stakeholder comments. These interactions are crucial to the OECD as a medium for gaining valuable stakeholder input into the policy making process but may also be crucial in garnering legitimacy. To do this effectively however, the OECD must mediate between diverse stakeholder views and produce laws which uphold the integrity of the tax system for the general interest (Gribnau, 2017). As noted by Gribnau (2017) policy making with regards to taxation



of MNE's has in the past been susceptible to subversion through the lobbying of powerful corporate interest groups. This not only has the effect of securing unfair benefits for MNE's and wealthy individuals but undermines the integrity, and hence legitimacy, of the system. Up to this point the study has talked about stakeholder engagement, it is worthwhile noting however that this is often termed lobbying in the academic literature. This term will be adopted in the following paragraphs to concur with established practice.

Analysis of throughput legitimacy in this study will centre on the OECD's use of an Action 13 Consultation and comments gathered in response from stakeholders. This represents the formal channel through which stakeholders were able to influence the OECD's policy making. Whilst it is doubtless that other less formal channels were also used, the formal processes will be analysed as it is generally believed that whilst stakeholders may lobby policy makers in a number of ways the representations made by e.g. comment letter through formal channels tend to accurately reflect their genuine views (Georgiou, 2004).

Despite efforts to engage with stakeholders through consultations, interestingly, the OECD do not give explicit details on how the responses they received during the BEPS Action Plan consultations were used and how different stakeholder attitudes were balanced. The OECD themselves published a best practice guide to stakeholder engagement (BPGSE) in regulatory policy making (OECD, 2016), but it is not explicit whether this has been followed in the BEPS Action Plan process. The BPGSE nonetheless sets some benchmark standards for policy makers such as recognising the value that diverse stakeholders bring to policy discussions and ensuring consultation processes are as transparent and open as possible (OECD, 2016). Brosens & Bossuyt (2020) are sceptical as to whether the OECD followed their own principles in this regard with the BEPS Action plan, noting that it was not always explicit how stakeholder comments were used and what the outcome of stakeholder meetings were.

To appraise the OECD's attempt to garner democratic legitimacy for Action 13 it is necessary to identify the key stakeholder groups who the OECD engaged and understand their expectations vis-à-vis the final Action. To do this the following paragraphs will draw on extant studies from both the tax and accounting literature.

Both Elschner et al. (2018) and Mulligan and Oats (2016) observe that there have been few studies of the direct impact of firm lobbying on tax policy. Elschner et al. (2018) suggest that this presents an opportunity in terms of conducting new empirical research and building theory in the tax discipline, they also regard BEPS is a fertile ground for this research due

to consultation documentation being publicly available. To overcome the relative paucity of established theory and methodological precedence with respect to lobbying in the tax literature the authors suggest drawing on the accounting literature (Elschner, et al., 2018). The literature on lobbying accounting standard setters is very well established and itself is based on earlier theoretical work done in the political science field (Sutton, 1984). Whilst there may be some differences in the tax law setting process and the accounting standard setting process, as observed by Elschner et al. (2018), these are less manifest in the context of the BEPS Action Plan. For example comparing the BEPS Action Plan to accounting standard setting, the following similarities are of importance: like accounting standard setters the OECD relies on jurisdictions incorporating their regulations (or mandating their adoption) in national law rather than direct legal power; the OECD's process of stakeholder engagement is similar to the methods used by accounting standard setters such as the IASB, FASB and the UK ASB; and lastly the implications of the BEPS standards will be similar in terms of potential increased tax liabilities and increased administrative and compliance requirements for MNE's. These similarities justify the use of literature from accounting studies in framing the expectation of stakeholders and aiding the design of the research, especially as the lobbying of accounting standard setters has been the focus of extensive research over a sustained period of time, for example (Bamber & McMeeking, 2016; Georgiou, 2004; Giner & Acre, 2012; Jorissen, et al., 2006; Kwok & Sharp, 2005; Orens, et al., 2011; Reuter & Messner, 2015).

Extant studies of stakeholder engagement in the BEPS Action Plan identify three broad groups of stakeholders; civil society, professional advisors and taxpayers (MNE's) (Christensen, 2018; Elschner, et al., 2018). These categorisations also concur with those used in several accounting lobbying studies (Bamber & McMeeking, 2016; Reuter & Messner, 2015).

The following sections will analyse each of these key stakeholder groups in terms of their expectations of the OECD and some potential lobbying strategies which they may employ.

#### *3.5.2.1 Civil Society*

The BEPS Action Plan responds to calls from a growing number of very active tax campaign groups representing civil society (Mikler & Elbra, 2018). These groups are likely to have high expectations of the OECD and would be expected to be active in consultation processes.

Whilst other stakeholder groups may be easier to define, clarification is required as to what 'civil society' means in this context. Diamond (1994), in his seminal article delineates 'civil society' from 'society' at large by recognising that civil society actors have come together to express their

views in a public sphere and make demands of the state (authorities). Furthermore, civil society is delineated from other groups by being:

*“Voluntary, self-generating, (largely) self-supporting, autonomous from the state, and bound by a legal order or set of shared rules.”* (Diamond, 1994, p. 7).

In terms of influence in the BEPS Action Plan consultation process, previous studies suggest that civil society groups are limited in their relative influence as a result of information asymmetries and the ability of other stakeholders to engage using technical and legalistic language, which is not generally available to civil society (Elschner, et al., 2018). In other words, civil society will respond using conceptual arguments rather than economic ones. Conceptual arguments are those based on principles (either legal, moral or procedural). Economic arguments tend to focus on the cost of implementation, either in terms of additional administrative costs or costs arising from changes in the way in which performance is measured or tax is charged (Reuter & Messner, 2015). There is a school of thought which suggests that civil society activism is at its most effective in initiating policy change through high profile challenges to regulators based on moral reasoning (Culpepper, 2010). These policy changes are however susceptible to dilution or nullification at the detailed drafting stage. This is because corporate actors tend to be more effective in engaging with policy makers on the detailed drafting of rules and may be able to shape rules to their benefit, whilst policy makers maintain the appearance of having affected reform in line with civil society asks (Culpepper, 2010). This is a phenomenon which Christensen (2018) observed in the BEPS Action plan process with regards to country-by-country disclosures made under Action 13 and which he termed as ‘technicisation’ of the debate. Although (as noted by Christensen) civil society did have some technical capacity in the form of Richard Murphy writing for the BEPS Monitoring Group. Murphy is a chartered accountant, academic and prominent tax campaigner who is credited, by some, with creating the concept of CbCR<sup>28</sup>. However, according to Christensen Civil Society arguments were ultimately overwhelmed by the volume and technical capacity of MNE’s and their advisors. Who were successful in negotiating a flexing of the rules to allow MNE’s significant scope for judgement in constructing their CbCR disclosures (Christensen, 2018)

The work of Christensen (2018) and Elschner et al (2018) agrees with studies in the accounting literature in suggesting that civil society stakeholders show a preference towards conceptual rather than economic argumentation and also suggests that civil society stakeholders participate considerably less than other stakeholders (Giner & Acre, 2012; Reuter &

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<sup>28</sup> See [www.taxresearch.org.uk/Blog/richard-murphy/](http://www.taxresearch.org.uk/Blog/richard-murphy/)

Messner, 2015). The use of conceptual arguments may arise because of a predisposition towards moral argumentation or as a result of a lack of access to sufficient data to make effective economic arguments. It may not however prove to be a disadvantage, as studies tend to find a preference across all groups for conceptual arguments and a greater instance of these proving to be persuasive to policy makers (Giner & Acre, 2012; Reuter & Messner, 2015). In either case this will be something the OECD will have to effectively manage to run a fair and legitimate consultation process.

#### 3.5.2.2 MNEs

Studies in the tax literature suggest that MNE's will participate in a lobbying process if they believe that the economic benefit of participation will outweigh the cost, so called 'rational economic actor' theory (Barrick & Brown, 2019). Empirical investigation into the participation of firms in practice also suggests that larger firms and those in industries particularly affected by regulation will participate to a greater extent (Barrick & Brown, 2019; Giner & Acre, 2012).

It would be expected that MNEs would seek to mitigate the impact of policy changes on their business model and profitability, and that this may lead them to object to any rules which restrict their ability to avoid tax. However, there is also a pressure on MNEs to act in socially responsible ways and an increasing awareness of the social irresponsibility of some tax avoidance techniques used by MNEs (Dowling, 2014). As the interactions between the OECD and MNEs via comment letters and stakeholder meetings are publicly accessible there may be some reticence amongst MNEs around fully objecting to measures to decrease tax avoidance opportunities. However, cognoscente of the points made above: that overt lobbying through comment letters is representative of stakeholder's true views (Georgiou, 2004); and the ability of MNEs to apply technical and economic arguments in order to dilute policy (Christensen, 2018; Culpepper, 2010) it may be expected that MNEs will seek to offer some resistance to measures in the Action Plan. What will be challenging for the OECD will be to balance technical argumentation and responses which 'speak the language' of international tax policy against moral argumentation from civil society stakeholders.

The accounting literature suggests that MNEs will seek to create power blocks in consultation processes by forming coalitions and interest groups ('CIG') (Durocher, et al., 2007). In the tax literature Mulligan and Oats (2016) also point out that in house tax professionals within MNEs frequently interact through professional associations to influence regulators for the benefit of the organisational field. This level of cooperation is suggestive of a belief amongst MNEs that cohesion and weight behind an argument is an important element of lobbying. In the

context of BEPS, Elschner et al. (2018) also suggest that the formation of interest groups appears to be a successful lobbying strategy for firms (MNEs).

It may be expected from the literature, therefore, that MNEs will submit similar comment letters and that these may be presented on mass with a degree of cohesion. This may present a challenge to the OECD in terms of balancing the interests of all stakeholders in the face of an apparently strong majority view and could be perceived as a threat to legitimacy.

### *3.5.2.3 Professionals Advisors*

Elschner et al. (2018) view the tax profession as a powerful lobbying group in the context of the BEPS Action Plan, especially when involved in group lobbying efforts. In their study of Action 7 the authors note that arguments made by the profession were adopted to a greater extent than MNEs (Elschner, et al., 2018). As suggested by Christensen (2018) advisors can access technical language and expertise that arguably give them an advantage over civil society and perhaps (given their depth of knowledge) even MNEs. Furthermore, Tran (2020) observes that tax professionals provided a key bridge between policy makers and MNE's in the BEPS consultation process (at a local implementation level).

It may be assumed at first glance that tax advisors will oppose stricter tax avoidance measures as a threat to their fee income and ability to avoid tax for their clients, the so-called principle agent theory (Jorissen, et al., 2006).

Author's such as Sikka and Murphy have published extensively on the role of the accounting profession in creating and promoting tax avoidance schemes (Murphy, 2014; Sikka & Hampton, 2005; Sikka & Willmott, 2010). These authors stress the role of professional accountancy firms in identifying tax avoidance schemes, selling them on to their clients and then adapting them to stay ahead of legislative changes. Sikka and Hampton (2005) identify tax advisors as the main drivers of the tax avoidance industry, encouraging the use of aggressive schemes to fuel their own commercial success.

Should advisors choose to side with their clients this could create a significant power block, or Coalition and Influence Group (CIG) (Durocher, et al., 2007), which may prove difficult for the OECD to ignore. CIG's can be especially effective when advisors play a part in the meso-level interactions between tax professionals working for MNEs (Mulligan & Oats, 2016), as this may strengthen the technical ability and also the credibility of these groups as e.g. including 'experts' (Barrick & Brown, 2019).

The role of professional advisors in lobbying standard setters is however contentious, with some authors suggesting that advisors will favour more

regulation as this in turn provides them with more work – ‘economic regulation theory’ (Jorissen, et al., 2006).

In the case of the BEPS Action Plan, convincing arguments could be put forward to support the accounting profession responding in such a way as to demonstrate the economic regulation theory; whereby they stand to gain from the consulting opportunities that increased complexity and regulation in international tax will afford.

Having identified the diverse stakeholders which the OECD must garner legitimacy from, the contentions to be balanced begin to emerge. Whilst civil society want to see radical change on moral grounds these interests must be balanced against the economic interests of MNEs and the technicalities of implementation. Showing a robust and transparent mediation of stakeholder inputs is therefore crucial to the OECD’s maintaining throughput legitimacy.

### **3.5.3 Output legitimacy and BEPS**

Output legitimacy will be gained or not depending on the impact that Action 13 has in practice, in terms of achieving its ends and satisfying stakeholders.

As set out in 3.2.3 output legitimacy concerns policy makers ability to solve collective problems which citizens and mechanisms such as markets are unable to solve themselves (Scharpf, 1999, p. 11). To evaluate a policy maker’s success in this regard, it is necessary to look both objectively and subjectively at the policy output.

An objective assessment measures the policy outcome against its own stated goals, and a subjective evaluation measures the policy outcome against the expectation of stakeholders (Boedeltje & Cornips, 2004).

The following section will review extant literature in the form of, academic articles, practitioner publications and civil society campaign material to understand what can be gleaned to date about the output legitimacy of Action 13.

#### *3.5.3.1 Objective measurements – Impact on Firms*

The following studies seek to measure the ultimate cash tax impact of Action 13, and therefore the wider purpose of BEPS – to reduce the ability of MNE’s to avoid taxation.

Joshi (2020) measures the impact of the CbCR disclosure requirement of Action 13 in Europe by employing a regression analysis to measure changes in the ETR’s of 1,809 MNE’s with EU headquarters, following adoption of Action 13 by the EU. The study observed a 1-2% increase in firm level ETR for firms with consolidated turnover above the level at

which Action 13 becomes mandatory (€750m). This finding suggests Action 13 had some success in curbing income shifting. The author is, however, cautious in attributing this observation purely to Action 13 and notes that there appeared to be no impact on subsidiary level income shifting. Carrying out further testing the study concluded that the greatest impact was in countries where tax authorities were active and well-funded (Joshi, 2020).

Drawing on a 2019 conference draft of Joshi (2020), and extending the scope of Joshi's work with more granular analysis, Hugger (2019) measures the impact of Action 13 on the ETRs of MNE's and attempts to identify any associated increase in cash taxes paid. Hugger finds an increase of 0.8% in the ETR's of MNE's falling within the ambit of Action 13. The lower value obtained than Joshi is explained by Hugger's attempts to identify different channels of profit shifting to isolate more discretely the impact of CbCR reporting. This study identifies a reduction in profit shifting but notes that this mostly encompasses movements from developed countries to tax havens rather than increasing profits in third countries. The study does not identify any significant increase in cash tax payments because of Action 13, noting that the increase in ETR is likely offset by a decrease in the tax base (Hugger, 2019).

Quantitative studies (Joshi, 2020; Hugger, 2019) provide a wider perspective of the issue and arguably benefit from a greater degree of objectivity, given their positivist approach. However, these studies, by their own admission, are limited in being able to isolate the exact impact of Action 13 on MNE's ETR's and cash tax payment, due to the complex and interwoven nature of international tax law. They give a high-level overview but do not explore the detailed inner workings of how Action 13 has manifested for MNE's and their advisors.

These studies suggest that Action 13 has had some success in achieving its aims, particularly in terms of discouraging profit shifting to obvious tax havens. The studies are, however, cautious, noting that success may depend on the resourcefulness of individual tax authorities. Quantitative studies therefore accord with more subjective assessments of Action 13 in suggesting that the success of Action 13 will largely depend on the efforts of tax authorities to implement it. They also concur in their opinion that options are still available to MNE's to adjust their tax affairs to maintain a stable (low) cash tax profile.

#### *3.5.3.2 Subjective evaluation – stakeholder perspectives*

As Ashforth and Blake put it: "*like beauty, it [legitimacy] resides in the eye of the beholder*" (Ashforth & Blake, 1990, p. 177).

Academic critics point out that the transfer pricing focussed Actions of the BEPS Action Plan (including Action 13) leave many of the key components

of the international tax system, which enable widespread avoidance, intact (Avi-Yonah & Xu, 2017; Christensen, 2018; Murphy & Sikka, 2017). By attempting to tighten rules which are outdated rather than changing the system more radically these critics argue that the OECD has severely limited the scope of its impact (Floris De Wild, 2017). Avi-Yonah and Xu (2017) regard the failure of the Action Plan to address the independent entity principle as fundamentally limiting to potential reform. This is because the legal fiction which treats MNE's as groups of separate and independent legal entities encourages MNE's to set up dozens or even hundreds of affiliates in multiple jurisdictions to take advantage of arbitrages and double non-taxation opportunities arising across borders (Avi-Yonah, 2016; Avi-Yonah & Xu, 2017). Whilst the Action Plan seeks to address some of these opportunities with specific rules, the prevalence of the wider principle still encourages MNEs to seek tax arbitrage and opacity through complex group structures (Avi-Yonah & Xu, 2017; Ylönen & Laine, 2015).

Studies also criticise the OECD for continuing to support the Arm's Length Principle (ALP) as the preferred method for calculating intra-group prices within MNEs (Avi-Yonah, 2016; Avi-Yonah & Xu, 2017). The ALP requires companies within an MNE to trade goods and services between each other as if they were unaffiliated third parties (Davies, et al., 2014). However, given that many of the transactions within MNE's relate to part finished goods, proprietary intellectual property or management services provided in respect of a specific project, an ALP is often very subjective and hard to determine (Cristea & Nguyen, 2013; Rogers & Oats, 2019).

The combination of the separate legal entity principle and the ALP are seen to afford MNEs, diverse opportunities to shift profits (Avi-Yonah & Xu, 2017; Ylönen & Laine, 2015). In addition, the intra-company prices charged (in accordance with the ALP or not) are often shrouded in opacity, meaning tax authorities struggle to challenge MNE's on their application of these key principles (Cristea & Nguyen, 2013)

Action 13 seeks to empower tax authorities to address manipulation of the ALP and opaque group structures by providing them with more information (OECD, 2014). This, however, puts the burden of investigation on (in many cases under-resourced) tax authorities. For some this perpetuates the unfairness's which exist in the international tax system as poorer countries with less developed institutional capacity will be less able to benefit from this information (Fung, 2017). For others, confining the disclosure of CbCR data to tax authorities rather than making this data public represents a failure to realise the potential of transparency as a method of holding MNE's to account (Murphy, 2016).



In terms of subjective evaluation of output legitimacy, the criticisms noted above suggest that Action 13 does not go far enough in addressing the authentic policy preferences of some tax campaigners. Nonetheless whilst these critics point out flaws in the BEPS Action Plan, they also offer commendations to the OECD for tackling this issue and boosting it up the policy agenda (Avi-Yonah & Xu, 2017; Floris De Wild, 2017). Indeed, a mixture of criticism and praise appears to be a feature of the more critical literature in general (Brosens & Bossuyt, 2020; Burgers & Mosquera, 2017).

Offering a perspective from practice Lankhorst and van Dam (2017) note that Action 13 will place a significant administrative burden on MNE's and may require accounting systems to be changed. They do however believe that the added transparency will give tax authorities the power to, more effectively, pursue the most aggressive tax avoiders. They note however that this may lead to tax authorities wrongly pursuing MNE's with less standardised business models which utilise unique, although not necessarily tax motivated, transfer pricing policies. Interestingly, these authors are in accord with academic authors in their criticism of the Action Plan for failing to address structural deficiencies in the international tax system e.g. adherence to the ALP and separate entity principle (Lankhorst & Van Dam, 2017). The authors regard these principles as out of step with how value is created in 21<sup>st</sup> century business and like their academic counterparts note that the Action Plan whilst trying to 'fix' the existing rules to stop abusive behaviour ignores wider structural problems (Lankhorst & Van Dam, 2017).

Prior to the implementation of Action 13 requirements in Australia and New Zealand, Sawyer and Sadiq (2019) sought views from tax practitioners and revenue officials about their readiness for CbCR and information exchange. The study found concerns around the lack of consistency of application across different jurisdictions both in terms of templates and filing requirements (Sawyer & Sadiq, 2019). These concerns were recognised by practitioners who perceived the standards as having limited benefit but creating a large administrative burden for their clients (Sawyer & Sadiq, 2019). These points are echoed by Tran (2020), who interviewed tax professionals in Vietnam and New Zealand after implementation of Action 13. This study also found a lack of transparency and consistency around how tax authorities pursued transfer pricing audits and a lack of clarity in how new rules were communicated to tax payers (Tran, 2020).

In terms of a subjective evaluation of output legitimacy, the view from taxpayers and advisors is again mixed. While there is acceptance that the TP and TP documentation system is ripe for reform, those involved in implementing Action 13 perceive that the new documentation

requirements only go some way towards addressing the current inadequacies, whilst also creating considerable workloads.

In summary the more subjective studies, provide a mixed picture, highlighting significant concerns from various constituents albeit with several potential positives highlighted. The quantitative studies show a potentially positive impact of Action 13 but raise further questions about which jurisdictions may benefit and the effort involved in affecting positive change through use of CbCR. The studies highlighted do, however, have their limitations. Whilst providing expert insight (Avi-Yonah, 2016; Avi-Yonah & Xu, 2017; Lankhorst & Van Dam, 2017) do not use empirics and provide their commentary at a very early stage in the implementation of Action 13. Studies employing interviews (Sawyer & Sadiq, 2019; Tran, 2020) are more empirical in nature but necessarily limited in their scope by being tied to specific jurisdictions.

From reviewing the studies above there appears to be some evidence to support the efficacy of Action 13 in practice however early stakeholder perspectives are less than universally positive. There is therefore a gap to fill in the literature in terms of providing an assessment of how Action 13 has manifested in practice and become part of the legal landscape after its initial introduction and a period of bedding in.

### ***3.6 Research gap***

It is clear, from the extant literature that there are widespread concerns about the democratic input legitimacy of OECD policy making (Brosens & Bossuyt, 2020; Christians, 2010; Fung, 2017; Rixen, 2011). Studies focussed on this area cite their research at the macro level and concentrate on the interaction of nation states in the political sphere. These studies challenge the global hegemony on grounds of fairness and democracy and raise pertinent questions about how tax policy should be formed in the future if it is to remain a legitimate component of global governance. Whilst it is hard to argue against the points made by authors criticising the OECD for its elitist composition (Burgers & Mosquera, 2017; Fung, 2017), these concerns may not preclude the OECD from developing policy which is effective in addressing stakeholder needs, if the policy creation mechanism employed is effective. This study takes on board the points made by the body of research but perceives the need to focus in on the policy making mechanisms within the OECD to investigate the efficacy of detailed policy drafting efforts by the OECD's subject matter experts. This is done to examine whether effective throughput legitimacy may result in an output which legitimately addresses the needs of a wider stakeholder group despite any perceived deficiencies in input. In practice where neat theoretical lines may blur, policy makers must balance real world concerns against the theoretical ideals of participative democracy,

especially if they want to achieve anything quickly (Buchanan & Keohane, 2008). Indeed, some would argue that in complex policy arenas where stakeholders have diffuse wants and needs it is extremely difficult to balance input fairly, nonetheless, stakeholders may be willing to overlook this if the policy output is effective (Boedeltje & Cornips, 2004). This study will therefore contribute to this discussion by examining in detail the throughput legitimacy of the Action 13 consultation.

To date only Christensen (2018) has studied the Action 13 consultation in detail. In his study Christensen investigated the extent to which the policy making process was captured by corporate interests and perceives this to have happened through the debate being framed (by corporate lobbyists) in a very technical language. Christensen concluded that this gave MNE's and their advisors dominance over the consultation and resulted in a watered-down version of Action 13, which falls short of what civil society campaigners had hoped for (Christensen, 2018). Christensen (2018) arrived at his findings by interviewing stakeholders involved in the policy making process and categorising stakeholder views on seven points within the consultation<sup>29</sup> based on whether they argue for more, or less transparency. Christensen's results make for interesting reading and raise concern about how the OECD's policy may be influenced unduly by a small group. However, his study did not review all the questions asked by the OECD in the Action 13 consultation and his categorisation of responses as either more or less in favour of transparency does not capture all facets of the debate. This study will add to and check the validity of Christensen's (2018) findings by taking a more granular and structured approach to analysing the consultation (Chapter 5). By coding how each respondent replied to the OECD and statistically testing responses against the final policy this study will offer a robust assessment of whether there was bias across the entire consultation. Where Christensen used detailed reading and content analysis to form an impression as to which type of narrative won the OECD over, this study will code argumentation for each of the 15 main questions asked by the OECD depending on whether it is conceptual or economic and again test for whether the OECD favoured a particular type of argumentation.

The approach taken in this study draws on established practice in the accounting literature (Bamber & McMeeking, 2016; Reuter & Messner, 2015) and opens up the possibility of new understanding of the OECD's policy making mechanisms contributing to our understanding of throughput legitimacy by answering RQ1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13

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<sup>29</sup> The filing and sharing mechanism, materiality thresholds, and five specific data points (cross-border payments, nature of subsidiaries' business activity, number of employees, tangible assets, and total employee expense)

consultation process in order to create a legitimate standard in terms of throughput legitimacy.

Despite its potential impact and the amount of legislative change precipitate by Action 13 (see 2.9) there have been relatively few evaluations of the success of Action 13 in practice. The second empirical chapter of this thesis (Chapter 7) will contribute to knowledge by assessing the manifestation in practice and therefore output legitimacy of Action 13, going some way to filling this research gap.

In terms of extant literature studying Action 13's impact, quantitative studies (Hugger, 2019; Joshi, 2020) suggest Action 13 has increased MNE's ETR's in Europe. However, the nature of these studies means they do not consider *how* or *why* the change in ETR has been achieved. Whilst these studies are very interesting and point to some impact it is important that further understanding is gained as to how Action 13 has been interpreted and enforced. Tax law is not an exogenous force which applies like a law of nature, but rather an endogenous phenomenon which relies on interpretation and application by key players (Mulligan & Oats, 2016). Therefore, in order to understand Action 13, it is necessary to speak with those involved in complying with and enforcing the rules. Only through this understanding can an appreciation be gained of whether the law is working as it should. There have been studies which do this (Lankhorst & Van Dam, 2017; Sawyer & Sadiq, 2019; Tran, 2020) through interviews with tax professionals and tax administrators in Australia, New Zealand and Vietnam. These studies were, however, conducted before or around the time when Action 13 was fully implemented in their respective jurisdictions. This means that findings were centred on issues arising from the early implementation of Action 13, including: the need for more guidance from tax authorities about how they will utilise information (Sawyer & Sadiq, 2019; Tran, 2020); and the likely need for systems upgrades and concerns about compliance burdens (Lankhorst & Van Dam, 2017). There are however no such studies concerning how effective the rules are now they are in maturity and as noted by one of the studies mentioned above, Sawyer and Sadiq (2019):

"One clear area for future research will be to interview tax practitioners in three to four years after CbCR has been operating to assess ... further concerns have arisen from the perspective of tax practitioners and multinational corporations." (Sawyer & Sadiq, 2019, p. 586)

This study will respond to this call for research by conducting tax practitioner interviews in the UK. Using similar methods and a similar interview sample to the studies mentioned above these interviews will review Action 13 in maturity adding new insight into whether it has manifested as a legitimate output, therefore answering RQ2: Has Action

13 manifested effectively in practice and can it be considered a legitimate policy output.

Table 3 below summarises the extant research with respect to the *input*, *throughput* and *output* democratic legitimacy of the BEPS Action Plan.

*Table 3 - Extant research with respect to the input, throughput and output democratic legitimacy of the BEPS Action Plan.*

	<b>Sources</b>
<p><b><i>Input Legitimacy</i></b></p> <p>The BEPS Action Plan in general lacks representation from developing countries.</p> <p>OECD power structures are dominated by powerful Western states.</p> <p>Implementation of OECD policy lacks parliamentary scrutiny at the nation state level.</p>	<p>(Fung, 2017), (Burgers &amp; Mosquera, 2017), (Mosquera, 2015), (Hearson, 2018)</p> <p>(Fung, 2017), (Christians, 2010)</p> <p>(Brosens &amp; Bossuyt, 2020), (Christians, 2009), (Mosquera, 2015)</p>
<p><b><i>Throughput Legitimacy</i></b></p> <p>It is not clear how the OECD used comment letters submitted as part of the BEPS Action Plan consultation process in general.</p> <p>It is likely that MNE's and their advisors formed coalitions of interest to enhance their influence (Actions 7 and 13 respectively)</p> <p>Civil society submissions are more likely to draw on moral argumentation (Actions 7 and 13 respectively)</p> <p>The Action 13 consultation process may have been 'technicised' by MNE's and their advisors wishing to dampen the effect of the rules</p>	<p>(Brosens &amp; Bossuyt, 2020)</p> <p>(Elschner, et al., 2018), (Christensen, 2018)</p> <p>(Elschner, et al., 2018) , (Christensen, 2018)</p> <p>(Christensen, 2018)</p>
<p><b><i>Output Legitimacy</i></b></p> <p>There is some evidence of Action 13 having increased the ETR's of firms in Europe.</p>	<p>(Hugger, 2019), (Joshi, 2020)</p>

There is limited evidence of a cash tax impact of Action 13.	(Hugger, 2019)
Tax professionals are concerned about increased admin and a change in the nature of their relationship with clients and tax authorities as a result of Action 13.	(Sawyer & Sadiq, 2019), (Lankhorst & Van Dam, 2017), (Tran, 2020)
There is concern across stakeholder groups that the Action Plan (including Action 13) is not radical enough to address the underlying problem but merely treats the symptoms.	(Avi-Yonah & Xu, 2017), (Lankhorst & Van Dam, 2017), (Murphy, 2016)

### **3.7 Chapter summary**

This chapter started by offering a critical understanding of democratic legitimacy, the theory which will inform the empirical investigations undertaken in the remainder of this thesis. The chapter highlights why democratic legitimacy is an effective theoretical lens to apply in this context and offers an application of the theory to the OECD's policy creation mechanisms for tax.

Next literature pertinent to the research questions including extant studies of the OECD, BEPS and Action 13 were reviewed and critiqued. This review identified the gap in the literature which this thesis seeks to fill, namely, a comprehensive analysis of the creation and manifestation in practice of Action 13, an important contribution to current understanding of this topic.

The proceeding chapter critically outlines the theoretical orientation of the research, which will underpin the methods applied in answering the thesis aim.

## 4 Chapter 4: Research philosophy

### 4.1 Introduction

The aim of this thesis is to evaluate the democratic legitimacy of Action 13 of the OECD's BEPS Action Plan by addressing the following research questions:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

This chapter will critically discuss the overarching research philosophy and the research approach which will be employed in answering the research questions. The detailed research method and work plan for data collection and analysis is discussed for each objective separately, RQ1 in this Chapter 4.6 and RQ2 in Chapter 6.

The overall approach taken in this PhD is a critical case study. The key defining characteristic of a case study is an depth focus on a particular 'case' (Bell, et al., 2019). Depending on the context of the research a case can be an organisation, a person, a location or an event (Bell, et al., 2019). In this thesis the case in focus will be Action 13 as a specific policy intervention, including its creation and manifestation in practice in the UK.

As Christians (2010) argues:

*"[international tax law] evolves through political, economic, and social contexts that are complex, multifaceted, dynamic, and difficult to study systematically."* (Christians, 2010, p. 332).

Cognoscente of this challenging dynamic, Christians (2010) argues that case studies provide scholars with potential to improve both empirical and theoretical understanding of international tax and hence are becoming increasingly accepted as an effective approach (Oats, 2012, p. 29). Christians (2010) does however stress that this potential is greatest where scholars are explicit about their "objectives, processes, and reasoning for collecting and using the data" (Christians, 2010, p. 361). Christians notes that not all international tax case studies (including some of her own) fully disclose and provide critique of their methodologies, and thereby potentially jeopardise the credibility of the findings they generate. Conscious of Christian's (2010) critique, this section will outline the philosophical underpinnings of the research before 4.6 and Chapter 6

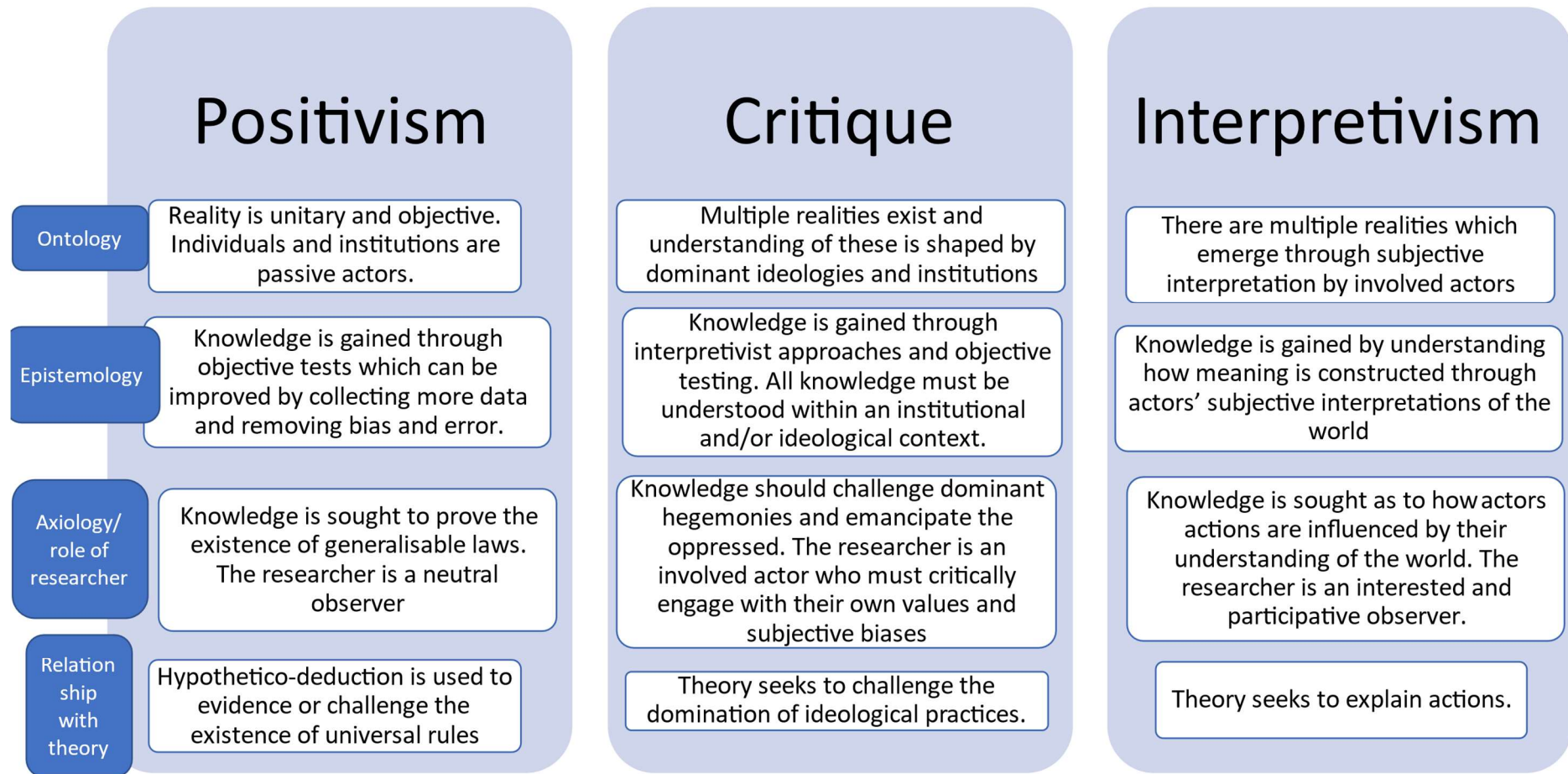
more fully describe the research processes undertaken as well as their limitations.

The philosophical paradigm in which the study is situated is that of critique (Chua, 2019). This philosophical stance is informed by an emerging body of critical research in taxation (Ylönen & Laine, 2015; Chatzivgeri, et al., 2019; Mulligan & Oats, 2016). The research philosophy also draws on a considerable body of critical research undertaken in the field of accounting (Chatzivgeri, et al., 2020; Chiapello & Medjad, 2009; Dillard, 1991; Durocher, et al., 2007; Gallhofer & Haslam, 1997; Gallhofer & Haslam, 2017). The use of theory from the field of accounting is felt to be pertinent, in view of calls from the prominent tax researchers to draw on more established methodological approaches from other research disciplines such as accounting and legal studies, in order to improve the tax research discipline (Christians, 2010; Oats, 2012). The use of critical accounting scholars' work is felt to be appropriate in this study for a number of reasons: Firstly, Action 13's disclosure requirements rely heavily on accounting information (OECD, 2014c); Secondly, there are similarities between the OECD and the International Accounting Standards Board (IASB), in terms of their policy creation processes and the process by which their policy becomes practice in local jurisdictions; Lastly, the IASB were lobbied to introduce a form of CbCR by some of the same Civil Society Organisations who lobbied the OECD in respect of Action 13. The IASB ultimately refused to act, but the power dynamics of this lobbying effort are very similar to Action 13 and have been the subject of critical accounting research (Crawford, 2019; Crawford, et al., 2014) which has informed the approach taken in this study.

Figure 15 has been constructed by the researcher, drawing on the following works (Bell, et al., 2019; Chua, 1986; Chua, 2019; Dillard, 1991; Smith, 2020), in order to present an understanding of critical research relative to the other prominent research paradigms:



Figure 15 - Paradigms of research philosophy



Sources: adapted from (Bell et al., 2019; Chua, 1986; Chua, 2019; Dillard, 1991; Smith, 2020)

Figure 15 will be used in the coming sections to explain and critically examine the critical research paradigm as the chosen philosophy for this study.

The remainder of this chapter will address the Ontology, Epistemology, Axiology, and theoretical orientation of the research. In doing this, the critical orientation of the research will be compared to positivism and interpretivism; although this approach is somewhat formulaic, it does offer useful points of comparison, which highlight the unique features of this philosophical approach and its appropriateness for the field of study.

## **4.2 Nature of reality (ontology)**

*"Ontology is concerned with theorising about the nature of reality"* (Bell, et al., 2019, p. 26)

Key to differentiating between different views on ontology is understanding whether the possibility of multiple realities exists and whether actors play an active role in constructing them (Smith, 2020).

A positivist view of the world sees the possibility for only one reality to exist and views this as being independent of observers or other actors, in other words: 'people are not seen as active makers of their social reality' (Chua, 1986, p. 606). Researchers are therefore concerned with proving the existence of abstract and generalisable rules which act exogenously on research subjects and other affected parties, and which are not impacted by worldviews or ideological constructs (Chua, 1986; Dillard, 1991)

Critical research is generally regarded as anti-positivist (Dillard, 1991) and in common with interpretivism regards multiple realities as possible and social actors as the involved participants who create them (Bell, et al., 2019). What differentiates a critical approach from other interpretivist research is the pervading requirement to acknowledge the influence of hegemonic forces on the realities constructed by actors, be they individuals or institutions (Smith, 2020, p. 5).

A critical ontological position is felt to be most appropriate for the current study as it reflects the researcher's understanding of tax policy as a socially constructed and involved practice (Oats, 2012), which is furthermore impacted by actors' ideological stances (Dillard, 1991).

As noted by Piketty:

*"Taxation is not a technical matter. It is pre-eminently a political and philosophical issue, perhaps the most important of all political issues. Without taxes society has no common destiny, and collective action is impossible."* (Piketty, 2014, p. 504)

To treat taxation as a purely technical phenomenon, in line with a positivist outlook, would be to ignore the political and moral aspects of tax policy, which are inherent to its nature (Oats, 2012). Furthermore,

ignoring these aspects would fail to engage with the political and practical reality of how tax policy is made and how it manifests itself in practice. Increasingly, research has shown that taxation of MNE's is a socially involved practice and rather than being an exogenous force acting on taxpayers, tax law is an endogenous phenomenon, open to interpretation and manipulation by taxpayers and their advisors (Mulligan & Oats, 2016). Taxation can therefore be studied effectively by understanding the actors involved and their perceptions and actions with regards to particular tax laws (Boden, 2012). For example, it has been shown that tax payers' and tax advisors' moral views will shape their compliance response and the extent to which they observe the 'spirit' of the law (Dowling, 2014; Lanis & Richardson, 2012). This stream of research very much supports the belief underpinning this research, that multiple possible interpretations of tax law are possible and in that sense Action 13 must be studied in view of this key understanding.

A critical rather than a purely interpretivist approach has been chosen as it is the researcher's belief that the moral and philosophical views of actors such as MNE taxpayers, professional advisors and civil society advocates will be shaped by dominant ideologies and institutions (Boden, 2012). As the OECD itself is a dominant force and institution in global tax regulation (Kurdle, 2014; Rixen, 2011), research into the efficacy and legitimacy of the BEPS Action Plan could arguably be considered incomplete if it does not engage with the OECD's position in the global hegemony. This is especially true given that the BEPS Action Plan has been criticised as an exercise primarily aimed at maintaining the OECD's legitimacy and power (Devereux & Vella, 2014; Fung, 2017; Mikler & Elbra, 2018), As explained in Chapter 2, the OECD played a pivotal role in the 20<sup>th</sup> Century in helping to enable cross-border trade through its efforts to decrease double taxation (Sarfo, 2020). The OECD, as well as dominating global tax regulation, has also therefore played a role in the liberalisation of markets, the contraction of national jurisdictional power and the ascendancy of powerful MNE's – all hallmarks of neoliberal capitalism (Baker, 2005; Simmons, et al., 2006). The BEPS Action Plan itself is also criticised for promoting the ideological principles of neoliberalism, which tend to favour the richest nations (Fung, 2017). Furthermore, critics of BEPS and the OECD (Avi-Yonah & Xu, 2017; Murphy, 2016; Burgers & Mosquera, 2017) often suggest remedies more closely aligned with opposing ideological views from the critical social democratic spectrum (Baker, 2005).

Given that the BEPS Action Plan is the product of a political system where ideological tensions exist a critical approach is felt to offer the most appropriate lens through which to evaluate the democratic legitimacy of Action 13.

### **4.3 Nature of knowledge (epistemology)**

Epistemology is the theory of how knowledge is gained, epistemology follows naturally on from ontology, as a researcher's perceptions of reality will influence their understanding of how knowledge about reality can be gained (Bell, et al., 2019, p. 29).

Research in the positivist paradigm favours the use of methods which follow the same general rules and procedures as the natural sciences (Bell, et al., 2019). This is because a positivist ontological position regards reality as something objective which can be measured; so in this tradition the impact of a new tax law could be measured objectively just as a stress test could be performed on a new metal alloy. Key issues for generating high quality knowledge in the positivist tradition are the sufficiency of observable data, the independence of researchers and the refinement of testing methods (Smith, 2020). In tax research, positivist investigations would tend to make use of firm level data obtained from databases and other macro-economic data points e.g. to construct equations which attempt to measure variables which impact effective rates of taxation, see for example (Dharampala, 2014; Joshi, 2020; Hines & Rice, 1994).

Interpretivist studies, on the other hand, are underpinned by a belief in multiple realities and so their focus is to understand how different realities are constructed by different actors (Bell, et al., 2019). These studies tend to make use of more qualitative and mixed method techniques which seek to elicit the insights of actors, to make judgements about how meaning is constructed (Smith, 2020). Interpretivist research depends on the researcher's ability to assess logic, consistency and agreement within actors' interpretations of the world (Bell, et al., 2019). In tax research, interpretivist studies tend to use participant interviews or qualitative surveys e.g. to identify and understand how tax payers' beliefs and perceptions influence their compliance behaviour and tax morale (Yücedođru & Hasseldine, 2016).

It is the researcher's belief that tax law is an endogenous phenomenon (Mulligan & Oats, 2016) which manifests in practice according to how it is interpreted by the tax profession and how it is enforced by tax authorities, groups who both also feed into the production of the law. Understanding how tax law manifests is inherently difficult, as it deals with contested definitions of legal, accounting and financial concepts, which are themselves complex and often indeterminate (Picciotto, 2015). In this sense it is essential to engage with actors involved in the implementation of the law to understand how they interpret and action it in practice. This view of tax law requires researchers to be open to the possibility of multiple viewpoints (realities) and to be willing to construct knowledge of

the topic by critically engaging with multiple stakeholder opinions. Unlike a purely interpretivist position, it is the researcher's belief that actors' perceptions of different realities in this setting are potentially constrained and influenced by ideologies and powerful institutions, which seek to shape how tax law is understood (Chua, 2019; Boden, 2012). In the first instance the OECD, the subject of the study, is an institution which powerfully defends the current hegemony with regards to international tax governance (Avi-Yonah & Xu, 2017; Burgers & Mosquera, 2017; Fung, 2017). It has also been found that tax advisors are influenced by their peer group and a strong sense of professional identity (Dowling, 2014; Mulligan & Oats, 2016; Oats, 2012; Rogers & Oats, 2019). These larger forces at work to shape the environment in which tax advisors work are likely to play a part in how they understand the law and react to it and have therefore been key to framing this research. This in turn is why a critical epistemology provides the most appropriate approach to seeking knowledge here, because it requires engagement with prevailing hegemonic forces when interpreting results and engaging with key actors.

Critical research tends to favour the use of in depth and sometimes longitudinal case studies which are deeply cognoscente of the history and institutional environment acting upon the research subject (Chua, 1986; Boden, 2012). This allows actors' preferences and views to be understood within their context and to understand how dominant forces may be shaping their world view (Chua, 1986). These methods are often more closely aligned with the interpretivist tradition (Smith, 2020), however, the use of scientific or experimental methods, more closely associated with positivism, are not excluded. The key with critical research is to frame questions and understand the data sought with awareness of the institutional and ideological forces at work seeking to shape how reality is perceived (Boden, 2012). Critical tax research is an emergent field and makes use of a variety of methods, such as in depth case studies of MNE's group structuring (Finer & Ylonen, 2017), interviews with tax practitioners (Mulligan & Oats, 2016) and desk based research grounded in deep historical context, which draws on critical legal traditions (Avi-Yonah, 2016; Murphy & Sikka, 2017). This study will make use of both quantitative and qualitative methods to arrive at an overall assessment of the democratic legitimacy of Action 13, these will be discussed in more detail later in this chapter in 4.6 and in Chapters 6.

#### ***4.4 Purpose of the research and role of the researcher***

The ontological and epistemological choices made by a researcher will necessarily impact how they perceive the value of their research e.g. what

the knowledge they generate will be useful/used for (Smith, 2020). These philosophical choices will also impact how the researcher views themselves and their role with respect to the research.

In the positivist paradigm researchers perceive themselves as neutral observers, whose purpose is to prove the existence of generalisable rules, which can explain and predict observable events (Smith, 2020, p. 4). Knowledge generated by positivists is therefore sought to help improve the outcome gained from existing systems by better understanding how they operate. As previously stated, positivism applies thinking developed in the natural sciences to the social world and is predicated on an understanding of the world which sees actors as passive (Smith, 2020, p. 4). This neutrality and detachment is at once a strength and a weakness of positivist thinking, as the neutral frame of reference offers the possibility of completely objective and rational knowledge but at the same time fails to engage with questions of morality (Chua, 2019). Completely value free objective information is extremely attractive to policy makers, who face difficult political and moral choices, this is because it preserves the image of fair, balanced and apolitical decision making (Chua, 2019). However, there are those who question whether any information or data can ever be inherently neutral. In particular a large volume of literature suggests that the product of accounting systems, including the data on which transfer prices and corporate tax calculations are based, is inherently ideological, being principally aligned with the values of neoliberal capitalism (Dillard, 1991; Gallhofer & Haslam, 1997; Gallhofer, et al., 2015). These critics point out that most accounting systems produce information designed to meet the narrow objective of wealth maximisation for a very narrow group of stakeholders; the investor class (Dillard, 1991). This narrow field of vision and purpose mean that data obtained from existing systems will always favour the system of which it is a product (Chua, 1986). Therefore, even the most well-intentioned researcher who seeks to apply value free reasoning cannot but help to give at least tacit support to the existing system by aligning themselves with the positivist paradigm and therefore lending the data it produces the aura of being objective (Chua, 1986).

The value free objectivity promised by positivism does mean it remains the favoured paradigm in fields such as accounting (Chua, 2019). However, sustained attempts have been made to challenge the dominance of positivism and encourage researchers to engage critically with systems of values and beliefs and therefore re-frame practices like accounting and taxation as involved social endeavours (Oats, 2012; Gallhofer & Haslam, 2017; Chua, 2019). This includes the promotion of interpretivist and critical methods.

Interpretivist studies perceive a more active role for the researcher, who is viewed as an involved and interested participant (Smith, 2020). Interpretivist researchers may even seek to understand phenomena by placing themselves in the shoes of their research subjects e.g. by carrying out ethnographic studies or adopting other methods from anthropological research (Bell, et al., 2019). Whilst this level of involvement is not strictly necessary it underlines the anthropocentric orientation of interpretivism, which views humans as the key constructors of social reality (Chua, 1986).

The aim of interpretivist studies is to: "enrich people's understanding of their actions, thus increasing the possibility of mutual communication and action" (Chua, 1986, p. 615). For example, a study may seek to understand how taxpayers interpret the requirements of a particularly complex piece of legislation to improve how legislation is written and communicated. This perspective deviates from positivism in recognising a piece of tax legislation as an endogenous phenomenon which can only take on meaning when actors engage with it to construct their compliance response. However, this type of thinking does still accept (albeit to a lesser extent) the status quo, in terms of ideology (Dillard, 1991). This is because the researcher accepts that there is a desired compliance response pre-determined at an institutional level, which may or may not be met (Chua, 1986).

Critical research is like interpretivist approaches in that it regards people as the constructors of social reality, however, a critical approach is defined by its central purpose, which is to challenge the status quo (Dillard, 1991). Like interpretivism a critical approach sees the potential for multiple realities, the role of research is not however confined to understanding these but is rather to challenge the powerful institutions who dominate our understanding of reality (Chua, 2019). This goes beyond critical thinking and the healthy scepticism which a researcher in any paradigm would bring to e.g. reviewing literature and selecting data sources, and drives towards a deeper ideological questioning of what we accept as knowledge (Dillard, 1991).

Critical research has to this point been discussed as a single concept, this is because its central mission, to question the status quo, largely unifies critical approaches in terms of their ontology and epistemology (Chua, 1986). However, the level of critique of the status quo is an area where there is much divergence between different critical perspectives (Laughlin, 1995). Laughlin (1995) explains that the level of criticality of the status quo can be understood along two dimensions: the extent to which the researcher believes the current system needs change; and the extent to which the researcher offers solutions to fix what they regard as broken in the current system. Laughlin (1995) categorises some of the most

influential critical theorists based on these dimensions noting that traditional Marxism ranks highly on both dimensions whereas French critical theory e.g. the work of Foucault would rank as low due to his low prioritisation of offering up solutions to change the current system. Laughlin (1995) opines that whilst these extreme positions offer much, a more moderate and central approach may provide the greatest potential for understanding and change:

“[the] “medium” position holds open the possibility that the status quo should continue while also keeping open that change is required. This more balanced perspective, which neither argues that everything is right nor that it is wrong, calls for a rather more sophisticated model of change to make this judgement” (Laughlin, 1995, p. 84)

Laughlin (1995) equates this mid-range perspective most closely with German critical theory and the work of Juergen Habermas in particular. He notes however, that it is possible to adopt a mid-range approach without fully adopting a Habermasian theoretical framework (Laughlin, 1995). This perspective is echoed in the work of notable accounting scholars such as Gallhofer and Haslam (1997; 2017), who stress the need for a pragmatic approach to critical research. This pragmatism sees the potential for emancipatory change in dominant capitalist systems, for the benefit of citizens at large. This change is however, seen as a gradual process whereby progressive, emancipatory elements of the current system can be encouraged and enhanced (Gallhofer & Haslam, 2017). This contrasts with more radical critical perspectives which call for revolutionary change and don't necessarily pose any practical solutions, but rather focus on the negative aspects of the current regime (Gallhofer & Haslam, 2017).

The middle-range perspective (Laughlin, 1995) has been adopted in this study as it is the researcher's belief that the BEPS project has the potential to facilitate positive change if the more progressive elements of the project are encouraged to flourish. The researcher is however pragmatic about potential the scope and pace of change given the extremely complex and politicised dynamic within which international tax rules are created and enacted. The diverse and sometimes competing interests of a large diffuse group of stakeholders (MNE's, Civil Society Advocates, National Governments (OECD and non-OECD), Competing agencies such as the UN) mean that the OECD must tread a careful path towards reform which preserves their authority and democratic legitimacy whilst balancing the diverse needs of their stakeholders. With this in mind this study attempts to be conscious of political reality whilst also minded to suggest how the more progressive elements of the BEPS project can be realised.



#### 4.4.1 Questions of value and independence

Having explained the key aspects of a critical approach it is necessary to address one of the main criticisms of this philosophical stance; the risk of a lack of objectivity. It is not possible to claim perfect neutrality if your philosophical position is one predicated on critique of the current hegemony. Therefore, pertinent questions are asked about the ability of the researcher to detach themselves from the current system and to comment from the outside (Chua, 1986). Critics may also question the value of critical research, it being predicated on the views and pre-conceptions of the researcher as to the current institutional and ideological status quo in the field under study (Chua, 1986).

Proponents of critical research would argue that taking a stated position of critique does not negate the usefulness of critical research (Gallhofer & Haslam, 1997). Rather that critical self-reflection by the researcher about their world view is a necessary part of the critical research process. Whilst this is true to an extent with any type of research approach:

*"all empirical research will be partial, despite any truth claims to the contrary, and thus it would be better to be clear about the biases and exclusions before launching into the empirical detail."* (Laughlin, 1995, p. 65)

It is especially important for the critical researcher who may be subject to criticisms of bias from the outset. Gallhofer and Haslam (1997) call for critical researchers to be critical of themselves and their preconceptions to remain relevant and to avoid producing work of marginal value. Gallhofer and Haslam (1997) explain that for critical research to be of value it is highly desirable for the researcher to express their values and the political and ethical stand point which informs their research, so that their conclusions can be understood in context, much as the researcher seeks to understand the subject of their research as part of a larger context.

Therefore, for readers to perceive the basis upon which this case study is undertaken, the potential influences and biases of the researcher are expanded on below.

The researcher is a chartered accountant who trained and practiced as a tax advisor in the UK for one of the Big 4 accounting firms (the Firm). This experience, whilst lending technical knowledge also influenced the researcher's views on tax policy and policy makers. The Firm's view, as perceived by the researcher, was one tending towards a liberal/neoliberal economic view (Baker, 2005). This view tended to regard tax reduction for clients through any legal means as an acceptable and desirable pursuit. The personal views of the researcher tend to align more closely with a social democratic way of thinking (Baker, 2005). This view sees tax as a

social contribution and a duty companies should regard as one of the foundations of good corporate citizenship (Dowling, 2014). The researcher views the creation of international tax regulation as a process which is largely dominated in practice by powerful institutions acting as agents of capitalism (Held, 1980; Dillard, 1991; Baker, 2005; Fung, 2017). Yet the researcher sees positive aspects of these systems which display emancipatory potential (Chatzivgeri, et al., 2019; Gallhofer, et al., 2015) and furthermore, in line with the theorising of Gallhofer and Haslam (2017), views pragmatic intervention in order to aid emancipatory purpose as possible and a desirable goal for critical research. In this context the BEPS Action Plan as a whole and the formation of Action 13 are viewed by the researcher as having emancipatory potential and yet still vulnerable to influence from powerful stakeholders who wish to maintain a status quo which is beneficial to the very few in society and yet harmful to the many.

#### **4.4.2 Relationship with prior theory**

The philosophical underpinning of a study will influence the degree to which the study is guided by extant theoretical models (Bell, et al., 2019). The approach taken in this study is consistent with a critical approach adopting a middle-range perspective. This perspective recognises that phenomena such as tax laws are not always so precise and predictable in their manifestation that they can be mapped by one universal theory (Laughlin, 1995). Yet there is recognition that certain elements of a tax laws will share universal characteristics rather than manifesting in entirely different ways depending on the social reality of each actor involved (Laughlin, 1995). For this study democratic legitimacy (Scharpf, 1999), has been chosen to offer a broad and skeletal theory of how an organisation like the OECD will construct policy which can be fleshed out using empirical data and further triangulation with relevant literature (Laughlin, 1995). The theory of democratic legitimacy (Scharpf, 1999) works particularly well in a critical study as it allows this degree of flexibility and is cognoscente of the hegemonic forces at work on an organisation and its stakeholders (Scharpf, 1999).

#### **4.5 A note on positivism**

Whilst this section has, in places, been critical of the positivist paradigm it is worthwhile noting that positivist studies such as the ones noted in 3.5 constitute important sources of knowledge. The goal of this research is in no way to dismiss these but rather to add to what they have found by understanding why it is so. As was discussed in 4.3 critical researchers are being urged to use a wide range of methods (Christians, 2010; Ylönen &

Laine, 2015) and to draw on research approaches grounded in experimental and scientific design. The key differentiator as discussed above is that a critical approach must do this whilst also questioning the source of the knowledge at an ideological level (Chua, 2019).

#### **4.6 Mixed methods approach**

Having outlined the philosophy which underpins this study, the approach taken to gathering and analysing data will now be introduced. Much more detailed information on the data collection, processing and write up can be found in Chapters 4.7 & 6. The focus of this section is to introduce the methods at a high level and explain how they align with the research philosophy outlined above.

This study will adopt a mixed methods case study approach to evaluate the democratic legitimacy of Action 13. This will involve a two stepped approach to analysis:

1. Step one is an analysis of the Action 13 stakeholder consultation process, utilising an experimental design to analyse input and throughput legitimacy.
2. Step two involves interviewing tax professionals and utilising content analysis of interview transcripts to evaluate output legitimacy.

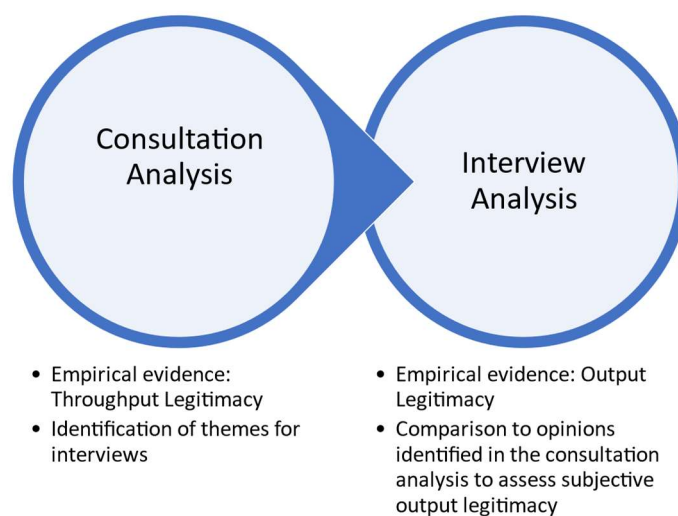
As mentioned at the start of this chapter, case studies are increasingly used as a method to study tax policies (Boden, 2012; Chatzivgeri, et al., 2019; Christians, 2010; Finer & Ylonen, 2017; Ylonen & Laine, 2015). This is because case studies allow tax policy to be analysed within its political and economic context, with knowledge of how it evolved historically, factors which are regarded as crucial for gaining a full understanding of the impact of policies in practice (Boden, 2012; Christians, 2010). This focus on the wider context around a policy and situating findings within the dominant hegemony also fits exactly with the requirements of a critical philosophy (Chua, 1986). The choice of research approach is therefore very well aligned with its philosophical underpinning (Boden, 2012).

A mixed methods approach to the case study has been chosen as it very effectively satisfies the demands of a critical approach. By drawing from diverse data sources, the researcher gains a fuller picture of the policy within its wider context, which is key to drawing critical conclusions (Chua, 2019). Mixed methods also work particularly well in studies of taxation, where data can be scarce and scattered across numerous sources (Boden, 2012; Picciotto, 2015; Ylonen & Laine, 2015). On a more practical level, the ability to draw on different sources of data and apply a range of methods made this study feasible and allowed pragmatic use of

the best available data to answer the research question (Bell, et al., 2019).

Key to a successful mixed methods approach is a strategy which effectively integrates the different data analysis techniques, to provide a coherent answer to the research questions (Bell, et al., 2019). This is often done by using the findings from different methods to gain alternative views of the same case and therefore construct a fuller picture and greater understanding. This process is often called triangulation (Smith, 2020) and can take several different forms. In this study a process of 'data triangulation' (Smith, 2020) was carried out between data generated from analysis of the Action 13 consultation and data from interviews. Neither analysis on its own can offer a full assessment of the legitimacy of Action 13 through the lens of Scharpf's (1997) model of democratic legitimacy (see Chapter 3). However, the combination of both methods allows a holistic analysis. This in itself is a benefit but in order to make the most of a mixed methods approach it is necessary to ensure that the different data streams complement each other rather than adding discretely to the aim, this is what differentiates a mixed method approach from two separate studies of the same phenomenon (Smith, 2020, p. 202). In this study the two streams of investigation complement each other by studying the democratic legitimacy of Action 13 concurrently from input through to output, with the findings and contextual knowledge gained from the input and throughput analysis being used to inform data collection for the output phase. As an example the coding of comment letters was essential to measure throughput but the experience of being immersed in the consultation data informed some of the questions asked in semi-structured interviews for the assessment of output. This occurred both directly where consultation themes formed interview questions and indirectly, where consultation themes led to further exploration in the literature, which then informed interview questions, the approach is diagrammatically represented below in Figure 16.

Figure 16 - Research Approach, mixed methods critical case study



Source: Author's Own

The remainder of this chapter will present a critical evaluation of the method used to analyse responses to the Action 13 consultation.

## **4.7 Consultation process – analytical approach**

As outlined in 4.6, a mixed methods approach has been adopted to gain a thorough critical appreciation of how Action 13's formation and manifestation in practice has impacted the OECD's democratic legitimacy. The purpose of this chapter is to explain and rationalise how responses to the Action 13 consultation were used to gain an appreciation of input and throughput legitimacy. This appreciation will form the first strand of empirical evidence underpinning the findings of the thesis. Findings from the analysis of the consultation are presented in Chapter 5 and are further synthesised with the findings from interviews with tax professionals in Chapter 8. This chapter outlines the research method employed in analysing the consultation, critically reflecting on the statistical tests chosen, coding of the data and reliability testing method.

### **4.7.1 Research method**

The use of statistical methods to gauge stakeholder influence in policy consultations is common practice (Bamber & McMeeking, 2016; Christensen, 2018; Reuter & Messner, 2015). This is because a consultation process, where stakeholders express conflicting views and where their inputs (comment letters) can be measured and correlated to an output (the final legislation), provides a context suitable for an experimental approach (Kwok & Sharp, 2005). As outlined in Chapter 6 the critical case study methodology adopted by this thesis encourages the use of a variety of methods to gain a full appreciation of the phenomenon

being studied. Whilst experimental approaches are more often associated with positivist research philosophies this does not preclude their use in a critical context (Smith, 2020). However, as outlined in Chapter 4, it is crucial when presenting findings to do so having acknowledged the impact of wider hegemonic forces (Chua, 1986). To this end the thesis will present statistics and then discuss and seek to explain them within the theoretical context of the thesis (democratic legitimacy, see Chapter 3)

To conduct statistical analysis, sub questions were developed to answer the broader research question. Comment letters were then coded to produce a dataset capable of being tested using statistical methods.

The statistical tests were used as an objective gauge of which stakeholders the OECD listened for each question and overall which group had the most influence on the consultation. However, aligned with the critical orientation of this thesis further investigation was conducted via content analysis to understand the basis on which stakeholders argued and the relative success of different types of argumentations, this will also be discussed in this chapter.

The remainder of this chapter describes the development of questions tested and the statistical tests carried out, as well as providing critical commentary on the strengths and weaknesses of the method.

#### **4.7.2 Research questions**

Research Question 1 asks: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy?

This question has been broken down into two components to be addressed by this empirical chapter.

RQ1.1: Were stakeholder groups (see 4.7.3) represented in equal proportion in the Action 13 consultation process?

RQ1.1 seeks to establish the representativeness of the consultation; this question addresses aspects of input legitimacy but is also crucial for throughput legitimacy (Schmidt & Wood, 2019). If a process is to be effective at the throughput stage it must encourage key stakeholder groups to participate (Brosens & Bossuyt, 2020).

RQ1.2: Did stakeholders exert equal influence on the final Action 13 standard?

RQ1.2 is the crux of the investigation and seeks to measure the relative influence of the diverse stakeholder groups on the OECD. RQ1.2 seeks to

measure how the OECD adapted (or not) Action 13 according to the preferences expressed by stakeholder lobbyists. This question will measure the responsiveness of the OECD to its diverse stakeholders and therefore the throughput legitimacy of the consultation process (Schmidt, 2013; Schmidt & Wood, 2019).

### 4.7.3 Stakeholder groups

For the purposes of this thesis the pertinent stakeholder groups are: Multi-National Enterprises (MNE’s); Professional Advisors (Advisors) engaged in advising MNE’s; and Civil Society Organisations (CSO’s). 137 responses were submitted to the consultation and the sample has been categorised as follows:

*Table 4 – Consultation Responders by Stakeholder Group*

<b>Total Submissions</b>	<b>Total Individual Submissions</b>
MNE	70
Advisor	56
Civil Society	11
	137

The categories employed are derived from extant literature, the same categories were employed in a recent study of Action 7 (Elschner, et al., 2018) and similar categorisation is used in the accounting context (Bamber & McMeeking, 2016; Reuter & Messner, 2015). Christensen’s (2018) study of Action 13 employs four categories: Tax Advisors, Corporations, Business Lobbies and Civil Society. This thesis has included business lobbies in the MNE category rather than as a separate group, this is because the members of business lobbies are MNE’s and the lobby groups exist to represent their member’s interests, this approach appears to be validated by Christensen’s (2018) findings as he observes his two categories of Corporations and Business Lobbies to have very similar views. Other differences are also noted from Christensen (2018), and although it is not possible to fully reconcile these, there are several likely causes: Firstly, Christensen’s (2018) sample is 122, this is likely lower than the current thesis as Business Lobbies appended individual submissions from MNE’s to their submissions. Christensen has perhaps treated the letter from the business lobby and appendices from its members as one submission. This study recognises each individual submission, even those appended. Christensen (2018) only recognises 49 tax advisors as opposed to this study’s 56, this could partly be explained by the Big 4 making multiple submissions, again this study has recognised each individual submission. Lastly, Christensen (2018) recognises 12

CSO's rather than 11, as the identity of these is not specified it is not possible to directly compare those classified.

In terms of how responses were categorised for this study MNE's were defined as those entities who may be required to comply with the provisions of Action 13 and the industry lobbies who directly represent them. This group is analogous to 'taxpayers' (Elschner, et al., 2018) identified by tax lobbying studies or 'preparers' (Bamber & McMeeking, 2016; Reuter & Messner, 2015) identified in accounting studies.

Advisors were categorised as those who provide advice to MNE's, mostly individual law and accounting firms but also professional bodies who represent professions, such as the Chartered Institute of Taxation and the International Bar Association. The latter are an interesting group and were less simple to categorise. This is because professional bodies often represent themselves as acting in the public interest (Parker, 1994). However, the conception of public interest presented by these organisations is often narrowly focused and aligned with neoliberal ideologies which see profit maximisation as a desirable societal goal (Baker, 2005; Gallhofer & Haslam, 2017; Gallhofer, et al., 2015). In line with the critical orientation of this research, which seeks to recognise the role of key players in wider power struggles (Chua, 1986), these organisations were categorised as Advisors. This aligns with similar studies on BEPS (Christensen, 2018; Elschner, et al., 2018) and studies in the accounting field (Bamber & McMeeking, 2016; Reuter & Messner, 2015). This also avoids the potentially misleading scenario of having professional bodies sitting in a different category from their members who work for Advisors and MNE's.

Civil Society were challenging group to define, within this group there are NGO's, who meet the frequently used definition of Civil Society set out by Diamond:

*"Voluntary, self-generating, (largely) self-supporting, autonomous from the state, and bound by a legal order or set of shared rules."* (Diamond, 1994, p. 7).

However, this category also includes other organisations and individuals, namely academics and trade unions. Table 5 below details the respondents categorised as Civil Society in this study.

*Table 5 - Civil Society Respondents*

<b>Name</b>	<b>Type</b>
Cefitax	Academic Centre
Christian Aid	NGO
Eurodad	NGO
Antony Ting	Academic



BEPS Monitoring Group	NGO
Global Financial Integrity	NGO
Jubilee Network USA	NGO
Plateforme Paradis Fiscaux et Judiciaires	NGO
ITC Leiden	Academic Centre
Oxfam	NGO
Trade Union Advisory Council	Trade Union

What distinguishes these respondents from Advisors and MNE's, for the purpose of this research, is their representation of the wider interests of society, as opposed to the narrow commercial concerns of corporations (Pleyers, 2010). Whether this interest centres on outcomes for the global poor (Oxfam), workers rights (TUC) or an interest in seeing tax law aid development (ITC Leiden), the centrality of each organisation's purpose is felt to delineate them from MNE's and Advisors. This again aims to align with the critical orientation of the research and the need to recognise the tensions which exist between players engaged in power struggles at both a technical and an ideological level (Laughlin, 1995).

Undoubtedly different scholars may take a slightly different approach to categorising the stakeholders, however, delineations set out above are not presented as absolute but are provided to enable readers to understand the process applied in arriving at the three categories and therefore the subsequent conclusions drawn.

#### **4.7.4 Comment letter coding**

To enable statistical testing and further understanding of stakeholder argumentation, content analysis was used to construct a measurable data set from the comment letters submitted in response to the Action 13 consultation (OECD, 2014d).

Content analysis can be defined as:

*"a systematic, replicable technique for compressing many words of text into fewer content categories"* (Stemler, 2001, p. 1)

Frequently used in accounting research (Smith, 2020, p. 149), content analysis has a variety of applications. Depending on the research question content analysis can be used for quantitative or qualitative analysis or to address questions which encompass elements of both (Oats, 2012; Smith, 2020).

In line with the mid-range perspective and critical orientation of this research (Laughlin, 1995) a mixed approach to content analysis was employed in this study, to allow the research question to be examined quantitatively and qualitatively. From a quantitative perspective, which

stakeholders voted for which outcomes were coded, and statistical testing was carried out to discern differences between stakeholder groups (see 4.7.6 for more details). This gave an objective measurement of who the OECD had sided with during their policy deliberations and the type of argumentation they favoured. Qualitative coding (4.7.5) was employed to provide further insight into the debates which arose from the consultation and took the form of categorising the various arguments employed by stakeholders into defined categories. These categories were explored to understand stakeholders' priorities vis-à-vis ideology and hegemony, as demanded by the theoretical orientation of the research (Chua, 1986). This in turn is arguably an essential requirement in addressing whether the OECD garnered legitimacy from its various stakeholders by addressing their priorities (or not).

This research follows a well-established tradition in the use of content analysis to analyse policy making and standard setting, both in the BEPS arena (Christensen, 2018; Elschner, et al., 2018) and in the wider accounting literature (Bamber & McMeeking, 2016; Giner & Acre, 2012; Holder, et al., 2013; Reuter & Messner, 2015). The studies cited utilise content analysis in a variety of ways, applying both quantitative and qualitative methods in various proportions according to the data they have access to and the questions they are trying to answer. For this study giving an objective perspective of what happened, using quantitative techniques is a first important step and is then supplemented with exploration of the 'why' through qualitative analysis.

The following paragraphs describe and critically appraise the content analysis process undertaken.

#### *4.7.4.1 Descriptive coding*

In constructing an effective coding schema, the first step was to code comment letters descriptively, to identify the stakeholder group which each response belonged to (Advisor, MNE or CSO). In most cases it was obvious which group a response belonged to. Where the individual or organisation was unknown to the researcher the response was read critically (with particular attention to introductory paragraphs and professional signatures) to ascertain whether the response could be classified from its own content. Where there was further ambiguity internet research was used.

In addition to stakeholder groups the characteristics in Table 6 were coded:

Table 6 – Comment Letter Characteristics

<b>Comment Letter Characteristics</b>
Country of main residence (where was the letter signed)
OECD or non-OECD country
Page length of submission
Did the submission follow the OECD questionnaire

These characteristics were identified as pertinent for measuring the throughput legitimacy, in particular the openness (see 3.2) of the consultation. Extant literature (Burgers & Mosquera, 2017; Fung, 2017) suggests that OECD policy making does not give adequate attention to the needs of non-OECD members, in particular developing countries. These concerns potentially detract from the legitimacy of the OECD as a policy maker (Burgers & Mosquera, 2017) and are therefore important to interrogate in this study.

Wherever possible the answers to the questions in Table 6 were answered using information obtained from the comment letters. However, if this information was not available, answers were sought on the responder’s website.

Page length of submissions and adherence to the consultation were recorded to give a first impression of the data. Had constituents from one group answered in short form, addressing only a few questions then statistical testing would have been challenging. These measures were therefore taken to give an initial degree of comfort that the method applied was viable, or at least worth exploring further.

#### 4.7.4.2 Coding for statistical testing

To test for RQ1.2 the comment letters were coded according to how stakeholders answered each question. To allow statistical measurement of the responses it was necessary to code these questions in a numerical format and so data was collected in an Excel spreadsheet using 1 and 0 as codes for various responses. For example, Question 1 asked: “*Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template?*” Stakeholders answering yes were coded 1 and those who answered no were coded 0.

An important contribution of this study is to provide further insight into how lobbyists formed their argumentation, responses were also therefore coded according to whether they employed economic (1) or conceptual (0) argumentation. Economic or conceptual as classifications are derived from the accounting literature (Giner & Acre, 2012; Reuter & Messner, 2015). This classification distinguishes argumentation which aims to influence the economic outcomes of firms e.g. either through increased

tax or administrative burdens; from conceptual argumentation, which may be based on moral or technical grounds. This categorisation is aligned with existing literature in the accounting and tax field (Elschner, et al., 2018; Giner & Acre, 2012; Reuter & Messner, 2015) and allows this study to add objective empirical evidence as to which type of argumentation was favoured by the OECD in this policy area.

As discussed in Chapter 3 understanding the types of argumentation which prevail in a policy debate may give valuable insight into the tendencies of lobbyists and policy makers (Elschner, et al., 2018; Giner & Acre, 2012; Reuter & Messner, 2015) and there is scope to add to this understanding in the tax policy making arena. And importantly for throughput legitimacy, MNE's and Advisors have more ready access to economic arguments (Giner & Acre, 2012) and so a debate which favours these may be disadvantageous to Civil Society lobbyists.

Whilst coding of comment letters according to the type of argumentation used has the potential to provide a more nuanced understanding of the debate it also requires a more subjective assessment of comments. It could be argued that this adds a level of subjectivity to the analysis, making the findings subject to scrutiny for coder bias. To mitigate against this and to validate the coding of more straightforward questions, intercoder testing was carried out using a conservative statistical method.

Intercoder reliability is of prime importance in content analysis (Lombard, et al., 2002). If independent coders cannot agree on the correct coding the quality of the data analysis may be severely compromised (Valiquette, et al., 1994). To ensure that the data was reliably coded an independent expert was employed to code a sample of comment letters, for comparison with the original coder (intercoder reliability testing). The independent coder was a member of the Accounting and Finance department at RGU and a fellow PhD student. The independent coder was not a tax expert but a very knowledgeable finance professional with experience of policy making by consultation. To ensure a rigorous check of the coding, the independent coder was briefed about Action 13, the consultation process and the aims of the research. This briefing included a walkthrough of how the researcher had coded an individual submission. After the briefing the independent coder coded a submission and met with the researcher again to discuss areas where further clarification was needed. When providing clarification, the researcher was at pains not to influence the independent coder where subjective judgement was required, clarification was confined to explaining any technical points or clarifying the exact meaning of questions. After this second meeting the independent coder conducted an independent coding of a chosen sample of comment letters.

The sample chosen for intercoder reliability testing represented 10% of the total pages submitted to the OECD, this is in line with the generally accepted norms for intercoder-testing (Lombard, et al., 2002, p. 601) and similar studies (Bamber & McMeeking, 2016). A stratified approach was taken to sampling, this means comment letter from each of the three constituencies was chosen (Smith, 2020, p. 177). Whilst random sampling is often considered the most objective approach (Lombard, et al., 2002), a stratified approach is appropriate in this instance, given the diverse stakeholder groups within the sample and the focus of the research on potential differences in responses between groups (Smith, 2020). As the sample was skewed (71 MNE, 56 Advisors, 11 CSO's) care was taken to ensure that at least 10% of the page count was taken from each stakeholder groups' collective content. In addition, submissions which failed to answer all the OECD's questions were not chosen in order to ensure that each question was adequately reviewed. Table 7 sets out the overall responses to the consultation and Table 8 gives details of the inter-coder testing sample.

*Table 7 – Submissions to the Action 13 consultation by stakeholder group*

<b>Total Submissions</b>	<b>Total Individual Submissions</b>	<b>Pages Submitted</b>	<b>Avg pages</b>	<b>Avg questions answered (of 15)</b>
MNE	70	624	8.91	9.27
Advisor	56	473	8.45	8.27
Civil Society	11	57	5.18	8.82
	137	1154	8.42	8.82

*Table 8 – Intercoder testing sample*

<b>Sample for Inter-Coder Testing</b>	<b>Sample</b>	<b>% of total submissions</b>	<b>Pages</b>	<b>% of total pages submitted</b>
MNE	7	10%	104	17%
Advisors	5	9%	67	14%
Civil Society	2	18%	21	37%
	14	10%	192	17%

Testing was conducted on the sample utilising Cohen's Kappa ( $\kappa$ ). There are several tests identified in the literature as suitable for conducting intercoder reliability testing however,  $\kappa$  is often favoured for data sets with nominal coding, such as the one used in this research (Lombard, et

al., 2002). The main advantage of  $\kappa$  is that it accounts for chance agreement between coders, which pure percentage agreement fails to do (De Vries, et al., 2008). This added sophistication does, however, make it a more conservative measure as it only recognises agreement between coders beyond the chance distribution of values (Lombard, et al., 2002). This conservatism, whilst worth being mindful of, does give a higher degree of comfort as to the accuracy of the coding. The questions asked expressly by the OECD in the consultation draft are mostly answered with a yes or no and therefore other than coder error there should be little disagreement between coders. Coding in respect of whether stakeholders have employed economic or conceptual argumentation, on the other hand, requires subjective judgement. The more rigorous testing afforded by  $\kappa$  is therefore necessary to give comfort over the accuracy of this aspect of the coding.

Kappa is calculated as follows:

$$\kappa = \frac{p_0 - p_c}{1 - p_c}$$

Where  $P_0$  is the observed agreement between coders and  $P_c$  is the expected agreement that occurs by chance (Munoz & Bangdiwala, 1997, p. 106)

A  $\kappa$  factor of 1 indicates perfect agreement between coders and a value of 0 would denote no agreement beyond pure chance (Munoz & Bangdiwala, 1997). There is debate in the literature as to what constitutes an acceptable level of agreement, Munoz and Bangdiwala (1997) state that agreement of between 0.6 - 0.8 is regarded as substantial and  $>0.8$  almost perfect. Lombard et al. (2002) note that a level of 0.7 is often set as a benchmark for measures of intercoder reliability, but advise that this may be reduced when dealing with a conservative measure such as  $\kappa$ . In a recent accounting paper, published in a high-quality journal, Bamber & McMeeking (2016) achieved inter coder agreement of between 0.64 - 0.92 and relied on this as the basis of their analysis, having satisfied themselves that the lowest scores did not relate to fundamental understanding of the coding instrument.

From table 9 below 16 tests returned a score of 1; 8 returned a score greater than 0.8; 3 received scores of between 0.7 - 0.8; and 2 received scores 0.6 - 0.7. The overall agreement across the coding instrument could therefore be said to be very reliable. However, in line with Bamber and McMeeking's (2016) approach the two questions receiving 0.6-0.7 (highlighted amber) were double checked and a coding error for one question 'Constituents will lobby to restrict additional forms' was discovered and corrected. The other score of 0.6-0.7 related to a subjective judgement and was deemed immaterial to the overall analysis.

Full reports from SPSS are available at Appendix 1 and are summarised in Table 9 below:

Table 9 – Intercoder testing statistics – quantitative coding

Question	Cohen's Kappa Value	Asymptotic Standard Error <sup>a</sup>	Approximate T <sup>b</sup>	Approximate Significance
Q1 - Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template (B1). - Y1/N0	0.641	0.319	3.322	0.001
ec1/con0	1.000	0.000	4.520	0.000
Q2 - Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction (B3)Y1/N0	0.823	0.170	3.928	0.000
ec1/con0	0.823	0.170	3.928	0.000
Q3 - Should preparation of the Masterfile on a line of business basis be permitted (C1)- Y1/N0	1.000	0.000	3.742	0.000
ec1/con0	0.865	0.122	3.613	0.000
Q4 - Should the CbCR report be included as part of the Masterfile (C1)- Y1/N0	1.000	0.000	4.843	0.000
ec1/con0	1.000	0.000	3.742	0.000
Q5 - Should Action 13 prescribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis (C1) – Y1/N0	1.000	0.000	4.520	0.000
ec1/con0	0.725	0.174	3.623	0.000
Q6 - Should CbCR on a country consolidation basis be permitted (C1) - Y1/N0	0.874	0.122	3.921	0.000
ec1/con0	0.754	0.152	3.924	0.000
Q7 - Should the CbCR template allow flexibility for corporate income tax to be reported on either an accruals or a cash paid basis (C1) - Y1/N0	1.000	0.000	3.742	0.000
Cash1 Acc0	1.000	0.000	4.804	0.000
Q8 - Should the CbCR template require reporting of withholding tax (C1)- Y1/N0	1.000	0.000	4.923	0.000
Covers cash vs accruals and WHT	0.877	0.112	4.516	0.000
ec1/con0				

Q9 - Should the CbCR template include aggregate cross border payments between associates (C1) - Y1/N0	1.000	0.000	3.742	0.000
ec1/con0	0.864	0.131	3.926	0.000
Q10 - Should the CbCR template require reporting of business activities on a jurisdiction by jurisdiction basis (C1) - Y1/N0	1.000	0.000	4.973	0.000
ec1/con02	1.000	0.000	5.159	0.000
Q11 - Should Action 13 include specific guidance on materiality (D3) - Y1/N0	1.000	0.000	3.742	0.000
ec1/con0	1.000	0.000	4.741	0.000
Q12 - Should documentation be filed using a common language (D6)- Y1/N0	0.853	0.140	4.196	0.000
ec1/con0	0.877	0.118	4.432	0.000
Q13 - Should the Masterfile be filed in each jurisdiction in which the MNE is active (E) - Y1/N0	1.000	0.000	3.742	0.000
ec1/con0	1.000	0.000	3.742	0.000
Q14 - Should the CbCR template be filed in each jurisdiction in which the MNE is active (E) - Y1/N0				
ec1/con02	0.641	0.319	3.322	0.001
Q15 - Should details of APA's and MAP processes be filed as part of the Masterfile (Annex 1)- Y1/N0	1.000	0.000	4.741	0.000
ec1/con0	0.770	0.217	3.866	0.000

#### 4.7.5 Qualitative coding

To understand the main priorities of stakeholders' in responding to the OECD, argumentation employed by responders was coded and sorted into categories. For the quantitative analysis above argumentation was identified as being either economic or conceptual in nature, this coding goes a step further by identifying the main point of common arguments.

This form of qualitative content analysis is common in both accounting (Baker, 2005; Chatzivgeri, et al., 2019; Durocher, et al., 2007) and tax research (Oats, 2012) and has been used in the context of the BEPS Action Plan (Christensen, 2018; Elschner, et al., 2018).



As briefly mentioned in the introduction to this chapter, the theoretical orientation of this thesis requires the researcher to critically reflect on research subjects' orientation vis-à-vis the prevailing ideology. Whilst the quantitative analysis described above provides a first step and a good indication of whether stakeholders support progressive policy making, which challenges the status quo or espouse conservative views to defend it. Further analysis of the argument's stakeholders used has the power to provide greater insight into how they justify their stance. This understanding is also key in understanding whether the OECD were successful in garnering legitimacy. This is because it enables understanding of the arguments which persuaded the OECD and hence which stakeholder groups policy objectives they were compelled by.

Qualitative content analysis is by its nature a subjective endeavour, however, to ensure a rigorous and replicable process was followed several steps were taken.

Firstly, a number of categories of argumentation were identified from relevant extant literature, namely: Christensen's (2018) study on action 13, Elschner et al.'s (2018) study on Action 7 and Chatzivgeri et al.'s (2019) study on Chapter 10 of the EU Accounting Directive, which mandates a form of CbCR. Categories identified from this literature are summarised in the following table:

*Table 10 – Consultation argumentation by stakeholder group identified from literature*

<b>Relevant Stakeholder</b>	<b>Argumentation</b>
MNE's & Advisors	Compliance Burden – it was identified from prior literature that MNE's and Advisors are likely to argue against expanded disclosure requirements on the grounds of them creating an excessive compliance burden (Christensen, 2018; Chatzivgeri, et al., 2019; Elschner, et al., 2018)
MNE's & Advisors	Confidentiality - it was identified from prior literature that MNE's and Advisors are likely to argue against expanded disclosure requirements on account of the commercial sensitivity of data being disclosed (Chatzivgeri, et al., 2019; Christensen, 2018)
MNE's & Advisors	Risk Assessment Purpose – Christensen (2018) concludes that MNE's and Advisors were successful in restricting the scope of Action 13 by framing it as a risk assessment tool.

Civil Society	Transparency – prior literature suggests that Civil Society will argue for the societal benefits of greater corporate tax transparency, particularly for developing countries and in the interests of global fairness (Chatzivgeri, et al., 2019; Christensen, 2018; Mikler & Elbra, 2018)
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Coding instances of the argumentation identified from literature was a deductive process e.g. setting out to find evidence in the consultation of types of argumentation deployed in similar contexts from extant literature (Bell, et al., 2019).

In addition to this a form of inductive coding was also conducted, whereby content analysis allowed for the coding of argumentation identified within the context of Action 13 which had not previously been identified in other studies. This was a subjective and iterative process which required close reading of each submission to identify unique arguments not captured in the table above. Once these arguments had been identified a process of rationalisation was undertaken to identify any which were prevalent across the sample (Smith, 2020). This process identified a stream of argumentation relating to defence of the ALP, which was a feature of MNE and Advisor commentary. This form of inductive coding is consistent with the philosophical framing of the research as a critical study, aligned with middle-range thinking (Laughlin, 1995). This method also aligned well with the guiding theory of democratic legitimacy. This is because to assess throughput legitimacy a researcher must understand constituent’s authentic preferences in order to assess whether these were taken into account (Schmidt, 2013). In this respect, coding comment letters to identify how stakeholders argued was essential in identifying these preferences.

In order to gain comfort that this coding was representative of consultation submissions several of the themes initially identified were included in the round of inter-coder testing described above. The results of the intercoder testing are set out in Table 11 below which shows all 9 tested themes receiving a score greater than 0.8 with 7 receiving a perfect score of 1. Although not comprehensive this testing provided comfort that the arguments identified were genuine and had been consistently coded across submissions (De Vries, et al., 2008).

Table 11 - Intercoder testing statistics – qualitative coding

Question	Cohen's Kappa Value	Asymptotic Standard Error <sup>a</sup>	Approximate T <sup>b</sup>	Approximate Significance
Constituents will cite confidentiality as a concern - Y1/N0	1.000	0.000	3.742	0.000
Constituents will argue to scale back the scope to exclude providing enough info to conduct an audit - Y1/N0	1.000	0.000	3.742	0.000
ec1/con0	1.000	0.000	5.251	0.000
Constituents will lobby for rules to be imposed over how tax authorities use the info - Y1/N0	0.857	0.136	3.240	0.001
ec1/con0	0.837	0.155	3.175	0.001
Constituents will lobby to ensure ALP is protected - Y1/N0	1.000	0.000	4.608	0.000
Constituents will refer to overall compliance burden - Y1/N0	1.000	0.000	3.742	0.000
Constituents will comment that CbCR Should only be for risk assessment - Y1/N0	1.000	0.000	3.742	0.000
The response follows the OECD DD format - Y1/N0	1.000	0.000	3.742	0.000

Types of argumentation employed are discussed in the analysis of the consultation in Chapter 5 with illustrative quotes identified from the various stakeholders.

#### 4.7.6 Testing

Table 12 below summarises questions asked by the OECD in the discussion draft which will be tested in this chapter along with responses given by each of the stakeholder groups. This study seeks to add granularity and further depth to conclusions already drawn as to the efficacy of the OECD's consultation by Christensen (2018). To do this, questions not previously analysed will be considered in terms of how stakeholders responded and the argumentation they employed to support their view. This will provide greater understanding as to the extent to which the OECD was influenced in the course of the consultation and the types of argumentation which prevailed.

Table 12 – OECD Consultation Questions

OECD Questions	MNE		Advisors		Civil Society		Total		Outcome in Action 13
	Yes	No	Yes	No	Yes	No	Yes	No	
Q1 - Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template (B1).	3	46	8	27	2	4	13	77	No
Q2 - Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction (B3).	2	42	9	27	5	1	16	70	No
Q3 - Should preparation of the Masterfile on a line of business basis be permitted (C1).	39	6	33	5	5	3	77	14	Yes
Q4 - Should the CbCR report be included as part of the Masterfile (C1)	4	52	8	31	2	9	14	92	No
Q5 - Should Action 13 prescribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis (C1)	10	47	14	23	5	1	29	71	No
Q6 - Should CbCR on a country consolidation basis be permitted (C1)	38	10	28	6	6	3	72	19	No
Q7 - Should the CbCR template allow flexibility for corporate income tax to be reported on either an accruals or a cash paid basis (C1)	16	33	14	14	3	4	33	51	No
Q8 - Should the CbCR template require reporting of withholding tax (C1)	19	20	13	18	3	3	35	41	Yes

Q9 - Should the CbCR template include aggregate cross border payments between associates (C1)	14	37	9	20	3	3	26	60	No
Q10 - Should the CbCR template require reporting of business activities on a jurisdiction by jurisdiction basis (C1)	32	9	20	10	9	0	61	19	Yes
Q11 - Should Action 13 include specific guidance on materiality (D3)	1	55	1	45	8	1	10	101	Yes
Q12 - Should documentation be filed using a common language (D6)	39	3	32	4	1	4	72	11	No
Q13 - Should the Masterfile be filed in each jurisdiction in which the MNE is active (E)	5	50	11	28	7	1	23	79	Yes
Q14 - Should the CbCR template be filed in each jurisdiction in which the MNE is active (E)	2	56	7	31	8	1	17	88	No
Q15 - Should details of APA's and MAP processes be filed as part of the Masterfile (Annex 1)	5	41	8	24	3	4	16	69	Yes
<p>*references are to paragraphs in the 30 January 2014 OECD Discussion Draft on Action 13</p> <p>**a total of 136 responses were received, however, not every stakeholder answered every question – non-answers are excluded from this table</p>									

Having established an acceptable level of inter-coder reliability, appropriate tests were identified to test whether there were differences in how stakeholders responded to the questions and whether stakeholders

employed different argumentation. This required identification of the variables to be tested and the use of descriptive statistics and normality tests to identify whether parametric or non-parametric testing should be employed.

The key variables to be tested in the study are summarised in Table 13

*Table 13- Variables to be tested*

Variable	Coding	Dependant/Independent	Characteristic
Stakeholder Group	Advisor 1 CSO 2 MNE 3	Independent	Nominal
Response to consultation question	0 No 1 Yes	Dependent	Nominal
Argumentation Employed	0 Conceptual 1 Economic	Dependent	Nominal

To gain a better understanding of the distribution of the dataset as a whole and to identify the most appropriate statistical tests to perform to address the hypothesis (Pallant, 2020) the dataset was tested for normality. Normality was tested by applying the Kolmogorov-Smirnov test (Pallant, 2020) to the responses received for each question in Table 13 above. In addition, the same test was applied to coding of the argumentation used by stakeholders in each question. Non-responses to questions, coded as 2 and points made with no argumentation or no clear argumentation, also coded 2 were included in the testing to give a full view of the dataset. The Kolmogorov-Smirnov test was used as the most appropriate test for scores or nominal variables (Pallant, 2020) and results are summarised in Appendix 1. However, mindful of criticisms of this test for use with larger samples (Pallant, 2020), histograms were also generated (Appendix 1) to allow visual validation of the results generated for the Kolmogorov-Smirnov test.

For each question and each categorisation of argumentation the Kolmogorov-Smirnov test returned a significant result of  $<0.05$ , this is an indication that the data set is not normally distributed. This was confirmed by visual inspection of the histogram's generated (x axis 0, 1, no response; y axis number of responses). This result was not unexpected, as explored in the previous section, the distribution of stakeholders was skewed towards MNE's and Advisors, groups which the literature (Christensen, 2018; Elschner, et al., 2018) suggests will vote on mass for similar outcomes. This meant it would be unusual for the dataset to show a normal distribution across yes/no and economic/conceptual when it could be expected that responses to questions would cluster around the preferred response of the combined MNE/Advisor cohort.

The findings of normality testing suggest a non-parametric approach to be the most appropriate. The characterisation of the variables as nominal and categorical suggests that the most appropriate non-parametric test to utilise would be Pearson's Chi-squared ( $\chi^2$ ) (Pallant, 2020). This method was also used by similar studies undertaken in the accounting literature (Bamber & McMeeking, 2016; Kwok & Sharp, 2005).

The  $\chi^2$  test is based on a crosstabulation with variables classified by categories,  $\chi^2$  compares the expected ( $E_i$ ) frequencies in each category with the actual observed frequencies ( $O_i$ ) (Pallant, 2020) and is calculated as follows:

$$\chi^2 = \sum \frac{(O_i - E_i)^2}{E_i}$$

(Franke, et al., 2011)

$\chi^2$  can identify whether there is a relationship between variables e.g. stakeholder group and answer to a particular question asked by the OECD, by highlighting where observed responses differ from what would be expected based on the population as a whole.

However, the data set assembled does present challenges in the use of  $\chi^2$ , as both the relatively small number of CSO responses and the tendency of MNE's and Advisors to cluster around the same answer present a challenge in terms of the minimum expected cell frequency assumption which underpins  $\chi^2$ . For  $\chi^2$  to be valid, 80% of cells must contain a minimum expected count of 5, when responses are cross-tabulated. With respect to the present data set, there are 6 cells (three rows for stakeholder groups and two columns for answers yes or no) and therefore  $\chi^2$  will only be feasible where no more than one cell contains less than 5 responses. As can be seen in Table 12 above, this condition is not met for each of the questions. This low cell frequency means  $\chi^2$  will potentially be compromised as a measure for use here. As an alternative to  $\chi^2$ , Fisher's exact test (Fisher's) can be used where cell counts and samples are low (Bamber & McMeeking, 2016), similar to  $\chi^2$  Fisher's exact test compares expected cell counts to actual and concludes on whether there is a statistically significant difference in proportions between different categories (McDonald, 2014).

Fisher's is more accurate than  $\chi^2$  but has the disadvantage of being more complex to calculate. This means Fisher's is less preferred for large sample sizes, however the sample size in this study is small (less than 1,000) (McDonald, 2014) and therefore Fisher's is an appropriate choice of statistic as an alternative to  $\chi^2$ .

The formula for Fisher’s exact test for a 3x2 table, as used in this study is as follows:

	Yes	No	Total
MNE	a	b	r1
Advisor	c	d	r2
CSO	e	f	n

$$p = \frac{\left(\frac{a+b}{a}\right) \left(\frac{c+d}{c}\right) \left(\frac{e+f}{e}\right)}{\left(\frac{n}{a+c+e}\right)}$$

(Soper, 2022; Hoffman, 2019)

Fisher’s exact test was calculated using SPSS, there is no specific function in SPSS for calculating Fisher’s exact test but rather it is computed (if requested) along side  $\chi^2$ .

The null hypothesis which  $\chi^2$  and Fisher’s exact test, both test is that the relative proportion of responses by one stakeholder group are independent of another (McDonald, 2014) or that stakeholder group will not influence how respondents respond to questions. The null hypothesis to be tested are therefore:

$H_0$  = There will be no observed difference in answers to questions between stakeholder groups

$H_0$  = There will be no observed difference in argumentation employed by different stakeholder groups

Fisher’s will be used for each question asked by the OECD. In line with generally accepted practice (Bell, et al., 2019; Smith, 2020) a statistical significance level of 5% will be observed meaning the null hypothesis will be rejected if the probability value ( $p$ ) < 0.05.

Whilst the significance level calculation for Fisher’s will highlight a statistical link between stakeholder group and a particular response or use of argumentation, it does not give an indication as to the magnitude of the effect. For this Crammer’s V ( $V$ ) is used, Crammer’s V is calculated automatically by SPSS alongside Fisher’s and gives an indication of the effect size based on the following scale (small = 0.07; medium = 0.21; large = 0.35) (Pallant, 2020, p. 227).

Results are set out in the next chapter, which provides a question-by-question analysis of the consultation. For each question stakeholder response and argumentation were analysed using a combination of the statistics noted above. In addition, as a sense check and for visualisation,



graphs were produced to illustrate the responses and argumentation employed for each question. Furthermore, the types of argumentation employed in each question are expanded on to demonstrate how issues were debated. For each question the OECD's final decision (as reflected in the final Action 13 standard) is compared to what stakeholders lobbied for. This final piece of analysis is used to conclude whether the OECD conducted a measured and fair consultation and hence garnered democratic legitimacy.

#### **4.7.7 Chapter summary**

The first half of this chapter was devoted to an exploration of the underlying philosophical assumptions of the research and presented why a critical case study was employed as an appropriate method of enquiry.

The second half of the chapter presented a critical description of the methods used to analyse consultation data from Action 13, including the choice of statistical method and how data coding was checked for robustness.

The following chapter will present findings from this analysis of the consultation, answering Research Question 1:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

## **5 Chapter 5: Comment letter analysis and discussion**

### ***5.1 Introduction***

This chapter will answer research question 1 of the thesis:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

Underpinned by the theoretical framing of Scharpf (1997; 1999; 2002) and Schmidt (2013) and building on extant literature concerned with the BEPS policy creation process (Christensen, 2018; Elschner, et al., 2018), the results presented will be discussed in terms of how they improve critical understanding of the throughput legitimacy garnered or lost by the OECD in the course of creating Action 13.

To recap Section 3.2.2, throughput legitimacy can be split into 4 distinct, yet connected components: efficiency, transparency, accountability and Openness and responsiveness (Schmidt & Wood, 2019).

Efficiency concerns the timeliness and logistical organisation of the consultation process; transparency refers to the flow of information between the OECD and its stakeholders and accountability means being subject to a specific forum (Schmidt, 2013). These three elements are undoubtedly important and have been considered by other authors (Brosens & Bossuyt, 2020; Fung, 2017) however, this thesis will concentrate on openness and responsiveness (3.2.2), with particular attention paid to responsiveness.

The focus is justified by the relative paucity in research on how policy makers respond to lobbying efforts in the field of taxation (Barrick & Brown, 2019; Elschner, et al., 2018). Also, in line with calls to draw on broader disciplinary and theoretical perspectives (Oats, 2012), the volume of literature relating to the responsiveness of Accounting Standard setters to lobbying provides a rich theoretical source to utilise. See 3.6 for fuller justification of the focus on openness and responsiveness.

### ***5.2 Openness***

The first research questions is:

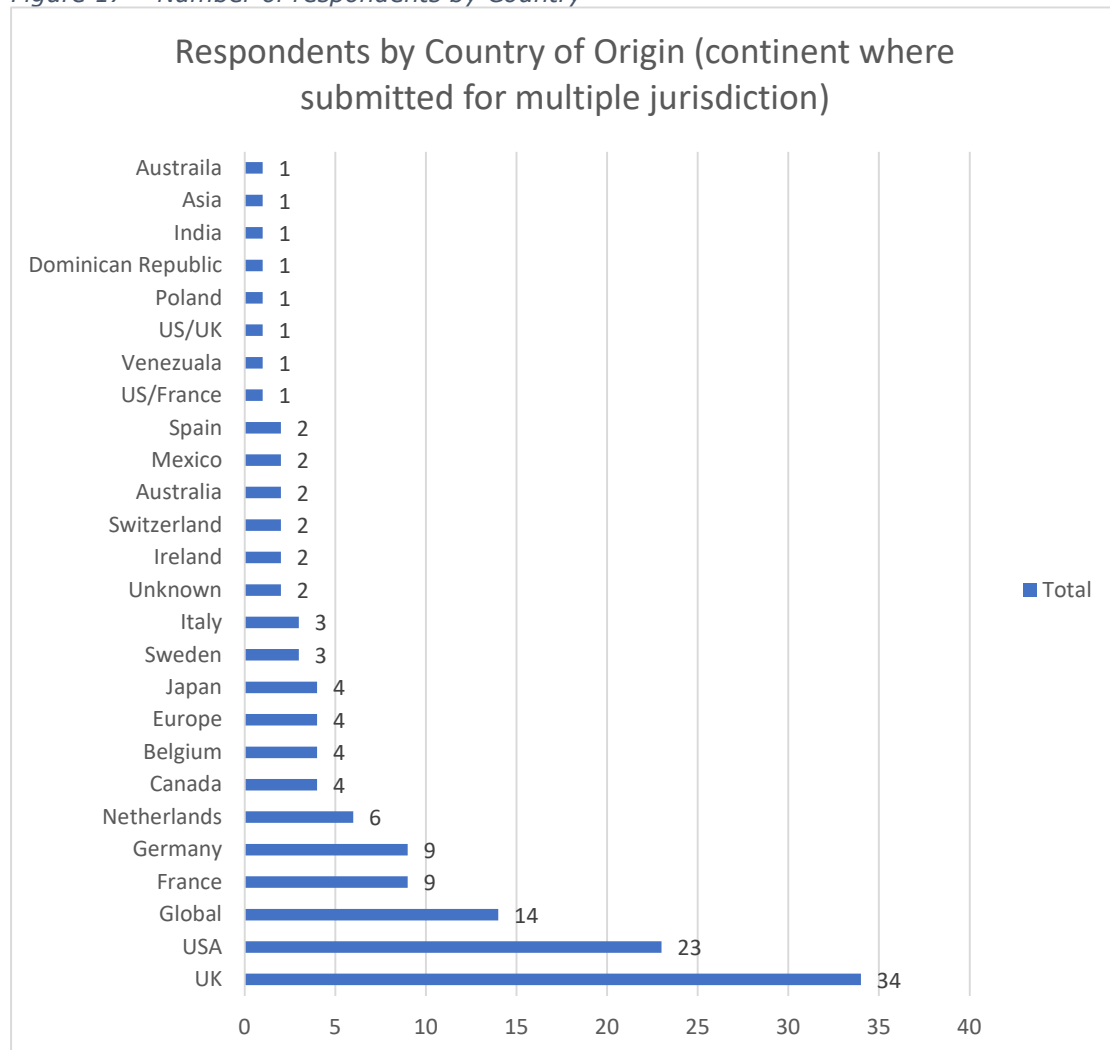
RQ 1.1: Stakeholders will be represented in equal proportion in the Action 13 consultation process.

This question seeks to analyse the representation of different stakeholder groups in the OECD’s consultation process. This hypothesis concerns ‘openness’, which can be split into two categories: horizontal and vertical (Schmidt, 2013).

### 5.2.1 Horizontal openness

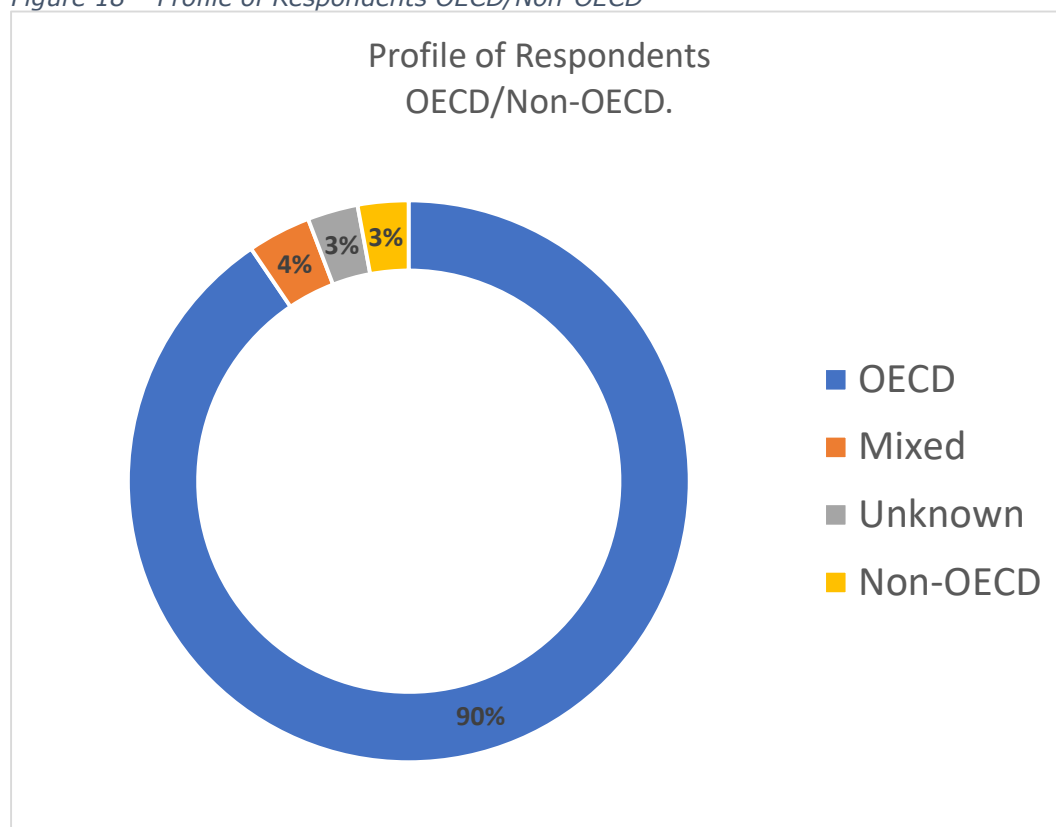
Recapping Section 3.2.2.4; horizontal openness relates to equal participation. In the context of international regulation affecting multiple states, this means all states should be able to vote on regulations (Brosens & Bossuyt, 2020).

Figure 17 – Number of respondents by Country



The graph in Figure 17 shows that the majority of responses received came from the EU (29% excluding the UK), the UK (25%) and the USA (17%). Furthermore, as shown in Figure 18 below, 94% of the responses received were from countries who are members of the OECD (90% sole OECD respondents 4% mixed OECD/Non-OECD respondents).

Figure 18 – Profile of Respondents OECD/Non-OECD



The profile of respondents presented above appears to support criticisms levelled at the BEPS process for being dominated by powerful, Western, OECD Member states (Burgers & Mosquera, 2017; Fung, 2017) and therefore lacking input and throughput legitimacy. As discussed in Section 3.4, concerns persist as to the dominance exerted over the international tax system by the Anglo-American countries and the EU, to the exclusion of developing and emerging nations (Brosens & Bossuyt, 2020). Whilst the OECD attempted to engage stakeholders from outside of its membership by holding regional stakeholder meetings (OECD, 2016), it does not appear that this translated into wider representation in their consultation process. There may have been cultural barriers for the OECD to contend with in this respect, with evidence from the accounting literature suggesting that Anglo-American countries are more likely to engage in open consultations, being more accustomed this type of policy making (Jorissen, et al., 2006). Nevertheless, the lack of representation from non-OECD countries in the publicly available submissions to the OECD, appears to show a process which has issues in terms of its openness to the broadest possible stakeholder group, and therefore input and throughput legitimacy.

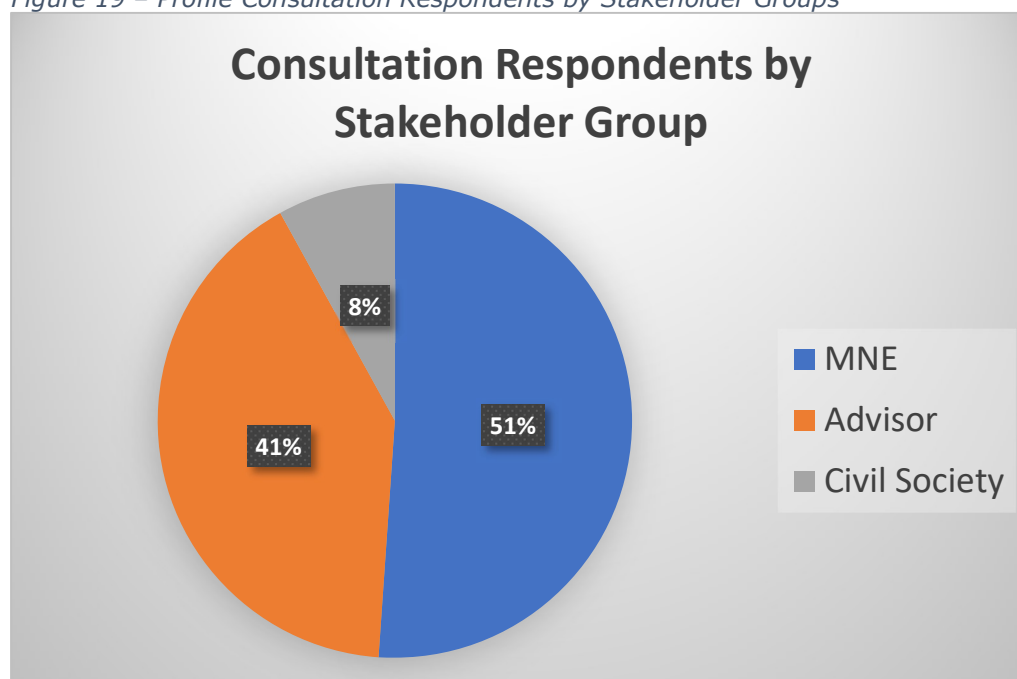
## 5.2.2 Vertical openness

Recapping Section 3.2.2.; vertical openness relates to the potential for non-governmental stakeholders affected by the regulations (taxpayers,

campaign groups, professional advisors, trade bodies etc) to access the policy making process (Scmidt & Wood, 2019).

Figure 19 below presents an overview of the profile of respondents by stakeholder group.

Figure 19 – Profile Consultation Respondents by Stakeholder Groups



This profile initially appears to show a poor degree of vertical representation; with civil society groups under-represented compared to MNE's and Advisors.

The domination advisors and MNE's on the accounting standard setting process is well documented (Bamber & McMeeking, 2016; Durocher, et al., 2007; Kwok & Sharp, 2005) and also features in the emerging literature on BEPS (Christensen, 2018; Elschner, et al., 2018). The heavy representation of MNE's and Advisors in the Action 13 consultation therefore poses questions around whether the Action was unduly influenced by those it intends to regulate (Christensen, 2018) and hence 'captured' (Durocher, et al., 2007). However, looking simply at the profile and comparing percentages does not fully take account of the representation offered by the responses, as it fails to take account of who each letter is *seeking* to represent.

Whilst individual MNE's may seek to represent themselves or in some cases their industry, other responders make wider claims as to who they represent. The Trade Union Council (TUC, coded civil society), for example, submitted their response on behalf of workers, a large and diverse group of stakeholders with interests in corporate taxation which tend towards societal benefit at large, rather than those of corporate managers and investors (TUC, 2014).

Furthermore NGO's, acting collectively and in support of each other submitted on behalf of even wider stakeholder groups. For example, the letter submitted by Christian Aid states that:

*"We work globally in 45 countries for profound change that eradicates the causes of poverty, striving to achieve equality, dignity and freedom for all, regardless of faith or nationality."* (Christian Aid, 2014, p. 2)

The quote from Christian Aid makes explicit claims to represent the interests of civil society at large and goes on to specifically mention those in developing countries, currently disadvantaged by the global economic system (Christian Aid, 2014). These claims are clearly designed to highlight the intent of the letter's writers to represent many stakeholders well beyond the organisation itself. The quote also makes clear the purpose of the submission, to pursue motives related to the public good, rather than organisational goals. Similar claims are made either explicitly or latently by other Civil Society respondents (notably, the BEPS Monitoring Group, Global Financial Integrity, Jubilee Network, Oxfam, Platformme Paradis).

There is some concern in the literature about the extent to which global NGO's (despite their good intentions) genuinely represent those they claim to (Fung, 2017; Mercer, 2002). However, in the present consultation, as can be seen in Section 5.2, most NGO submissions call for greater regulation and champion progressive elements of the legislation, which could be said to promote public interests in the widest sense (Baker, 2005).

These points of nuance are important in highlighting that those potentially opposed to, or at least with different agendas from MNE's and their Advisors are potentially representative of a wider proportion of society. That said, viewing the graph presented in Figure 19 it would be hard to argue that the consultation could not have benefited in terms of openness by hearing from a wider range of stakeholders affected by the regulations.

As far as openness is concerned then it appear that concerns around the legislation being captured, horizontally by developed western interests (Burgers & Mosquera, 2017) and vertically by narrow corporate interests (Christensen, 2018; Elschner, et al., 2018) may indeed be well founded.

However, it may be an oversimplification to judge openness purely on the categorisation of stakeholders as it cannot be assumed that all respondents within a constituency will offer similar views. Whilst levels of homogeneity amongst preparers and their advisors have been observed in lobbying efforts (Durocher, et al., 2007), MNE's in particular may have competing interests when seeking to lobby policy makers and may not always be able to reach a compromise (Barrick & Brown, 2019). Similarly,

Civil Society groups, particularly NGO's, represent disparate interests, and whilst they are often able to coalesce for a common goal (Mikler & Elbra, 2018), it cannot be assumed that their interests will always align.

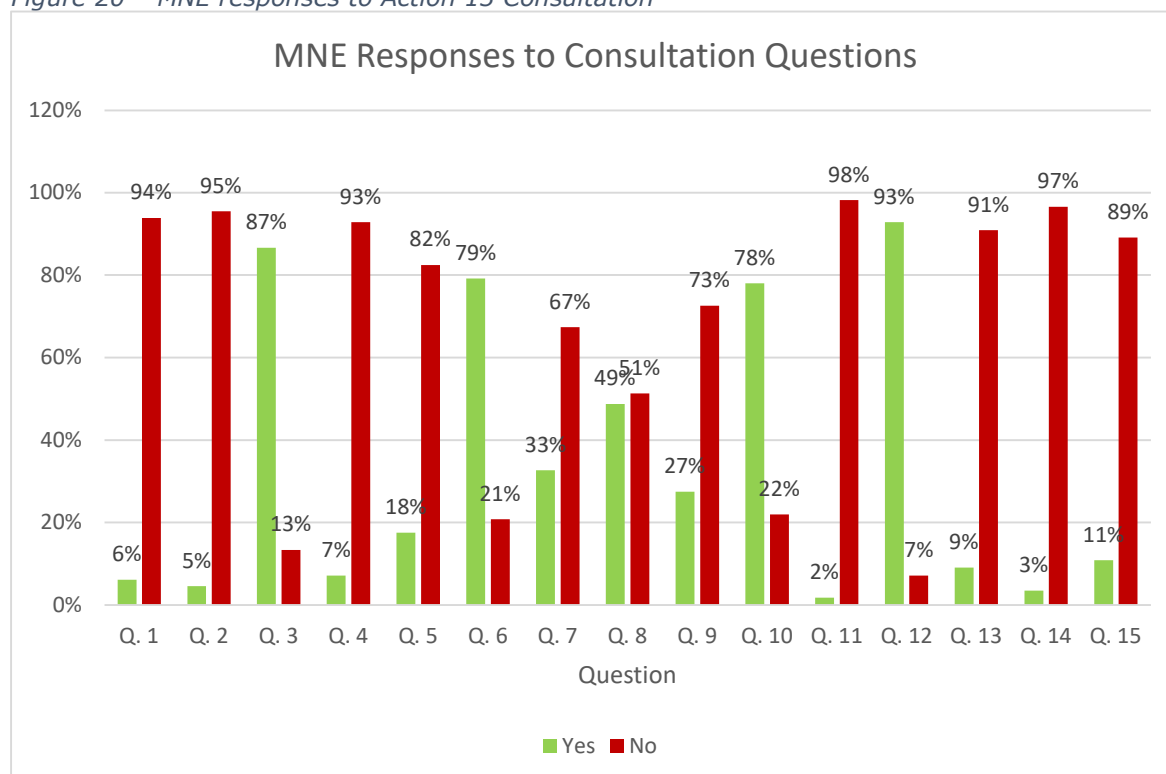
To explore this empirically and evaluate throughput legitimacy, this study analyses 15 questions asked by the OECD in their consultation, these are listed below in Table 14:

*Table 14 - OECD Action 13 Consultation Questions Analysed*

Q1 - Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template (B1).
Q2 - Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction (B3).
Q3 - Should preparation of the Masterfile on a line of business basis be permitted (C1).
Q4 - Should the CbCR report be included as part of the Masterfile (C1)
Q5 - Should Action 13 prescribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis (C1)
Q6 - Should CbCR on a country consolidation basis be permitted (C1)
Q7 - Should the CbCR template allow flexibility for corporate income tax to be reported on either an accruals or a cash paid basis (C1)
Q8 - Should the CbCR template require reporting of withholding tax (C1)
Q9 - Should the CbCR template include aggregate cross border payments between associates (C1)
Q10 - Should the CbCR template require reporting of business activities on a jurisdiction by jurisdiction basis (C1)
Q11 - Should Action 13 include specific guidance on materiality (D3)
Q12 - Should documentation be filed using a common language (D6)
Q13 - Should the Masterfile be filed in each jurisdiction in which the MNE is active (E)
Q14 - Should the CbCR template be filed in each jurisdiction in which the MNE is active (E)
Q15 - Should details of APA's and MAP processes be filed as part of the Masterfile (Annex 1)

The graphs in Figures 20, 22 and 24 show how stakeholders responded to each of the OECD's questions, 1-15 (Red = No; Green = Yes).

Figure 20 – MNE responses to Action 13 Consultation



As can be seen in Figure 20 MNE’s tended to answer the same way e.g. for Q1 94% of MNE’s responded ‘yes’.

Questions are analysed in detail, with statistics applied in Section 5.3, however, Figure 20 gives a good illustration of the high degree of agreement within the MNE constituency. The large majority responses to questions arguably present a unified front in terms of taxpayer opinion. This echoes the findings of Christensen (2018) for the Action 13 consultation questions he analysed and Elschner et al.’s (2018) analysis of Action 7.

It may be that, to an extent, the level of agreement observed in the MNE constituency arose organically, with taxpayers independently expressing their genuine preferences. In the consultation MNE’s tended to argue for less regulation, less stringent disclosure requirements and generally to oppose more progressive aspects of the Action 13 (see 5.3). This conservative stance accords with the established lobbying literature, which highlights multiple examples of MNE’s opposing increased transparency in their corporate disclosures (Christensen, 2018; Crawford, 2019; Kwok & Sharp, 2005).

However, it is also documented that tax professionals from different organisations will coalesce to present a unified front when lobbying policy makers (Mulligan & Oats, 2016). This approach is also well documented in the accounting literature with respect to lobbying standard setters, where



MNE's have been observed to set up so called 'coalition of interest groups' (CIG's) (Durocher, et al., 2007).

Figure 21 below highlights potentials CIG's of MNEs identified from the consultation.

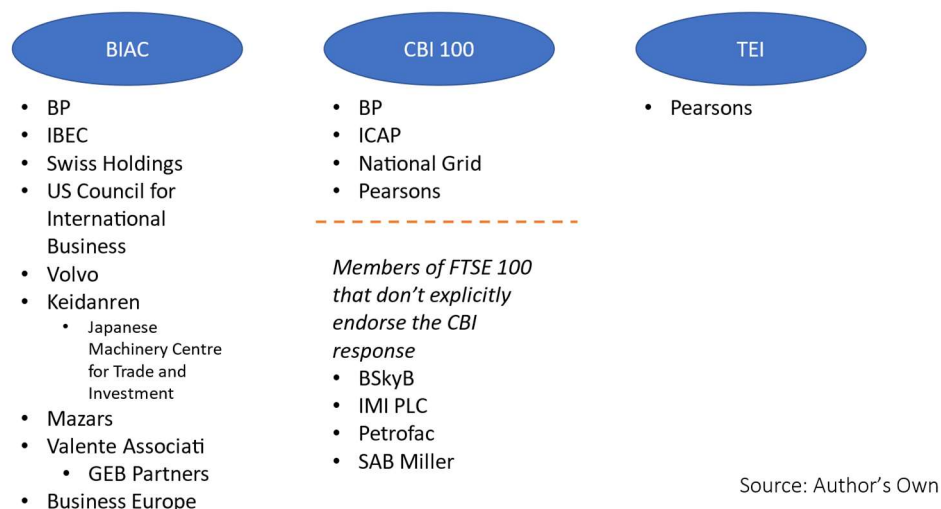
Those grouped under BIAC (the official OECD business lobby) all explicitly endorse the main BIAC submission, and several appended their own individual submissions to the BIAC letter.

The British Chamber of Business and Industry (CBI) submitted a response on behalf of the FTSE 100 companies, several of whom also submitted their own responses. Figure 21 identifies all FTSE 100 companies who responded but splits them by those who explicitly endorse the CBI response and those who do not mention it.

The Tax Executives Institute (TEI) supports members in some 3,000 countries however, the only signatory to the TEI letter who also submitted a response to the consultation was Pearsons.

Figure 21 – MNE Coalition of Interest Groups

### MNE Coalition and Influence Groups (CIG)



These groupings only identify linkages made explicit in the consultation submissions, however they may be representative of wider cooperation between MNE's and, as will be discussed below, their advisors.

Cortese et al. (2010) investigating the formation of IFRS 6<sup>30</sup> found that 'powerful players' backed by networks of allies can be successful in capturing regulation and steering policy makers during consultation processes. This is further echoed by Elschner et al. (2018) who found evidence of successful use of networked lobbying by firms responding to

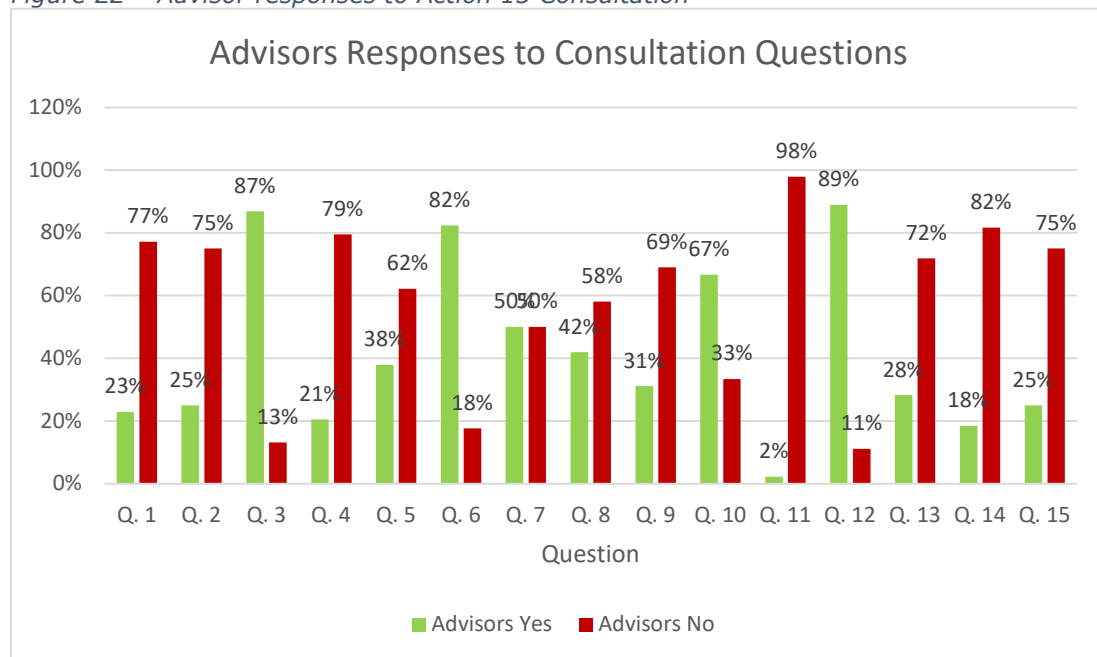
<sup>30</sup> International Financial Reporting Standard 6, Extractive Industries

the OECD on BEPS Action 7. The unified front presented by MNE's may therefore pose a significant legitimacy threat to Action 13 if it enabled MNE's shape the legislation according to their preferences.

However, there is evidence from the accounting literature that MNE's are less successful where they are not supported by other constituencies (Bamber & McMeeking, 2016). It is therefore important to consider the Advisor constituency and whether they acted in support of the MNE's.

Figure 22, shows responses offered by the Advisor constituency:

Figure 22 – Advisor responses to Action 13 Consultation



As can be seen from Figure 22 there was a high (if not overwhelming as in the case of MNE's) degree of agreement in the Advisor constituency. 12 questions received agreement of 67% or above. Question 7, regarding whether tax should be reported on a cash paid or accruals basis in the CbCR report split the cohort and questions 5 & 8 were also less well defined (see 5.3 for full discussion).

Considering coalitions of interest, Figure 23 below shows that three of the Big 4 firms made multiple submissions to the consultation: with Deloitte responding twice, once as a global firm and once as a separate UK firm; EY responded on their own behalf and on behalf of MNE's grouped under the association the 'Global BEPS Working Group'; and PWC submitting a response themselves, one on behalf of the 'Financial Services Working Group (FSWG)' and a further one for the FSWG's subordinate offshoot the 'Capital Markets Tax Committee of Asia' and finally a response for the US Fortune 100 companies.

Figure 23 – Advisors Coalition of Interest Groups

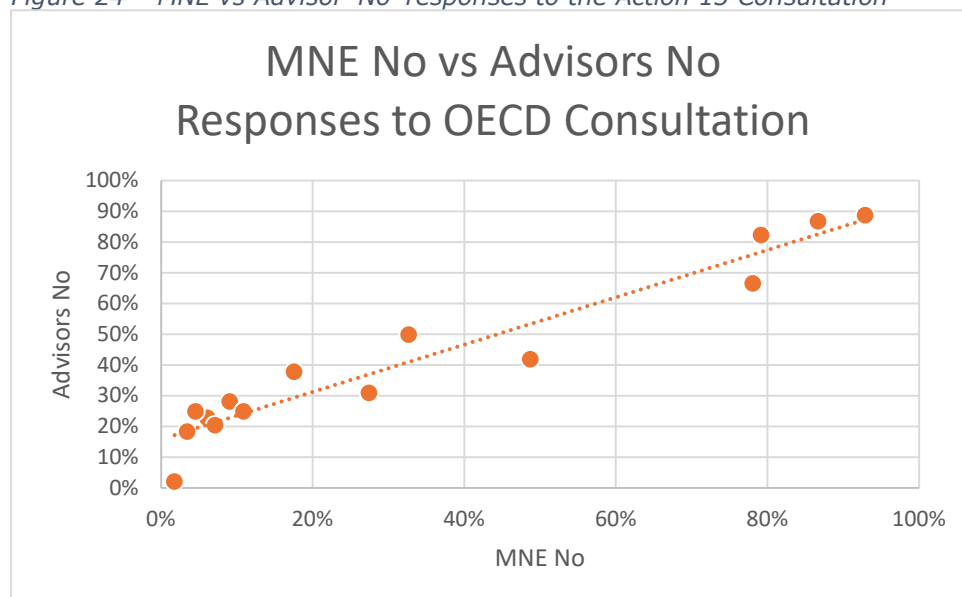
**Advisors Coalition and Influence Groups (CIG)**



Source: Author's Own

What can also be observed when comparing Figures 20 and 22 is that MNE's and Advisors voted in the majority for the same things on the same questions. Figures 24 further illustrate this (Advisor response rates plotted as dots along a line representing MNE responses).

Figure 24 – MNE vs Advisor 'No' responses to the Action 13 Consultation



There is debate in the literature as to whether Advisors will support their clients in lobbying to influence regulation, the so called 'principal agent theory' or lobby in favour of more regulation to increase consulting opportunities 'economic regulation theory' (Jorissen, et al., 2006).

In this instance it appears that Advisors acted in the role of principal agents, supporting MNE's in their lobbying efforts. Again, this confirms the findings of other authors who examined the BEPS consultation process

(Christensen, 2018; Elschner, et al., 2018). Elschner et al. (2018) highlights that advisors were more successful than MNE's in having their voices heard in the Action 7 consultation and notes that the technical expertise and experience gained working for multiple clients gives credibility to Advisors' lobbying efforts. This is echoed in the accounting literature with reference frequently made to the power of the Big 4 accounting firms when it comes to influencing policy outcomes (Bamber & McMeeking, 2016; O'Dwyer, 2022; Sikka, 2010).

Whilst advisors represent a knowledgeable group whose expertise and insights may lend legitimacy to the OECD's policy, this must be balanced against the danger of these firm's pursuing their clients' needs ahead of broader society (O'Dwyer, 2022). There is also the challenge that the OECD recruit from amongst the ranks of professional advisors; Centre for Tax Policy Administration (CTPA) staff for instance tend to be tax experts with some experience in practice<sup>31</sup>. These professionals, regardless of their current role, are likely to have some connection with professional firms either past or present. These factors combine to make this a challenging group for the OECD to manage in terms of legitimacy. Whilst they have the status of 'experts' and the ability to promote the OECD's policy or criticise it from a position of knowledge and status this group also face legitimacy challenges of their own around their involvement in the tax avoidance industry (O'Dwyer, 2022).

Given the unity of MNE's and Advisors, Civil Society, wishing to challenge the corporate lobby appeared to face a challenge in terms of a strong and cohesive block of corporate interest. Figure 25 shows Civil Society responses to the consultation.

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<sup>31</sup> From review of CTPA job vacancies and requirements [May 2021]

Figure 25 – Civil Society responses to Action 13 Consultation

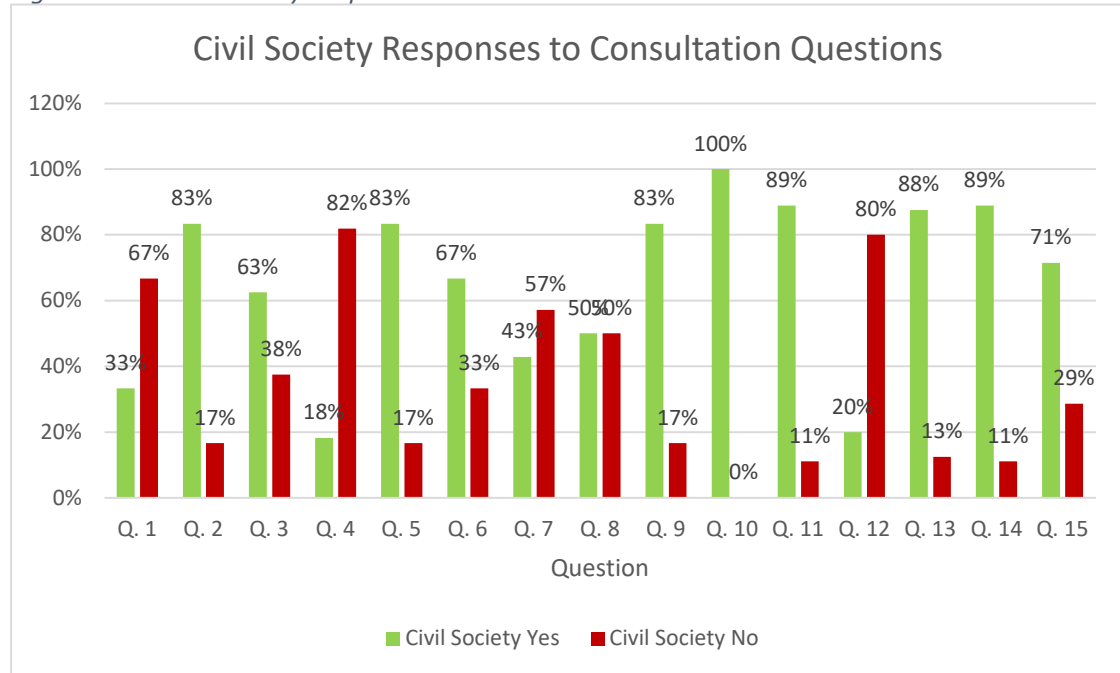
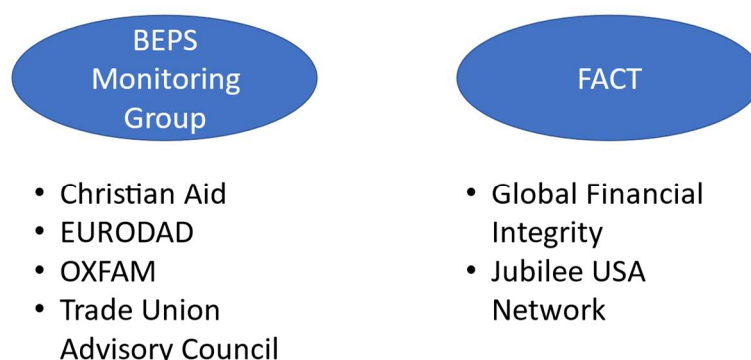


Figure 25 shows that there was a high degree of agreement within the Civil Society Constituency (discussed in greater detail in 5.3).

The civil society constituency was the smallest of the three identified in this thesis and in some ways the most diverse; with academics, NGO’s, trade unions and private individuals all classified as Civil Society. The high degree of agreement within the constituency may therefore be explained by a general motive within this constituency to represent the public good and oppose the corporate lobby in its efforts to scale back more progressive elements of the Action (Mikler & Elbra, 2018). This overarching aim may have individual submissions but also appears to have encouraged Civil Society respondents to collaborate, Figure 26 below shows Civil Society CIG’s:

Figure 26 – Civil Society Coalition of Interest Group

**Civil Society Coalition and Influence Groups (CIG)**



Source: Author's Own

Civil Society may be assumed to be at a disadvantage in technical lobbying arenas due to their limited access to expert knowledge and data (Elschner, et al., 2018). However, in the context of Action 13, as noted by Christensen (2018), civil society (through the BEPS Monitoring Group) had the advantage of drawing on the skills of Richard Murphy a qualified accountant and Professor of Taxation and other similarly qualified members of the Tax Justice Network. This allowed the BEPS Monitoring Group to produce a technically detailed and informed response which was then shared widely with various Civil Society Groups. Each of the organisations grouped under the BEPS Monitoring Group, above, submitted their own response but fully endorsed the letter submitted by the BEPS Monitoring Group. In addition, the Global Financial Integrity (GFI) group drew on the skills of its technically informed staff to draft a response on behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition, who represent over 30 US CSO's; Jubilee USA, a network of faith-based organisations, also submitted individual an response fully endorsing GFI.

It appears therefore that the Civil Society constituency also perceive the benefit of collective lobbying, through CIG's. This may have been to utilise the limited (in comparison to MNE's and Advisors) concentration of technical expertise available to them. It may also have been to demonstrate the weight of numbers behind their cause and argumentation and demonstrate a united front. In either case the impression is of a relatively united and cohesive Civil Society response.

### **5.2.3 Conclusions on openness**

In answer to RQ 1.1: Stakeholders will be represented in equal proportion in the Action 13 consultation process? The findings above present a consultation which was, in terms of volume of responses, dominated by MNE's and Advisors from developed countries and therefore compromised in terms of openness.

This accords with the findings of extant studies on BEPS (Christensen, 2018; Elschner, et al., 2018; Fung, 2017) and suggests a consultation which may have been compromised in terms of throughput legitimacy.

However, openness is only one aspect, and the following sections will go on to discuss how the OECD responded to constituents.

### **5.3 Responsiveness**

This section will comprise the bulk of analysis and main contribution of the PhD towards understanding the throughput legitimacy gained (or not) by the OECD in the Action 13 Consultation. To do this Research Question 2 will be tested:

RQ1.2: Stakeholders will exert equal influence on the final Action 13 standard.

To recap section 3.2.2.4; responsiveness requires policy makers to consider and respond to preferences, concerns and opinions expressed by stakeholders during deliberation process (Bamber & McMeeking, 2016; Schmidt & Wood, 2019). Extant literature suggests that this is not achieved by 'vote counting' or looking for simple majority opinions within the body of consultation responses but rather by policy makers judging the merit of the argumentation expressed for and against their proposals and giving weight to the most compelling advocacy (Giner & Acre, 2012). Were the OECD to take this approach it may prove possible to overcome the lack of openness suggested by the skewed consultation response which, in numbers, is heavily dominated by MNE's and Advisors. However, without a detailed insight into the discussions had by the OECD policy makers it is difficult to surmise the extent to which this was the approach taken in the case of Action 13. However, comparing the views of stakeholders to the final action does give a good idea of whether the OECD listened to certain groups on certain issues more than others (Kwok & Sharp, 2005). This granular approach also offers the chance of examining the types of argumentations (whether economic or conceptual) employed by the various lobbyists. This additional piece of analysis offers further insight into whether the OECD was predisposed towards certain constituencies, as the literature notes that economic argumentation is far more available to MNE's and Advisors than Civil Society (Bamber & McMeeking, 2016).

The following sub-sections analyse the responses to, and argumentation employed by each stakeholder group to the 15 consultation questions set out in Table 14 (5.2.2). Fishers Exact Test and Crammer's V are used to test for statistically significant differences in responses made by different stakeholder groups. In addition, quotations identified during the coding of comment letters are used to illustrate the types of arguments employed by various stakeholders.

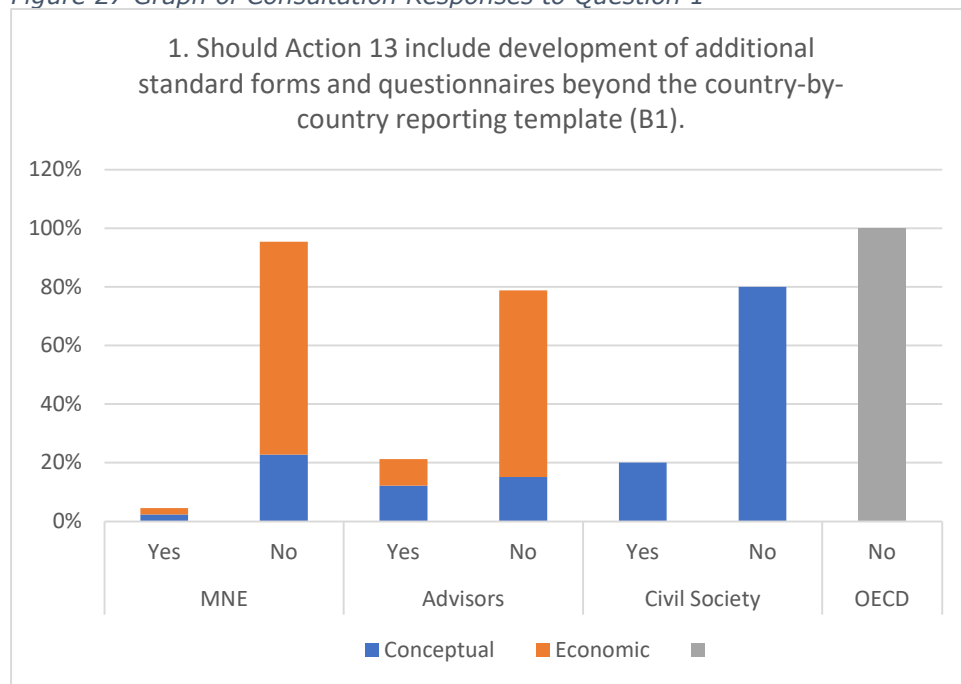
Following the detailed question by question analysis this section summarises the relative successes of each stakeholder group's lobbying efforts with reference to the extant literature. This analysis will cover the relative success of constituents on this consultation and will explore the use of different argumentation strategies by the different stakeholder groups.



### 5.3.1 Question 1: Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting template?

This question asks constituents to comment on the scope of Action 13 and to identify any further data points which may be relevant. The grey bar in this graph and those which follow represents how the OECD decided to write the final Action 13 standard.

Figure 27 Graph of Consultation Responses to Question 1



Fisher's shows a significant difference between groups ( $p=0.027$ , 5% significance level). From the graph, the main difference is generated by significant minorities of Advisors and Civil Society answering 'Yes' compared to only a very few MNE's.

Considering the argumentation employed by stakeholders, Fisher's shows a significant difference ( $p=0.003$ ) and Crammer's V shows a large effect size of 0.386 ( $p=0.003$ ).

From the graph it is possible to see that the statistics refer to MNE's and Advisors making use of primarily economic argumentation vs Civil Society who entirely rely on conceptual argumentation.

Some examples of the different types of arguments are included below:

*"Standard forms and questionnaires often produce standardised answers and could further increase the compliance burden for MNEs without providing meaningful information that is useful either for MNEs or tax administrations."* (Charles River Associates, 2014, p. 1)

This response from a firm of specialist transfer pricing advisors (coded Advisors) is typical of the economic line of argumentation employed by MNEs and Advisors. Namely, that the compliance costs associated with additional disclosures would outweigh their potential benefit and therefore be a disproportionate burden on taxpayers. This line of argumentation speaks to the OECD's own wording in the discussion draft which states that:

*"Taxpayers should not be expected to incur disproportionately high costs and burdens in producing documentation."* (OECD, 2014, p. 7)

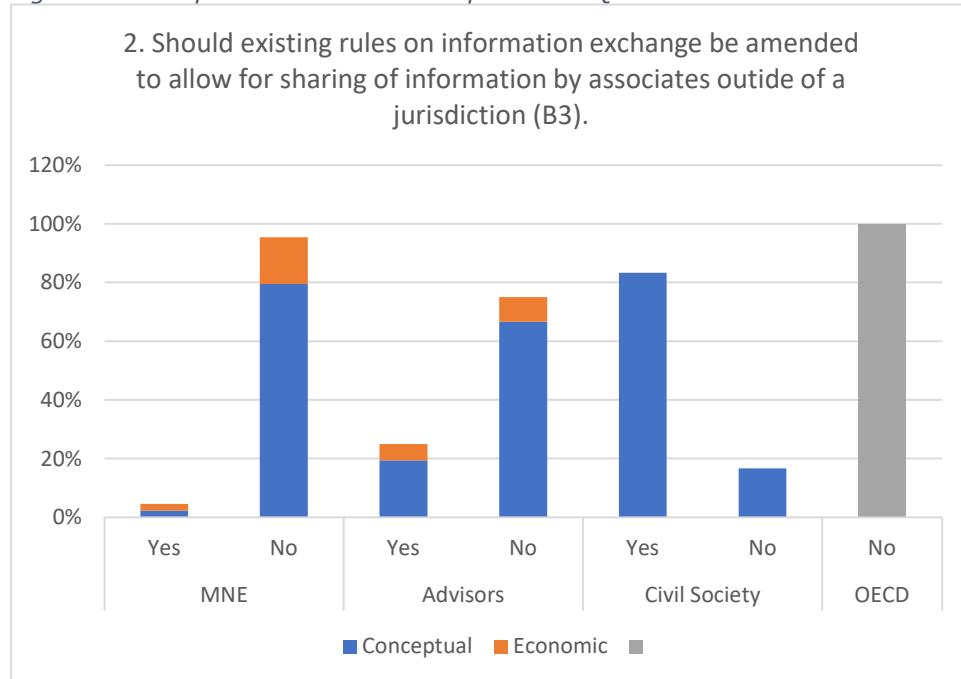
Offering a counter view some Civil Society campaigners made conceptual arguments for data points and forms that they felt should be included, in addition to the OECD's proposals. For example, the Trade Union Advisory Committee to the OECD (TUAC) list several additional pieces of information concerning the location of business activities and key personnel as well as information on any restructuring activities with tax impact (TUAC, 2014).

Overall, however, the relatively few responses supporting additional forms and questionnaires did not present a unified request and were therefore likely outweighed by the majority, who opposed this suggestion. The OECD chose not to introduce any additional forms.

### **5.3.2 Question 2: Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction?**

This question concerns the powers tax authorities have to request information from subsidiaries of MNE's located outside of their direct jurisdiction, when conducting TP audits. Ordinarily this type of information can only be obtained through formal exchange mechanisms set up between tax authorities and the question seeks to assess opinions on relaxing this process.

Figure 28 - Graph of Consultation Responses to Question 2



For question 2 Fisher’s shows a significant difference ( $p < 0.001$ ) and Crammer’s V shows a large effect size of 0.518 ( $p < 0.001$ ). As the graph shows the statistically significant difference arises from division of opinion between Civil Society and the other constituents. Interestingly Advisors were split less definitively than MNE’s, with a significant minority arguing for relaxation of restrictions on cross border information exchange.

Fisher’s ( $p = 0.896$ ) show no statistically significant difference between argumentation used by respondent groups for this question. Cramer’s V shows an insignificant effect size of 0.114 ( $p = 0.724$ ). This question therefore appears to have been argued on conceptual rather than economic grounds.

On this question, the OECD have sided with the majority view expressed by MNE’s and Advisors; in the face of opposition from Civil Society.

Those MNE’s and Advisors who opposed tax authorities being given the power to request information from outside of their jurisdictions, in order to better conduct TP audits, largely cited commercial confidentiality as the reason for their objection. The following quote from Deloitte’s UK firm (coded Advisors) articulates the twofold argument made by several MNE’s and Advisors:

*“A significant concern for businesses is ensuring that commercially sensitive and tax information remains confidential. This concern is two-fold: firstly, that the information is not published by tax authorities in those countries where tax information is routinely made public under domestic legislation; and, secondly that commercially sensitive data or*

*business knowledge (e.g. in relation to valuable intellectual property) is not shared widely within the multinational group, increasing the risk of it being shared with competitors.” (Deloitte UK, 2014, p. 4)*

Concerns around information being made public or reaching competitors appear to be countered by suggestions that taxpayers should control the data in the Masterfile centrally, this being the ask from many advisors and MNE’s. This is a premise challenged by Civil Society (discussed in 5.3.13) but not specifically in answer to this question.

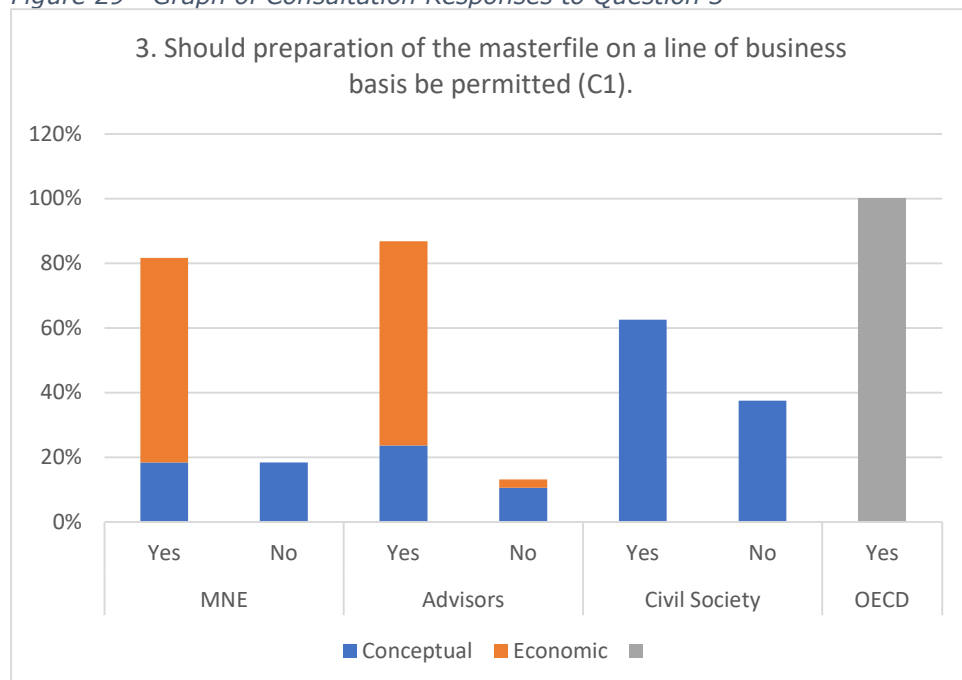
Making information sharing from associates easier is not strongly advocated for by Civil Society. Also, rather than supported, is not strongly opposed by a small number of advisors, who appear to see it as reasonable if tax authority requests are grounded in a genuine need for information.

The lack of a cohesive opposition potentially made this an easier decision for the OECD who have sided with the unified response presented by the majority of MNE’s and Advisors. The OECD chose not to relax information sharing rules.

### 5.3.3 Question 3: Should preparation of the Masterfile on a line of business basis be permitted?

Question 3 concerns the format in which the Masterfile is prepared, specifically, whether MNE’s should be able to elect to split their Masterfile into divisions according to different business functions (lines of business LOB).

Figure 29 - Graph of Consultation Responses to Question 3



Fisher's ( $p=0.195$ ) does not show a statistically significant difference between answers given by respondent groups for this question. Cramer's V shows a small effect size of 0.194, however this not significant ( $p=0.202$ ).

In terms of argumentation Fisher's shows a significant difference ( $p=0.001$ ) and Cramer's V shows a large effect size of 0.385 ( $p=0.001$ ). From the graph it is possible to see that the statistics refer to MNE's and Advisors making use of primarily economic argumentation vs Civil Society who entirely rely on conceptual arguments.

MNE's and Advisors again made economic arguments around the proportionality of disclosure requirements, arguing that flexibility in terms of the format of reports will allow taxpayers to comply without having to significantly modify their reporting systems. These groups also drew on conceptual argumentation, citing the potential for information to be confusing and irrelevant if not prepared according to how MNE's business models are organised:

*"There may be times when the preparation of a master file should be undertaken on a LOB [line of business] basis. A LOB approach may provide more relevant information to review intercompany transactions for large MNEs with complex, multifaceted business lines." (Praxity, 2014, p. 2)*

The quote above from the Praxity Network (a network of law firms; coded Advisors) captures the essence of this argument.

Whilst Civil Society responses were split between supporting and opposing disclosure on a line of business (LOB) basis, those supporting recognised the need to keep regulations relevant. Those opposed note that LOB may afford opportunities for taxpayers to hide information from tax authorities:

*"the CbC reporting system should minimise the opportunities for MNEs to hide information from tax administrations. The entity wide basis should serve this objective better." (Ting, 2014)*

This quote from Anthony Ting, a prominent tax academic, draws on his research into Vodafone's global reporting structure and demonstrates Civil Society scepticism about giving MNE's too much flexibility. Civil Society consistently argue for proscription and standardisation, citing the need for comparability and the possibility of MNE's obfuscating facts if they are allowed to adapt regulations.

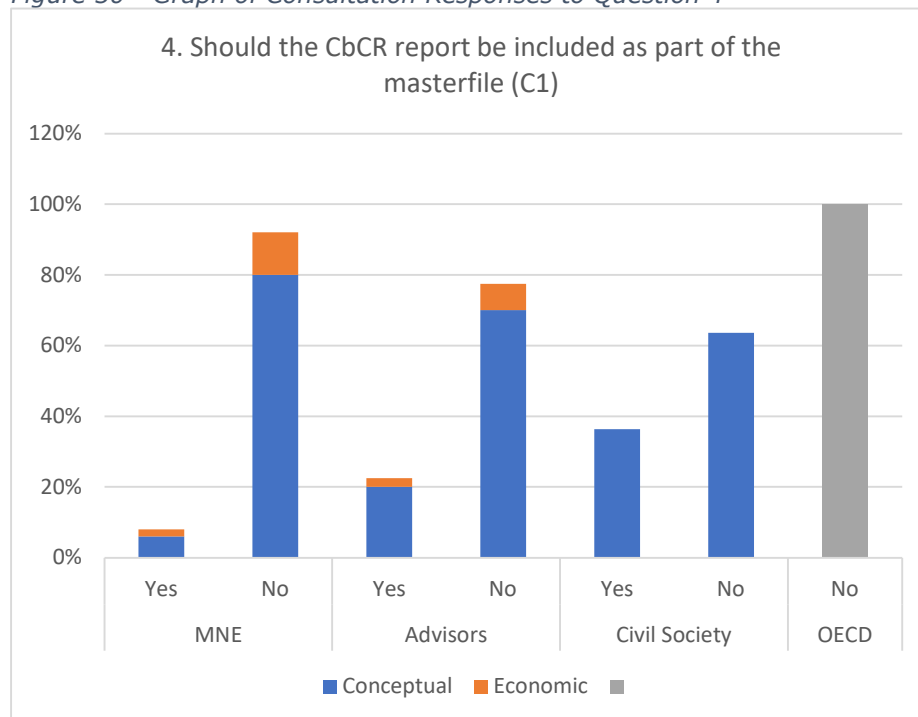
Responses to this question illustrate the ability of MNEs and Advisors to

draw on both economic and conceptual argumentation to make their case. Again, the OECD have followed the majority consensus expressed by MNE's and Advisors. The OECD chose to allow LOB reporting.

### 5.3.4 Question 4: Should the CbCR report be included as part of the Masterfile?

Question 4 also concerns format and whether the various Action 13 documents should be distinct from one another.

Figure 30 - Graph of Consultation Responses to Question 4



Fisher's shows a significant difference between groups for this question ( $p=0.01$ ) and Cramer's V shows a medium effect size of 0.272 ( $p=0.021$ , 5% significance level).

As can be seen from the graph, the difference relates to the higher proportion of No votes from the MNE constituency, when compared to Advisors and Civil Society.

Interestingly, the response from Advisors for this question is more closely aligned to Civil Society than MNE's.

Fisher's ( $p=0.541$ ) does not show a statistically significant difference between argumentation used by respondent groups for this question, Cramer's V shows an insignificant effect size of 0.136 ( $p=0.434$ ).

As can be seen from the graph, conceptual argumentation was favoured by all three stakeholder groups. Indeed, there was broad agreement across constituencies that the CbCR report had wider application than the Masterfile, for example:

*"the CbCR should be viewed as a tool to assist in a high-level risk assessment by providing information about the geographical spread of income and tax of a multinational. The master file on the other hand, provides a "blueprint" of the multinational's organization, businesses, income and product flows."* (BASF, 2014, p. 2)

The response above from BASF (a chemical company headquartered in Germany, coded MNE), is typical of MNE/Advisor responses in articulating that CbCR should be used as a high level risk assessment tool only and should be de-coupled from detailed transfer pricing discussions, a point taken further by some:

*"the [CbCR] template should be used only for risk assessment purposes. Once a determination is made to focus attention in a particular area, tax authorities should set aside the template in favour of reliance on the more detailed information contained in the transfer pricing documentation"* (Global BEPS Working Group, 2014, p. 3)

The Global BEPS Working Group (coded MNE), a group of MNE's responding together to the consultation make the point that the CbCR is in their opinion not suited to determining the appropriateness of transfer prices. This is a common theme in MNE and Advisor responses, with some noting that too much reliance on CbCR could undermine the Arm's Length Principle (ALP). This was an area which accords with Christensen's (2018) observation that MNE's and Advisors were at pains to diminish the perceived value of CbCR, framing it as a high level, first line tool.

Civil Society responses struck a slightly different tone, emphasising the wider application rather than the limitations of CbCR:

*"As we have described we see the CbC report as having potential uses beyond transfer pricing risk assessment, and that it should be public. As such it clearly should be a stand-alone document from the Masterfile."* (Christian Aid, 2014, p. 3)

Christian Aid's response refers to public disclosure of CbCR, a key advocacy point for Civil Society (Murphy, 2016) and accords with other Civil Society responses in seeing the positive potential for CbCR, a theme built on by academic Anthony Ting (coded Civil Society):

*"Besides being an effective anti-BEPS weapon, CbC reporting is possibly*

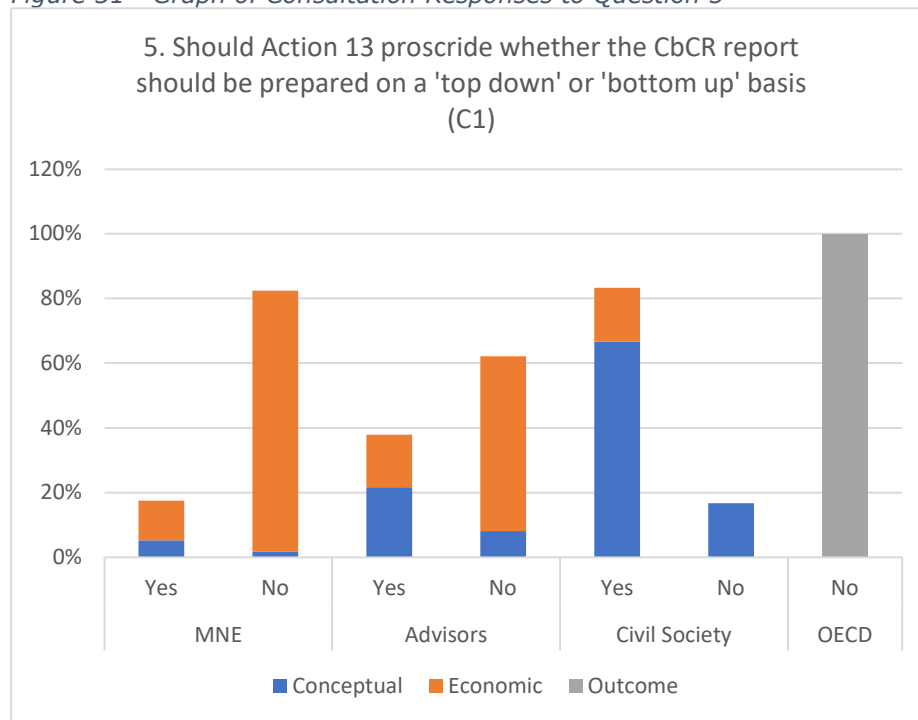
*the most feasible action that OECD can achieve in the short term. To avoid the risk of being entangled with other issues ... the CbC report should be a separate document from the master file.” (Ting, 2014, p. 4)*

The OECD have proscribed that the CbCR report should be filed separately from the Masterfile, in line with the majority view expressed by each of the three constituencies.

### 5.3.5 Question 5: Should Action 13 prescribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis?

This question concerns the information to be used in preparing CbCR disclosures: a top-down approach would require MNE’s to start with their highest consolidated accounts and allocate out revenue, profit etc on a country-by-country basis; a bottom-up approach would require MNE’s to start with individual entity accounts and build up total country-by-country disclosures through aggregation.

Figure 31 - Graph of Consultation Responses to Question 5



Fisher’s shows a significant difference ( $p=0.001$ ) and Crammer’s V shows a large effect size of 0.369 ( $p=0.001$ ). The difference detected refers primarily to Civil Society arguing for a proscription in the method for preparing CbCR vs MNE’s request for flexibility.



The majority of MNE's and advisors argued against the OECD setting one method as the proscribed approach, instead arguing that each MNE should be free to use the approach they regard as most suitable.

On the other hand the Civil Society responses to this question favoured the top-down approach and argued that this should be the only accepted basis of preparation.

Considering the argumentation employed by stakeholders; Fisher's shows a significant difference ( $p < 0.001$ ) and Cramer's V shows a large effect size of 0.482 ( $p < 0.001$ ). The difference identified relates to the majority of MNE's and Advisors favouring economic argumentation vs Civil Society who employed primarily conceptual arguments. Interestingly, Civil Society have also made some (rare) economic points, these appear to anticipate MNE's arguing for flexibility to minimise compliance costs and directly challenge (anticipated) claims around the cost of complying with more rigid requirements.

As discussed above civil society argued for a top-down approach to be the standard requirement for CbCR, for example the BEPS Monitoring Group were particularly focussed on this point, devoting almost an entire page of their submission to answering this question. In summary their argumentation covers three points: firstly bottom-up reporting does not supply new data to local tax authorities, as it merely aggregates the statutory accounting numbers already available to them; secondly, BEPS occurs at the group level and so local statutory accounts already include (potentially inappropriate) TP adjustments; thirdly, the aggregation process required by bottom-up reporting would potentially afford further opportunities to obfuscate data and may differ from consolidated figures reported under IFRS, creating greater confusion (BEPS Monitoring Group, 2014).

MNE's and Advisors employed an economic line of argumentation, predominantly focussed on compliance cost, this is summed up concisely in comments made by the Association of British Insurers ('ABI', coded MNE):

*"The ABI's membership are organised in different ways and use different systems to report financial information both internally and externally. We believe it is essential that there should be optionality over whether "bottom-up" or "top-down" approach is used in compiling the template. Providing this flexibility will still give tax authorities what is required to carry out a high level risk assessment without putting a disproportionate compliance burden on businesses." (ABI, 2014, p. 5)*

The argument for flexibility to enable companies to comply with minimal changes to their existing information systems is one made by the majority of MNE's with some submissions, such as the Chamber of British Industry (coded MNE) going as far as estimating costs associated with the additional requirements

*“In the absence of optionality ... the costs of amending existing systems or building new ones will vary by entity, however initial estimates range between £2 million to £10 million, in addition to ongoing costs.” (CBI, 2014, p. 4)*

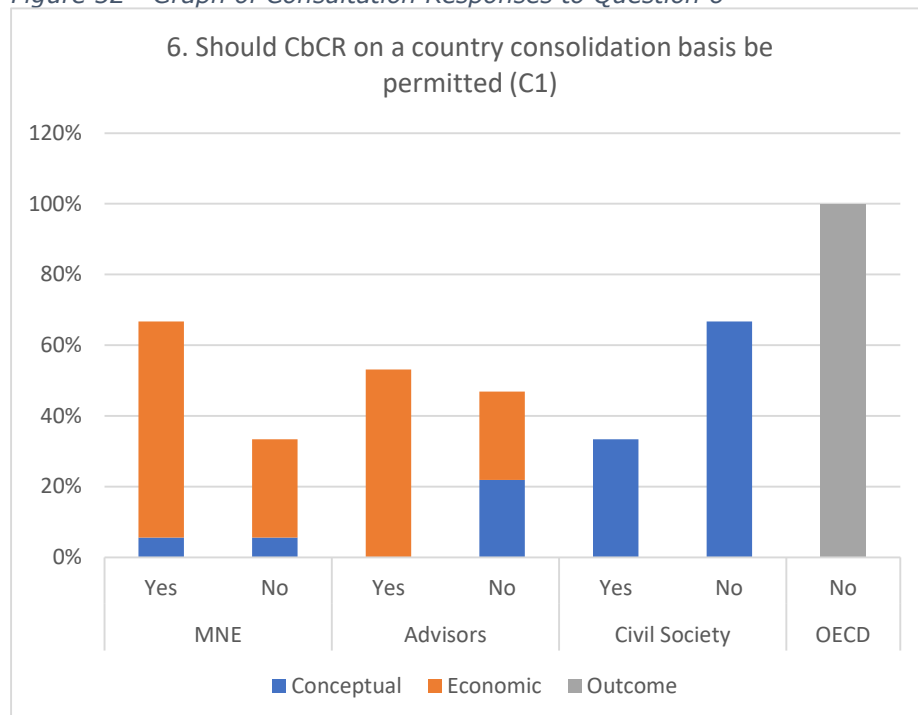
It appears that the OECD went with the majority and were unconvinced by Civil Society arguments about the compromised usability of bottom-up prepared CbCR, or viewed this argument as less compelling than the economic argument put forward by MNE’s and Advisors.

Again, this was a question where MNE’s and Advisors appear to have won by presenting a unified front and articulating an aligned message, which may have been helped further by referring back to the key commitment of Action 13 to keep compliance burdens ‘proportionate’ (OECD, 2014).

### 5.3.6 Question 6: Should CbCR on a country consolidation basis be permitted?

This question concerns whether, for the purposes of CbCR, MNE’s should prepare individual country consolidations for each jurisdiction in which they are active or whether they should report the results of each legal entity in each country.

Figure 32 - Graph of Consultation Responses to Question 6



Fisher’s ( $p=0.636$ ) does not show a statistically significant difference between answers given by respondent groups for this question. Cramer’s V shows a small effect size of 0.102, however this is not significant ( $p=0.636$ ).

Considering the argumentation employed by stakeholders; Fisher's shows a significant difference ( $p=0.002$ ) and Crammer's V shows a large effect size of 0.406 ( $p=0.001$ ). The difference identified relates to the majority of MNE's and Advisors favouring economic argumentation vs Civil Society who employed conceptual arguments.

The lines of argumentation used by stakeholders in responding to this question were similar to the responses for top-down vs bottom-up: MNE's and advisors stressed the need for flexibility for reporting entities to report in the way which best worked with their current accounting systems, in order to manage compliance burdens; Civil Society stressed the need for clarity and consistency and the importance of limiting opportunities for MNE's to obfuscate data.

The OECD were seemingly unconvinced by arguments in favour of country consolidation. It could be because of the very mixed response received from respondents however, it is important to view this question in the context of the one which preceded it. Having agreed to offer flexibility with respect to top-down vs bottom-up the OECD may have felt the need to limit further optionality in the reporting. This potentially disregards calls made by some in the MNE and Advisor communities for flexibility in favour of greater clarity and consistency, which aligns with the asks of Civil Society.

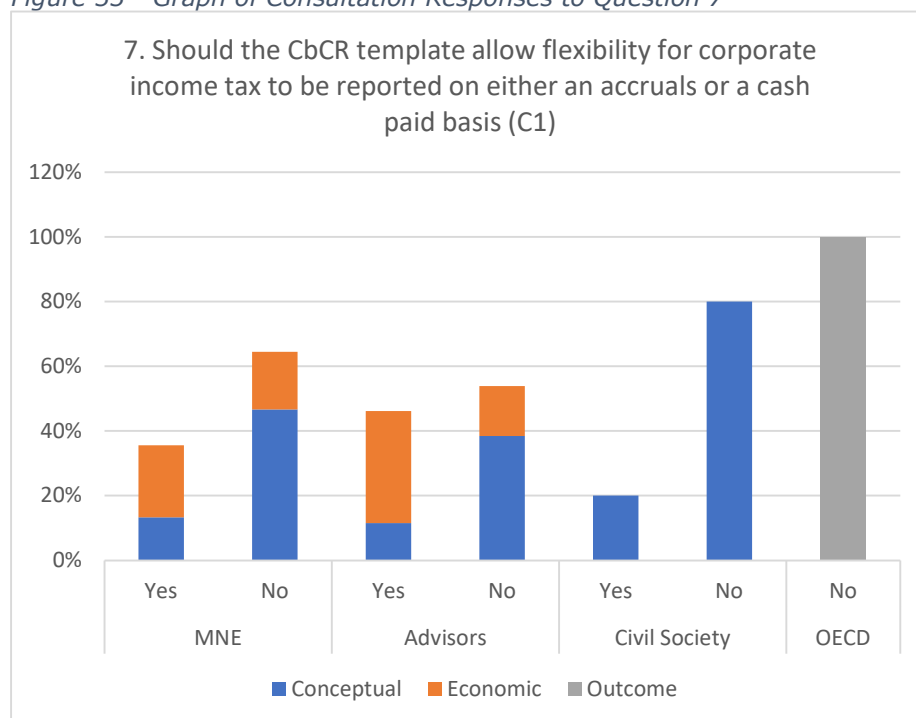
### **5.3.7 Question 7: Should the CbCR template allow flexibility for corporate income tax to be reported on either an accruals or a cash paid basis?**

This question concerns the basis on which tax figures are reported and determines whether CbCR reports will align with MNE's Annual Accounts, which (under the most widely used accounting standards) require the accruals basis to be used in reporting taxes<sup>32</sup>.

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<sup>32</sup> IFRS, IAS 12; US GAAP, ASC 740

Figure 33 - Graph of Consultation Responses to Question 7



Fisher's ( $p=0.362$ ) shows no statistically significant difference between answers given by respondent groups for this question. Cramer's V shows a small effect size of 0.150, however this not significant ( $p=0.412$ ).

As can be seen from the graph, opinion on this question was divided, even within stakeholder groups. The question itself concerns whether MNE's should report the taxation they contribute to each country on the accruals basis e.g. as it is reported in the income statement of the accounts or on a cash paid basis.

Those who answered 'yes' to this question were lobbying for MNE's to be able to choose whether to report on either the cash or accruals basis. Of those voting 'no', Civil Society advocated for both accruals and cash tax paid to be reported and the responses of MNE's and Advisors who voted 'no' are summarised in Table 2 below.

Table 15 – Summary of Cash vs Accrual Preferences

	Cash	Accruals	Total
<b>MNE</b>	17	21	38
	45%	55%	
<b>Advisor</b>	9	7	16
	56%	44%	

The OECD mandated that MNE's should disclose both the current tax accrual and cash taxes paid as part of the CbCR. In this they sided with Civil Society.

Considering the argumentation used, Fisher's ( $p=0.072$ ) shows no statistically significant difference between argumentation used by respondent groups Cramer's V shows a small effect size of 0.182 ( $p=0.057$ , 10% significance level).

BIAC (the official business lobby to the OECD) state in their submission that:

*"Although BIAC supports the inclusion of a tax number on a CbC basis, our members have not reached a consensus position on the basis on which this should be included."* (BIAC, 2014, p. 12)

This comment is telling of the argumentation put forward in responses to this question by all stakeholder groups. Several MNE's and Advisors made economic arguments concerning the ease of accessing data, however, there was no consensus over whether cash or accruals data was easier to source. Consequently, firms making these arguments tended to ask for flexibility, in how MNE's report albeit tempered with the stipulation that MNE's should stick consistently to one method once elected.

Others made conceptual arguments concerning the usefulness of the data. Those arguing for the accrual's basis pointed out that it provides better matching with other data points e.g. revenue and profit; those opting for cash argued that the accruals basis may use accounting concepts like deferred tax and fail to present the true economic case.

One Civil Society response which offered a counter to the arguments for flexibility was that of the BEPS Monitoring Group:

*"The choice then offered between a number for corporation tax paid or due is unnecessary. Every single multinational corporation that will be subject to country-by-country reporting knows both tax paid and due by jurisdiction by country each year... For that reason we consider that the country-by-country report for each jurisdiction should provide both of these numbers, as well as a complete reconciliation."* (BEPS Monitoring Group, 2014, p. 7)

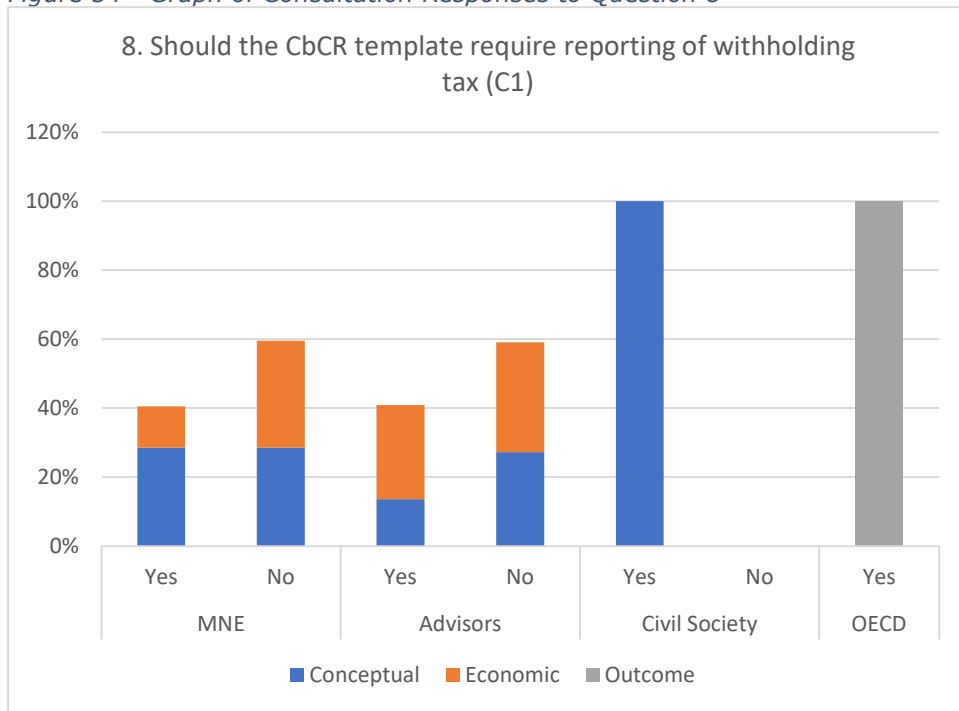
It appears that this may have had some resonance with the OECD albeit, no reconciliation was mandated in the standard.

It would have been impossible for the OECD to mandate one method of disclosure to please all stakeholders on this question. However, it is notable that instead of allowing flexibility they appear to have taken on board Civil Society arguments and mandated comprehensive disclosure.

### 5.3.8 Question 8: Should the CbCR template require reporting of Withholding tax?

This question concerns whether taxes withheld at source should be reported in the CbCR template. Withholding tax (WHT) is (in this context) a policy instrument used to ensure tax is paid on cross border payments made by MNE's (European Commission, 2023). For example, when paying interest on a loan to sister company in another jurisdiction a company may be required to withhold and remit to its home tax authority a percentage of the interest as corporate income tax. Double taxation relief (DTR) normally ensures that income (in the example above the interest payment) is not taxed twice, however there may be a delay in claiming DTR and so WHT can be an economic cost for businesses (European Commission, 2023).

Figure 34 - Graph of Consultation Responses to Question 8



Fisher's ( $p=0.05$ ) does not show a statistically significant difference between answers given by respondent groups for this question. Cramer's V shows no significant effect size (0.047;  $p=0.054$ ).

The graph demonstrates that like the previous question, this question split constituents in the MNE and Advisor groups, whilst eliciting a unanimous response from Civil Society.

Fisher's ( $p=0.072$ ) show no statistically significant difference between argumentation used by respondent groups Cramer's V shows a small effect size of 0.182 ( $p=0.057$ ).

In line with answers to Question 7, similar arguments around the cost of compliance and clarity of data were advanced on either side with respect to the inclusion of WHT. However, a number of companies also made the point that they pay significant amounts of WHT and would want to disclose this, to demonstrate their contributions through taxation, for example:

*"If withholding taxes are not included, there will be a structural error in the tax reporting showing too low level of taxation in some countries (especially in traditional source countries)." (Confederation of Swedish Enterprises, 2014, p. 6)*

Civil Society also showed support for inclusion:

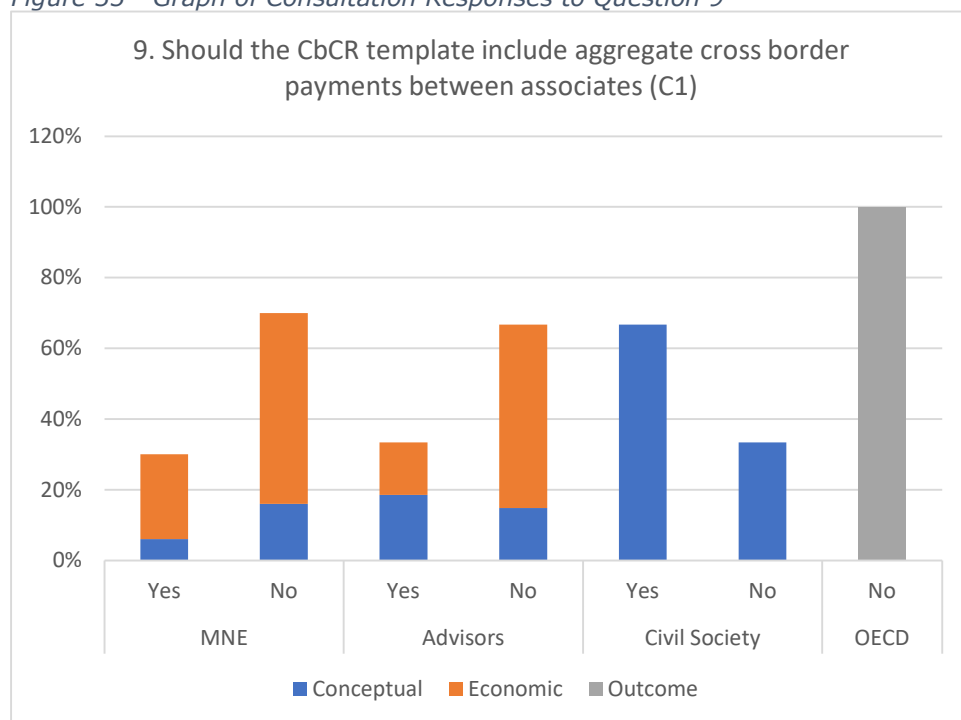
*"While withholding taxes paid will not significantly impact risk assessment on purely transfer pricing matters, it will be important for the broader base erosion and profit shifting concerns of tax administrations." (BEPS Monitoring Group, 2014, p. 7)*

The consensus on this question was far from clear, however, despite a majority of the MNE and Advisor communities being in favour of omitting WHT, the OECD has opted for its inclusion. This may be in response to Civil Society arguments or may show a tendency towards more transparency; in the absence of concerted lobbying to oppose it. In either case the effect is for fuller disclosure requirements.

### **5.3.9 Question 9: Should the CbCR template include aggregate cross border payments between associates?**

This question concerns whether intra-group payments should be separately reported in the CbCR report.

Figure 35 - Graph of Consultation Responses to Question 9



For Question 9, Fisher’s shows a significant difference ( $p=0.009$ ) and Crammer’s V shows a medium effect size of 0.279 ( $p=0.009$ ). The graph shows that MNE’s and Advisors answered in similar proportions to this question, with the majority in both constituencies opposed to more disclosure. Civil society on the other hand returned a majority in favour of disclosing these payments, accounting for the statistically significant difference observed.

Considering the argumentation employed, Fisher’s shows a significant difference ( $p=0.001$ ) and Crammer’s V shows a large effect size of 0.428 ( $p=0.001$ ). The difference identified relates to the majority of MNE’s and Advisors favouring economic argumentation vs Civil Society who employed solely conceptual arguments.

Some in the MNE/Advisor community recognised that certain intra-group payments considered high risk for transfer pricing such as royalties, interest and service fees should be reported to enable risk assessment. However, these responses tended to support the inclusion of these payments in local transfer pricing documentation or the Masterfile rather than the CbCR report. Reasons to limit the disclosure included the assertion that intra-group transactions reported between two jurisdictions would be of limited interest to tax authorities in any other jurisdictions but may be onerous for MNE’s to prepare and may create extra burdens for tax authorities in terms of reviewing data.

Others expressed concerns over how the data would be used by tax authorities:



*“if detail on intragroup transactions is to be provided, this needs to be on a risk assessed basis; we are concerned that some authorities may treat such data as an automatic trigger for an enquiry, irrespective of whether the transactions are between two countries with ‘normal’ tax rates or otherwise.”* (Chartered Institute of Taxation, 2014, p. 7)

The Chartered institute of Taxation (coded Advisors) were expressing their concern that e.g. royalties being paid to a low tax jurisdiction or tax haven may trigger speculative enquiries or audits from certain tax authorities. This was a concern shared by some other MNE’s and Advisors, who were keen to ensure that data disclosed under Action did not open the door for groundless questions from tax authorities.

The main concern expressed by MNE’s and their advisors was, however, the extra compliance burden that reporting these payments would impose.

Civil society anticipated and questioned the legitimacy of arguments centred on the compliance burden resulting from these additional disclosures:

*“MNEs must already maintain records on their intra-company transactions for their own accounting purposes, there would therefore not seem to be a significant burden on requiring reporting of an aggregate of the their intra-company transactions”* (Christian Aid, 2014, p. 4)

Civil society responses also made it clear that they consider reporting of intra-group transactions across borders as a key part of CbCR:

*“Country-by-country reporting has always required that all revenues and costs be stated in two parts; those to and from third parties and those to and from group entities.”* (BEPS Monitoring Group, 2014, p. 7)

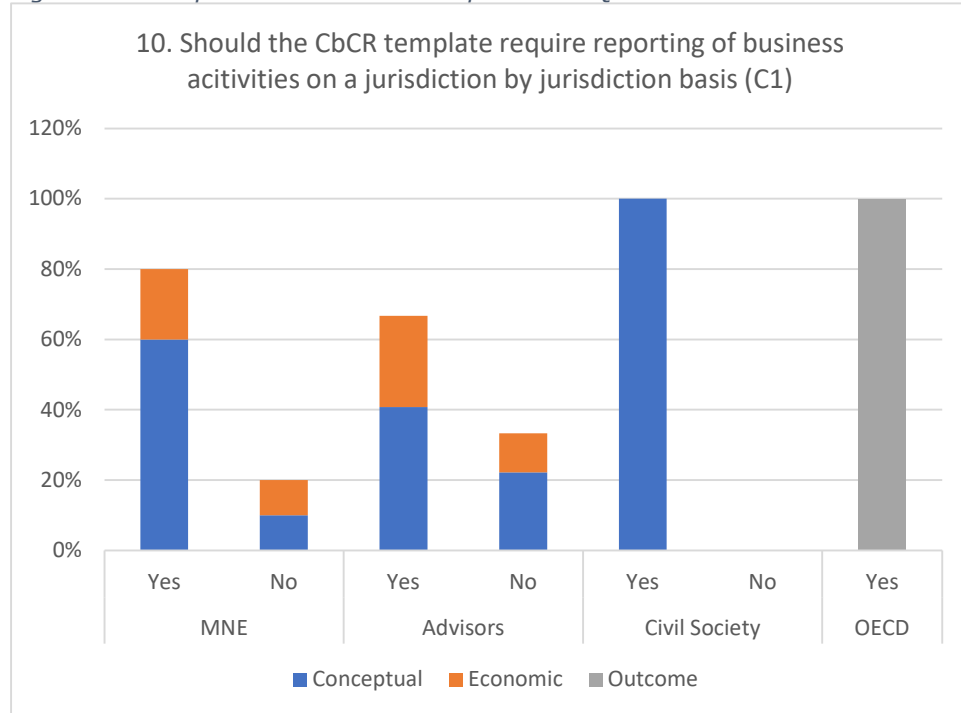
This view is presumably predicated on the perceived need for tax authorities to have visibility over global flows within and out with the business in order to perform a meaningful risk assessment.

The OECD appear to have sided with the majority view expressed by MNE’s and Advisors on this question. Cross border transactions between group companies come within the scope of the Action 13 documentation at large via the Masterfile and Local file. However, tax authorities will generally only be able to access detailed transaction information relating to companies which are either registered or have a reportable taxable presence in their jurisdiction. This may limit their visibility of MNE’s overall value chains.

### 5.3.10 Question 10: Should the CbCR template require reporting of business activities on a jurisdiction by jurisdiction basis?

This question asks whether the CbCR report should include as a data point the business activities undertaken by entities in each jurisdiction.

Figure 36 - Graph of Consultation Responses to Question 10



Fisher's ( $p=0.116$ ) does not show a statistically significant difference between answers by respondent groups for this question. Cramer's V shows a medium effect size of 0.234, however this is insignificant ( $p=0.125$ ).

Overall, there was clear majority in favour these disclosures despite significant minorities opposed in both the MNE and Advisor constituency.

Fisher's ( $p=0.149$ ) does not show a statistically significant difference between argumentation used by respondent groups for this question and Cramer's V shows a medium effect size of 0.234, however this is insignificant ( $p=0.149$ ).

Arguments in favour of disclosing business activities by MNE's, Advisors and Civil Society were similarly centred on improving understanding of the business. This was seen as beneficial from the point of view of allowing more effective risk assessment, which would enable tax authorities to target aggressive practice whilst leaving compliant businesses alone.

Some MNE's argued against providing this information, citing the compliance burden as disproportionate, for example:

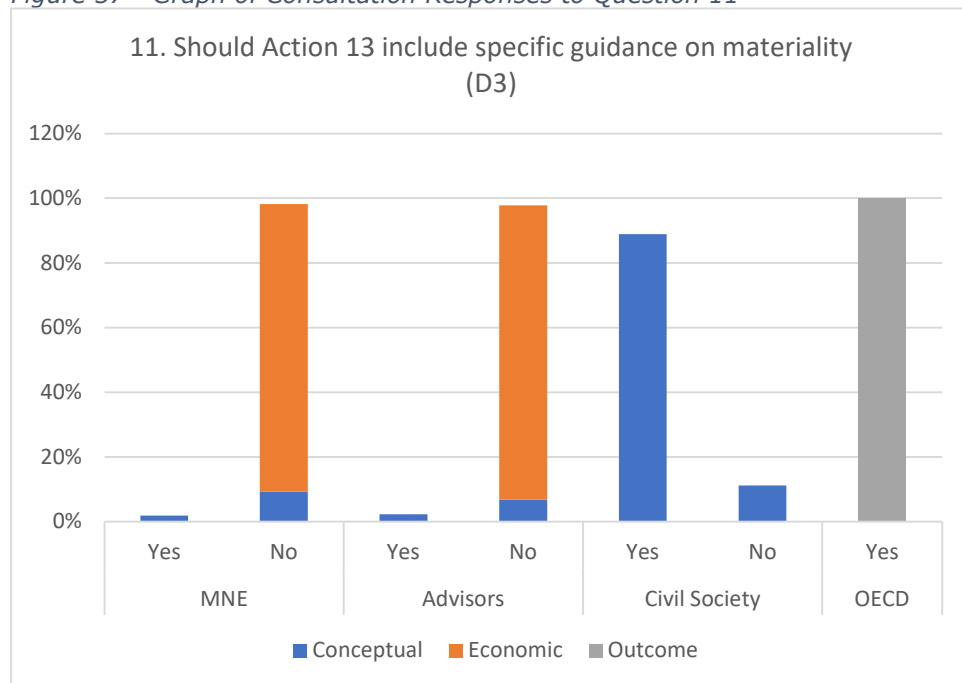
“Providing such information at entity level would be onerous, as the information would have to be extracted manually from accounts, and it would not seem to enhance the understanding of the operations as a whole.” (Insurance Europe, 2014, p. 5)

However, the majority of MNE’s and Advisors were happy to make this disclosure, possibly viewing it as in their interest to give this relatively uncontroversial information to head off spurious enquiries. There was, however, a concerted opinion amongst MNE’s and Advisors that the OECD could reduce the compliance burden associated with this disclosure by providing codes for business activities which MNE’s could select from. The OECD appear to have agreed with this line of argumentation and the final standard includes a list of recognised business activities which MNE’s can tick, with an ‘other’ box for any activities not covered. This compromise does not appear to diminish the asks of Civil Society.

### 5.3.11 Question 11: Should Action 13 include specific guidance on materiality?

This question seeks to assess where the power to set materiality thresholds should lie with the MNE’s reporting or tax authorities requesting documentation.

Figure 37 - Graph of Consultation Responses to Question 11



Fisher’s shows a significant difference ( $p < 0.001$ ) between groups and Crammer’s V shows a large effect size of 0.829 ( $p < 0.001$ ).

The statistically significant differences arise because of the Civil Society constituency favouring a proscribed level of materiality vs MNE’s and

Advisors, who argued for flexibility in setting their own materiality thresholds.

Considering the argumentation employed Fisher's shows a significant difference ( $p < 0.001$ ) and Crammer's V shows a large effect size of 0.653 ( $p < 0.001$ ). As can be seen from the graph, the difference identified relates to the majority of MNE's and Advisors favouring economic argumentation vs Civil Society who employed only conceptual arguments.

In general advisors and MNE's were overwhelmingly in favour of a materiality concept being introduced for all the documentation under Action 13, as articulated by the Canadian Life and Health Insurance Association (CLHIA, coded Advisors):

*"Given the amount of information that is requested in the current draft on TP documentation and CbCR reporting, it is critical to provide materiality thresholds in order to ensure effective risk assessment and to reduce the compliance burden on businesses."* (CLHIA, 2014, p. 5)

Argumentation put forward in favour of materiality highlighted the compliance burden associated with preparing documentation and like CLHIA several submissions also highlighted the danger of tax authorities being overloaded with information.

The consultation asks whether jurisdictions should be allowed to set materiality thresholds as opposed to MNE's being able to set their own thresholds. In answer to this question, MNE's and advisors argued for consistent but flexible rules, many did not want different levels of materiality in different jurisdictions, which they viewed as potentially onerous for compliance.

*"As a general rule taxpayers should not have to provide transfer pricing documentation disproportionate to the nature, scope and complexity of their intra-group transactions. It is difficult to provide a suggestion for an across-the-board materiality threshold, but Lloyd's welcomes the OECD's recognition that guidance on the point is important."* (Lloyds, 2014, p. 6)

In terms of flexibility, specific asks included; the exclusion of small groups, the option to apply internal risk assessments within reporting entities and exclude countries viewed as 'low risk'.

Civil Society on the other hand opposed the inclusion of materiality thresholds, as articulated by the Financial Accountability and Corporate Transparency Coalition (FACT):

*"Permitting materiality thresholds will undermine the objective of developing a true picture of corporate activities, and prevent accurate*

*reconciliation when necessary. As a result, we oppose the introduction of materiality thresholds.” (FACT, 2014, p. 5)*

However, Civil Society appear to have accepted that Action 13 will contain a materiality provision and so have tried to influence the operation of the concept. Civil Society arguments seek to limit MNE’s ability to obfuscate the rules and avoid potentially illuminating disclosures and were generally in favour of greater specificity and proscription. This is articulated by a federation of French NGO’s opposing the use of tax havens, who submitted under the collective name Plateforme Paradis Fiscaux et Judiciaries<sup>33</sup> (‘Plateforme Paradise’):

*“We are not in favour of materiality thresholds. Nevertheless, if this was the option chosen, it would be essential to define criteria taking into consideration materiality issues for both companies and countries. As ... companies and countries might have very different unity of measurement according to their respective sizes.” (Plateforme Paradis, 2014, p. 5)*

In the final Action 13 guidance the OECD appear to address the concerns expressed by Civil Society. Local File materiality levels are to be set by individual jurisdictions. This preserves the rights of individual countries to determine the information they will receive. Secondly the CbCR report must include data on every country, regardless of the level of activity within that country. This speaks to Civil Society concerns around potential BEPS activity being excluded from reports due to limited reporting in low tax jurisdictions.

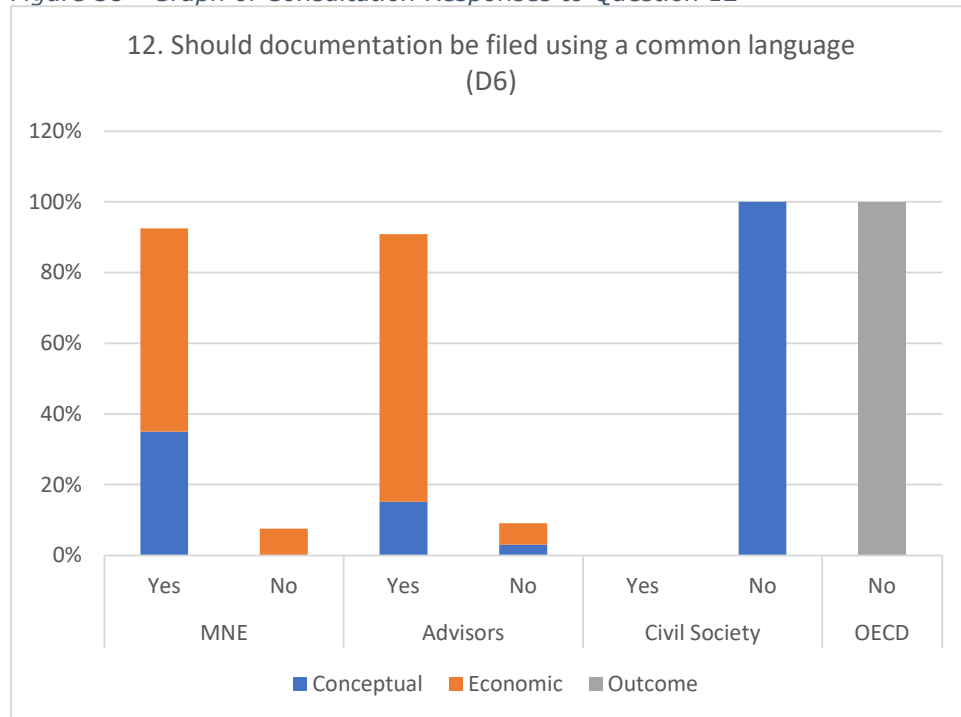
This is an area where it appears the OECD have sought to balance diverse opinions, taking account of economic arguments centred on the compliance burden imposed on MNE’s whilst also seeking to ensure the principle purpose of Action 13 is not undermined. In particular, the inclusion of all countries in CbCR and the ability of local jurisdictions to set their own thresholds for local file materiality appears to be a win for Civil Society, if not a total abandonment of the materiality concept.

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<sup>33</sup> Approx., Tax haven discussion forum

### 5.3.12 Question 12: Should documentation be filed using a common language?

Figure 38 - Graph of Consultation Responses to Question 12



Fisher’s shows a significant difference ( $p=0.001$ ) and Crammer’s V shows a large effect size of 0.502 ( $p=0.001$ ).

The statistically significant differences arise as a result of the Civil Society constituency arguing for jurisdictions to have the power to dictate the language in which they receive documentation vs MNE’s and Advisors, who argued for a single language of reporting (English).

Considering the argumentation employed, Fisher’s shows a significant difference ( $p=0.014$ , 5% significance level) and Crammer’s V shows a medium effect size of 0.33 ( $p=0.012$ , 5% significance level). The difference identified relates to the majority of MNE’s and Advisors favouring economic argumentation vs Civil Society who employed conceptual arguments.

Like a number of other questions concerning disclosure, MNE’s and Advisors stressed their desire for compliance burdens to remain proportionate to the aims of the disclosures requested as set out by law firm CMS (coded Advisor):

*“With regards to the language that should be used for the preparation of TP documentation, we strongly advocate the use of English for both the master file and the local file. In order to limit compliance costs” (CMS, 2014, p. 5)*

The popularity of English as the suggested filing language perhaps stems from over 60% of respondents coming from English speaking countries (see 5.2.1). Interestingly however, it was not only English based respondents who requested English as the filing language. For example, the quote below is from German Chemical company BASF:

*“Transfer pricing is an international tax matter and people involved in this topic are generally familiar with English language documents. Therefore we consider English as the most appropriate language to prepare the master file and CBCR. Local file may be prepared in the relevant local language if appropriate”* (BASF, 2014, p. 4)

BASF’s response makes a conceptual argument about the general acceptance of English as an appropriate common language for international tax regulation. This argument is made by several MNE’s and Advisors who note that guidance and key terms often originate in the English language.

In terms of compliance burden, for English speaking groups it makes sense that filing should be in English. However, it is notable that several non-English speaking groups still support the use of English as the main filing language. In some instances, this is supported by the conceptual argument expressed by BASF. It may also be the case that groups perceive the compliance requirement associated with translating their main language of operation to English may be lower than preparing multiple filings in different languages.

Civil Society argumentation centred on global fairness e.g., ensuring tax authorities in less developed and under-resourced countries are not disadvantaged.

*“we consider that at a minimum, the local file should be provided to tax authorities in a locally-specified language. ... we believe that less well-resourced tax authorities should be permitted to specify that the costs of translating non-local-language documentation should be borne in the first instance by the taxpayer [MNE]”* (BEPS Monitoring Group, 2014, p. 9)

The OECD do not make a strong proscription on this question. They encourage but do not mandate common language filing (interestingly not specifying the ‘common language’). The OECD note that it may be necessary to translate documents to local languages but urge countries to bear in mind the cost of translating documents and only to insist on this when the usefulness of documentation is compromised. They also urge tax authorities to give taxpayers adequate time to translate documents and restrict their requests to essential documentation only (OECD, 2015, p. D.6).

This somewhat vague guidance perhaps reflects the difficulty of balancing compliance burdens with the fairness and efficacy of the regulations but not proscribing English and giving countries flexibility appears to have favoured civil society by allowing multiple language filing, even if tempered with guidance about when this is appropriate.

### **5.3.13 Questions 13 and 14: How should Masterfile's and CbCR reports be filed?**

The next two questions are considered together as they formed part of a larger question asked by the OECD concerning how the various types of documentation generated under Action 13 should be shared with tax authorities in different countries.

The question asked by the OECD, below, concerns the Masterfile and CbCR reports and left some scope for respondents to offer a variety of opinions:

*"Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations. Possibilities include:*

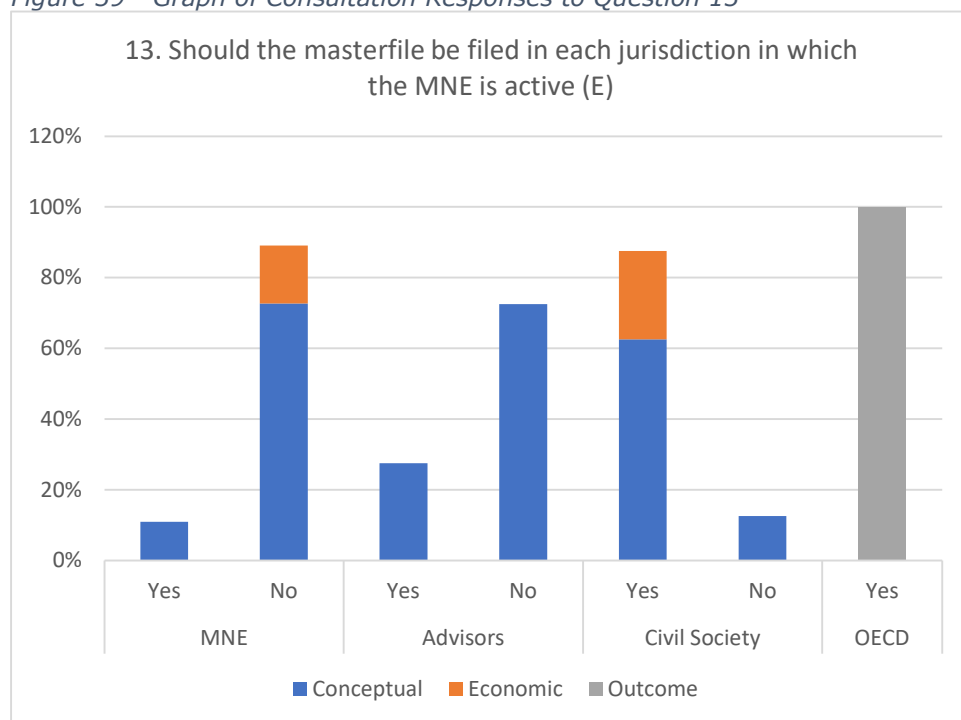
- *The direct local filing of the information by MNE group members subject to tax in the jurisdiction;*
- *Filing of information in the parent company's jurisdiction and sharing it under treaty information exchange provisions;*
- *Some combination of the above."* (OECD, 2014, p. 10)

To analyse responses to this question, distinction was made between responses which favoured automatic filing of the Masterfile and CbCR report in Jurisdictions where MNE's were active vs those which did not. The latter included a variety of suggestions about how the Masterfile and CbCR report might be shared e.g. through treaty exchange, upon request from the ultimate parent, only on the premises of the MNE's head office etc. The distinction chosen centred on whether the onus was on the taxpayer to make the information available or the tax authority to request the information. This distinction was an important factor in the argumentation employed by stakeholders.

Responses on whether the Masterfile and CbCR report should be filed in each jurisdiction have been separated out as there were some differences in opinion for the two different documents. Argumentation is very similar across the two questions as respondents tended to talk about both the Masterfile and CbCR when expressing arguments to justify their position.



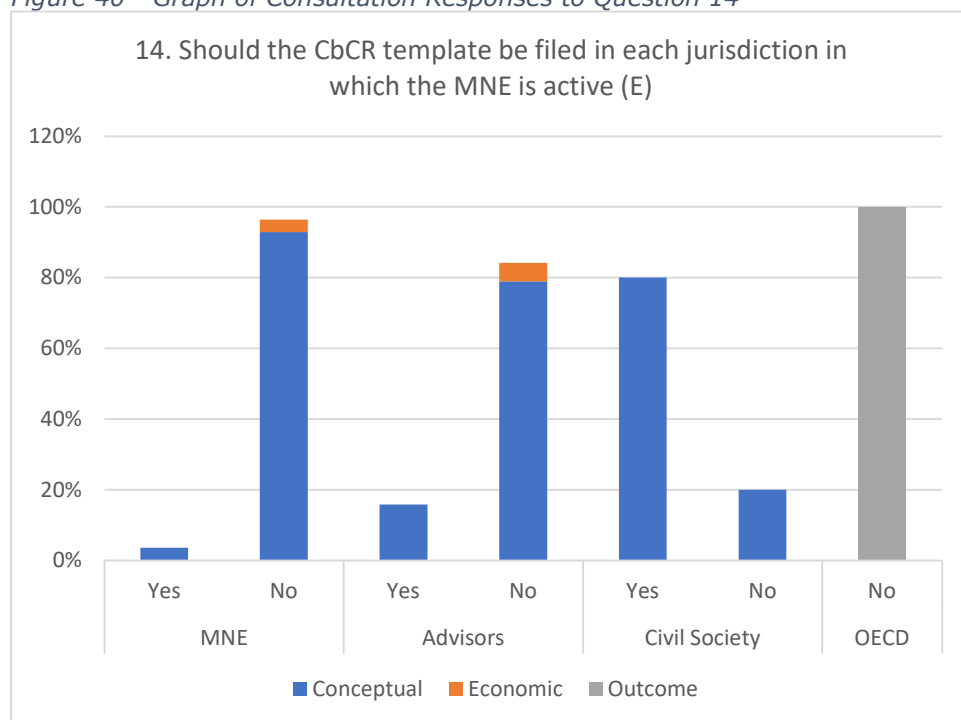
Figure 39 - Graph of Consultation Responses to Question 13



Fisher's Exact Test shows a significant difference ( $p < 0.001$ ) and Crammer's V shows a large effect size of 0.483 ( $p < 0.001$ ). As can be seen from the graph, the difference identified relates to the majority of MNE's and Advisors opposing filing of the Masterfile in multiple jurisdictions vs Civil Society, a majority of whom were in favour of this.

Considering argumentation, Fisher's shows a significant difference ( $p = 0.006$ ) and Crammers V shows a medium effect size of 0.285 ( $p = 0.014$ , 5% significance level). This difference arises as a minority of MNE and Civil Society responses employed economic argumentation. MNE's economic argumentation centred on compliance burden and was in line with the responses to previous questions. The relatively rare instance of Civil Society using economic argumentation is worth noting and explaining further. The two responses received using this argumentation were from Global Financial Integrity (GFI) and the Jubilee Network (who wrote to endorse GFI). The argument they employed was that MNE's should take on the economic cost of filing returns per jurisdiction as the alternative (treaty exchange) would be for this to be borne by tax administrations and indirectly taxpayers. A full assessment of argumentation will be discussed alongside the next question, as participants tended to discuss these questions together.

Figure 40 - Graph of Consultation Responses to Question 14



For question, 14 Fisher’s Exact Test shows a significant difference ( $p < 0.001$ ) and Crammer’s V shows a large effect size of 0.593 ( $p < 0.001$ ). As can be seen from the graph, the difference identified relates to the majority of MNE’s and Advisors opposing filing of the CbCR report in multiple jurisdictions vs Civil Society, a majority of whom were in favour of this.

Fisher’s ( $p = 1$ ) does not show a significant difference in argumentation employed, Crammers V shows a small, 0.077 but insignificant ( $p = 1$ ) effect size. The issue of how Masterfile’s and CbCR reports were to be shared was argued primarily on conceptual grounds by most stakeholders.

*“Master file data, including CbC Report, should only be shared under Information Exchange Treaties. This provides an avenue for the each country to assess and confirm that the other country has appropriate rules and practices that will keep the information confidential and to take action if a county later fails to safeguard the information.”* (Valente Associati Partners, 2014, p. 35)

The extract above from Valente Associati Partners, an Italian firm specialising in TP advice (coded Advisors), captures the main argument put forward by MNE’s and Advisors in opposition to the Masterfile and CbCR report being widely shared, namely, the confidential nature of the information they contain and concern that this will be abused or inadequately safeguarded. This concern appears to have been widely held (or at least expressed), indeed Deloitte’s submission mentions a survey they conducted of their clients; 86% of whom noted that they had

confidentiality concerns with respect to Action 13 documentation (Deloitte UK, 2014). Most responses from Advisors and MNE's expressed a similar opinion about the information being best made available through Treaty Information Exchange (TIE). Some took a more conservative view, opining that the information should be retained by the MNE's ultimate parent company and only shared on request in the event of an audit. Some even stated that it should be available to tax authorities to physically view at the parent company's head office but not available to copy or be distributed. These more conservative views were, however, relatively few, most were satisfied with mandatory use of TIE originating from the MNE's parent company jurisdiction

Civil Society respondents, however, questioned the credibility of arguments centred on confidentiality and offered opposition to the views expressed by MNE's and Advisors:

*"We do not believe that any of the information being considered and proposed for inclusion in the CbC report is sensitive enough to justify being treated as confidential; indeed it is exactly the kind of data that is necessary to meet the aims of improving engagement and assessment of tax policy and in understanding companies role in society."* (Christian Aid, 2014, p. 3)

This quote raises the issue of a lack of transparency and calls into question the validity of the claims made by the MNEs and Advisors.

Furthermore, Civil Society arguments recognised the potential for inequity between different countries if taxpayers were allowed to withhold information on the grounds of confidentiality:

*"Reliance upon information exchange via treaty networks alone would be highly undesirable, particularly for non-OECD countries for which the OECD template is nonetheless likely to serve as a model. As the UN Manual indicates, 'most non-OECD countries do not have the extensive treaty networks that OECD countries have, and will often have to rely upon taxpayers providing information for this reason'."* (BEPS Monitoring Group, 2014, p. 10)

This argument was recognised by MNE's and Advisors, but relatively little weight was given to it with the most common suggestion to overcome lack of access being for countries to sign up to the established information exchange mechanisms rather than making information more readily available out with them.

*"The fact that some countries do not have an extensive treaty network can be addressed through the multilateral instrument to be developed under BEPS action 15. Therefore, in our view it would be best practice for*

*one tax administration to be responsible for enforcing compliance with respect to the master file, in particular the country in which the ultimate parent company of the MNE group resides” (EY, 2014)*

The OECD appear to have agreed with Civil Society with respect to the Masterfile as Action 13 advises that Masterfile’s should be made available to tax authorities in jurisdictions where MNE’s are present (OECD, 2015).

On the other hand, in line with the asks of Advisors and MNE’s CbCR reports are to be shared with the tax authority in an MNE’s parent company jurisdiction and distributed to other tax authorities through existing information exchange mechanisms (OECD, 2015).

The OECD acknowledge the impact that this may have on developing countries: *“It is recognised that developing countries may require support for the effective implementation of Country-by-Country Reporting”* (OECD, 2015, p. 37) however, in the case of the CbCR report at least, argumentation about the confidentiality of data appears to have been persuasive.

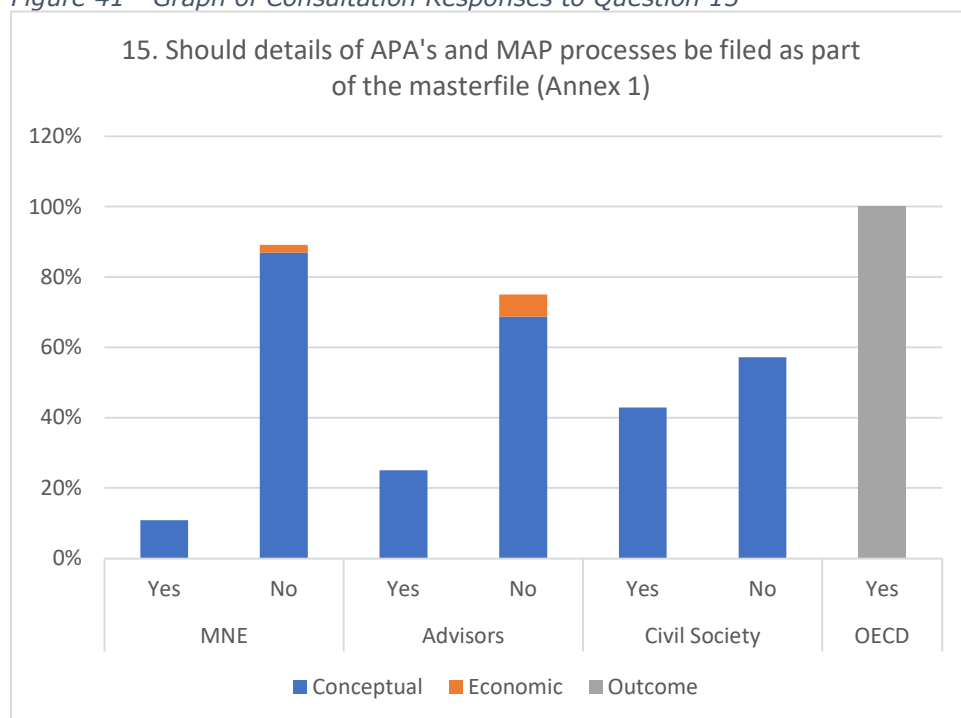
#### **5.3.14 Question 15: Should details of APA’s and MAP processes be filed as part of the Masterfile**

This question concerns the disclosure of special agreements between taxpayers and tax authorities. An Advanced Pricing Agreement (APA) is an agreement between a tax payer and a tax authority which sets out an agreed method for calculating the appropriate price of particular intra-group transactions (Picciotto, 2015). Mutual Agreement Procedures (MAP) are a process by which tax authorities in separate jurisdictions come together to resolve disputes; typically how the income of an MNE, generated in both territories, will be allocated for tax purposes (OECD, 2015).

APA’s face criticism for being ‘extra-legislative’ e.g. agreements made outside of the normal course of the law and therefore subject to abuse if tax authorities can be convinced or coerced to give taxpayers beneficial treatment (Picciotto, 2015).

MAP is an area where the OECD have sought to standardise practice by encouraging countries to sign up to a defined set of rules of arbitration, to be employed in the event of disputes. Whilst the intention is to ensure fairness, the OECD’s efforts in this area have attracted criticism for potentially favouring developed countries (Fung, 2017).

Figure 41 - Graph of Consultation Responses to Question 15



Fisher's Exact Test shows a significant difference ( $p=0.003$ ) and Crammer's V shows a large effect size of 0.403 ( $p=0.001$ ). As can be seen from Figure 27, the difference identified relates to the majority of MNE's and Advisors opposing details of APA's and MAP's being included vs Civil Society, a significant minority of whom were in favour of their inclusion.

Considering the argumentation employed, neither Chi Squared ( $p=0.665$ ) or Fisher's ( $p=0.665$ ) shows a significant difference in argumentation employed, Crammers V shows a small, 0.119 but insignificant ( $p=0.665$ ) effect size.

As can be seen from the graph, the proposed inclusion of APA and MAP data was argued on conceptual grounds by a large majority (96%) of stakeholders.

MNE's and Advisors centred their argumentation on the potential usefulness of the information and its potential commercial sensitivity:

*"APAs, MAP cases or other similar rulings contain very detailed and commercially sensitive information. Furthermore, such rulings or cases are very fact specific. It is highly questionable whether the disclosure of very detailed and fact specific cases and rulings would be relevant in assisting all the tax administrations in performing a high level transfer pricing risk assessment."* (Confederation of Swedish Enterprises, 2014, p. 7)

Civil Society on the other hand highlighted the benefits of including the data, not least for MNE's, in terms of helping tax authorities to understand the basis for their transfer pricing decisions:

*"We believe this information should be included in the documentation provided to tax authorities, or in the case of APAs a notation that the price is the result of an APA, with a willingness to provide the APA upon request. We would expect that it would be in the interest of companies to supply reference to other rulings and MAP cases in support of their transfer pricing decisions."* (FACT, 2014, p. 7)

This line of argumentation is also supported by claims from other Civil Society respondents which question the legitimacy of confidentiality concerns expressed by MNE's and Advisors:

*"However, our view is that it is inappropriate for either of these [APA's/MAP documentation] to be treated as secret. Confidentiality undermines public confidence by creating an impression that tax authorities are making secret deals with large companies."* (BEPS Monitoring Group, 2014, p. 2)

Despite the majority of MNE's and Advisors being opposed to inclusion, it appears that the arguments expressed by some in Civil Society and a small minority of other constituents gained traction with the OECD. The final version of Action 13 advises that the Masterfile should include:

*"A list and brief description of the MNE group's existing unilateral advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries."* (OECD, 2015, p. 26)

## 5.4 Responsiveness – discussion of findings

Figure 42 – Summary of responses to consultation questions

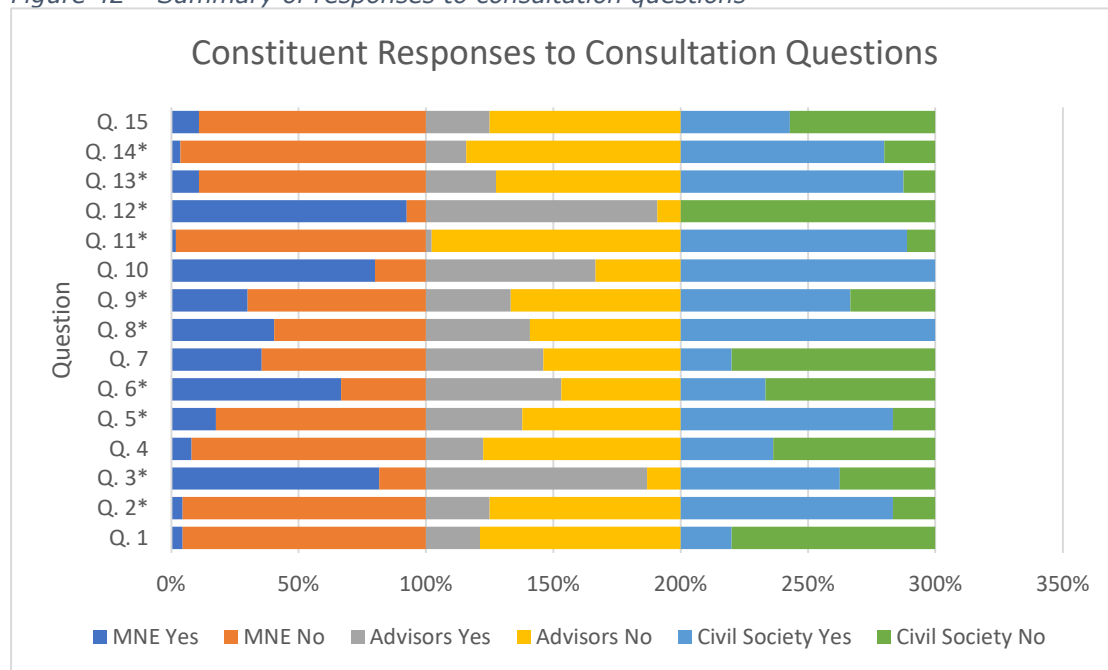


Figure 42 summarises the proportion of yes and no responses received by the OECD to each of its questions. The graph clearly shows the similar profile of MNE and Advisor responses (as noted in Section 5.2.2, figures 20 & 22) and furthermore shows that the response received from Civil Society differed from that of the other constituents for 10/15 questions (\* in the table). As noted in Section 5.2 Civil Society is significantly outnumbered by Advisors and MNE's and so a simple count of votes would likely result in this group's voice going unheard. However, it is interesting to note that civil society appear to have had success in influencing the OECD in at least some key aspects of the standard.

Table 16 below categorises the consultation questions according to the outcome approved by the OECD in the final Action 13 standard and the results of statistical testing in Section 5.3. As can be seen from the table, there are a variety of outcomes and far from being one sided, it appears that the OECD has incorporated the views of multiple constituencies.

To better understand the overall stakeholder impact on the consultation each category will be discussed in turn.

Table 16 - Categorisation of consultation questions asked by the OECD by outcome

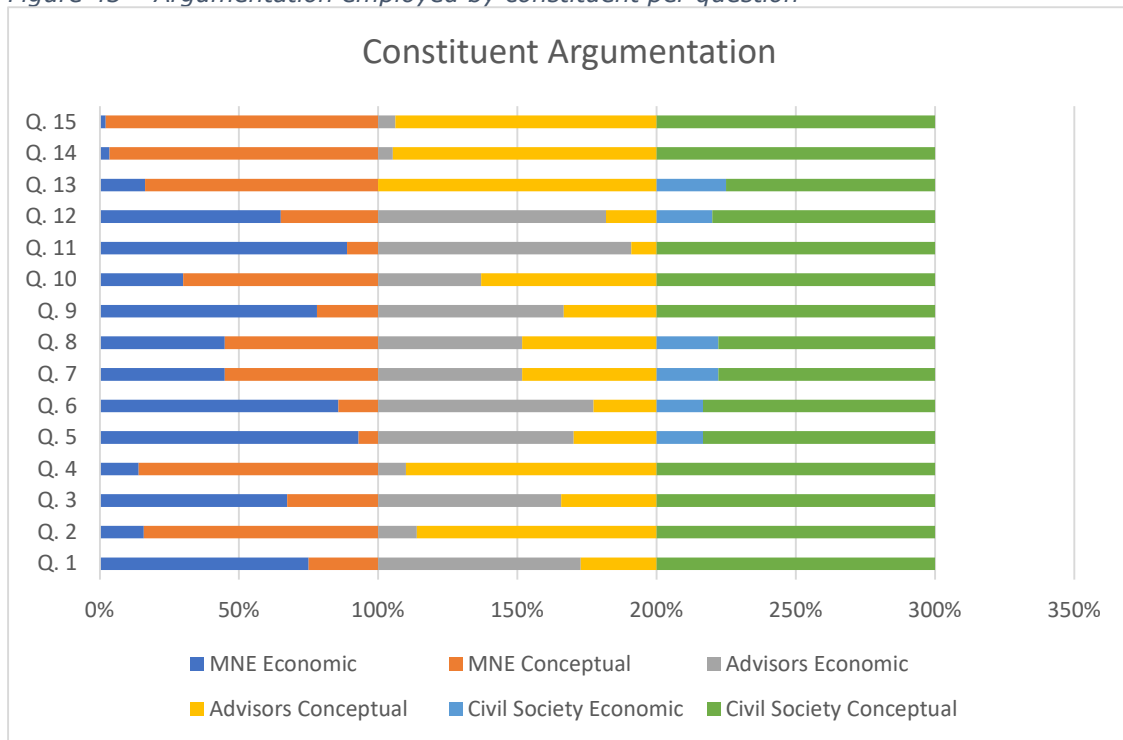
<b>No clear majority opinion from stakeholder responses</b>	<b>OECD adopted the suggestions of the majority with no statistical difference detected between constituents</b>	<b>OECD adopted suggestions statistically favoured by Civil Society</b>	<b>OECD adopted suggestions statistically favoured by MNE's and Advisors</b>
Q7 - Should the CbCR template allow flexibility for corporate income tax to be reported on either an accruals or a cash paid basis (C1)	Q1 - Should Action 13 include development of additional standard forms and questionnaires beyond the country-by-country reporting	Q11 - Should Action 13 include specific guidance on materiality (D3)	Q2 - Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction (B3).
Q8 - Should the CbCR template require reporting of withholding tax (C1)	Q3 - Should preparation of the Masterfile on a line of business basis be permitted (C1).	Q12 - Should documentation be filed using a common language (D6)	Q5 - Should Action 13 proscribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis (C1)
	Q4 - Should the CbCR report be included as part of the Masterfile (C1)	Q13 - Should the Masterfile be filed in each jurisdiction in which the MNE is active (E)	Q9 - Should the CbCR template include aggregate cross border payments between associates (C1)
	Q6 - Should CbCR on a country consolidation basis be permitted (C1)	Q15 - Should details of APA's and MAP processes be filed as part of the Masterfile (Annex 1)	Q14 - Should the CbCR template be filed in each jurisdiction in which the MNE is active (E)
	Q10 - Should the CbCR template require reporting of business activities on a jurisdiction by jurisdiction basis (C1)		



### 5.4.1 Argumentation strategies

In understanding the impact each stakeholder had on the consultation, it is important to understand the argumentation strategies deployed, along with the changes sought by each group.

Figure 43 – Argumentation employed by constituent per question



As can be seen from figure 43, Civil Society very rarely used economic argumentation when compared to MNE’s and Advisors. Furthermore, MNE’s and Advisors tended to use the same argumentation strategies for the same questions. The higher observed incidence of economic argumentation used by MNE’s and Advisors accords with findings in the accounting literature regarding lobbying of accounting standard setters (Reuter & Messner, 2015; Stenka & Taylor, 2010). This also speaks more generally of the ability of Advisors and MNE’s to draw on economic data, costs of compliance etc, to make a wider range of arguments than Civil Society. However, access to this separate stream of argumentation is not necessarily a guarantee of success. As observed by studies in the accounting literature (Giner & Acre, 2012; Reuter & Messner, 2015) standard setters in that arena are more likely to engage with conceptual argumentation when taking on board suggestions.

To understand the relative success of each constituency in the Action 13 consultation and enable comparison to the extant literature, it is necessary to engage with the detail of the debates. Therefore, each of the columns in Table 16 will be discussed, to analyse the responsiveness of

the OECD to different types of argumentation, employed by different constituents.

#### **5.4.2 Questions with no clear majority**

Questions 7 & 8 proved divisive for consultation respondents, with no clear opinion evident in any of the three constituencies (see Figures 33 & 34). As noted in Section 5.3.7, question 7 concerned whether corporate income tax should be reported in the CbCR report on a cash paid or an accruals basis; and question 8 (see 5.3.8) concerned whether withholding taxes (WHT) should be reported as part of the CbCR report.

As noted in Section 5.3, a disparate set of views were expressed with regards to this question; both conceptual (based around understanding of the data and the want for greater transparency) and economic (based around the cost of reporting data).

The OECD decided to mandate the reporting of both accruals and cash-based payment data as well as WHT. Although statistical analysis did not show this as being significantly aligned with any one majority group the eventual outcome was close to asks made by the BEPS Monitoring Group CIG, who suggested disclosure of all three data points and reconciliation between the accruals and cash bases (BEPS Monitoring Group, 2014). The OECD did not mandate reconciliation but appear to have agreed that the more rather than less disclosure was necessary. This decision appears to disregard economic argumentation made by advisors and MNE's who asked for flexibility to minimise compliance costs.

Per the Action 13 Consultation:

*"An important overarching consideration in developing such rules is to balance the usefulness of the data to tax administrations for risk assessment and other purposes with any increased compliance burdens placed on taxpayers."* (OECD, 2014, p. 2)

Questions 7 & 8 are interesting, because in the absence of a clear majority view from the consultation, the OECD was left to make a decision based on which aspects of the standard they felt were more important. In this instance they appear to have favoured greater transparency, over minimising the cost of compliance for MNE's. This challenges, if only on one small point, the findings of Christensen (2018), who perceived the consultation process to have been captured by the interests of business. The fact that the OECD chose greater disclosure and transparency with respect to this data point is perhaps unsurprising given that taxation is central in the Action 13 documentation. It does, however, show a willingness to promote more progressive aspects of the Action, arguably

intended to improve the standard for tax authorities and others with an interest in the public good.

### **5.4.3 Questions with clear consensus**

There were five questions where the majority opinion across all stakeholder groups agreed. For each of these six questions the OECD have sided with the majority consensus and amended/kept the standard in line with responses to the consultation. This clearly indicates the OECD's willingness to respond to stakeholder comments and therefore a process conducive to the creation of throughput legitimacy (Schmidt, 2013).

### **5.4.4 Questions where Civil Society had success**

Of the fifteen questions examined, four were identified where the OECD appeared to side with the prevailing view in the Civil Society constituency, which was statistically measured as being different to the view prevailing in the MNE/Advisor constituency and therefore the overall majority (in terms of number of letters).

The outcome of the four questions is summarised briefly in the coming five paragraphs and then analysed later in this chapter with a view to concluding on the implications for throughput legitimacy:

Firstly, question 11; Should Action 13 include specific guidance on materiality? Civil Society submissions highlighted the overarching need for greater transparency, which in their view might be undermined by materiality. They also highlighted the need for global fairness, in allowing countries to set materiality thresholds appropriate to their jurisdiction. MNE's and Advisors requested flexibility to set their own materiality thresholds citing economic arguments centred on the cost of compliance.

Secondly, question 12; Should documentation be filed using a common language? MNE's and Advisors made economic argumentation, centred on the cost of translating documents into multiple languages, to request that a common language should be adopted. Civil Society argued against a common language with conceptual argumentation centred on global fairness, particularly the ability of developing countries to utilise the disclosures.

Thirdly, question 13; Should the Masterfile be filed in each jurisdiction in which the MNE is active? This question was argued on conceptual grounds with MNE's arguing that the information is confidential and should not be widely circulated other than by means of Treaty Information Exchange (TIE). Civil Society again argued for greater transparency and global fairness, asserting that TIE, disadvantages developing countries.

Fourthly, question 15; Should details of APA's and MAP processes be filed as part of the Masterfile? This question was also argued on conceptual grounds with MNE's arguing that the information is confidential and not relevant for conducting a high-level risk assessment. Civil society, countered suggestions that the information is confidential, noting that such secrecy undermined confidence in the rule of law and failed to give tax authorities the information they need.

#### **5.4.5 Questions where MNE's and Advisors had success**

Of the fifteen questions examined, four were identified where the OECD appeared to side with the prevailing view in the MNE/Advisor constituency; which was statistically measured as being different to the view prevailing in the Civil Society constituency. As MNE's and Advisors outnumbered Civil Society, this could be argued to be going with the majority, from a purely numerical perspective. However, in acting responsively in a throughput legitimacy sense, it is important for policy makers to align with the 'best' argument as opposed to the most popular (Schmidt, 2013). In this sense as well as considering the outcome it is therefore important to understand the areas where the OECD agreed with MNE's and Advisors and the argumentation which convinced them. The outcome of the four questions is summarised briefly in the coming four paragraphs and then analysed with a view to concluding on the implications for throughput legitimacy:

Firstly, question 2; Should existing rules on information exchange be amended to allow for sharing of information by associates outside of a jurisdiction? MNE's and Advisors made conceptual arguments against the widening of information sharing powers based on the commercial sensitivity and confidentiality of data being shared. Civil Society advocated for widening of information sharing rules but did not offer much specific argumentation to support this question. Several Civil Society responses anticipated that MNE's would argue for CbCR data to be considered confidential and, in general terms, sought to counter this line of argumentation, but not specifically in relation to this question.

Secondly, question 5; Should Action 13 proscribe whether the CbCR report should be prepared on a 'top down' or 'bottom up' basis? MNE's and Advisors argued for flexibility in order to minimise compliance costs associated with having to potentially change accounting systems, with some even quoting potential costs of up to £10m associated with doing so. Civil Society argued in favour of prescription to ensure the information was fit for purpose. The BEPS Monitoring group in particular believed that only Top-Down reporting would be capable of identifying BEPS (BEPS Monitoring Group, 2014).

Thirdly, question 9; Should the CbCR template include aggregate cross border payments between associates? MNE's and advisors used primarily economic argumentation, centred on the cost of complying with this ask. Civil Society argued conceptually, basing their arguments on the need for cross border payments to be included for the information to be fit for purpose.

Fourthly, question 14; Should the CbCR template be filed in each jurisdiction in which the MNE is active? This question was argued on conceptual grounds with MNE's arguing that the information is confidential and should not be widely circulated other than by means of Treaty Information Exchange (TIE). Civil Society again argued for greater transparency and global fairness, asserting that TIE, disadvantages developing countries.

#### **5.4.6 Compliance costs**

Of the nine contested questions, four (5, 9, 11 & 12), were argued by MNE's and Advisors on economic grounds. The economic argumentation put forward centred on additional compliance costs associated with making disclosures under Action 13 and appears to have been met with success in the case of questions 5 & 9. Chatzivgeri et al (2019), investigating a form of CbCR introduced by the EU for extractive companies similarly found evidence of MNE's and Advisors utilising this line of argumentation in attempts to curb the scope of disclosure requirements. It is interesting to note that for both questions 5 & 9 that the conceptual argumentation mustered by Civil Society in defence of more prescriptive or expansive disclosures tended to be less specific and cohesive than was the case for other questions. For example, on question 5 only one Civil Society response tackled this question in detail and in question 9 several different arguments were made rather than one unified argument. It could possibly be inferred therefore that the economic argument won out in the face of weak conceptual argumentation. The OECD did make a specific commitment to keep compliance costs 'proportionate' (OECD, 2015), and may therefore have felt compelled to acknowledge arguments of this type. However, it appears that when faced with strong conceptual argumentation this stream of argumentation was deemed less important by the OECD e.g. questions 11 & 12 which Civil Society argued on global fairness grounds. This would accord with findings in the accounting literature (Giner & Acre, 2012; Reuter & Messner, 2015), which finds accounting standard setters are more susceptible to conceptual, rather than economic argumentation. However, it is important to note that MNE's and Advisors were able to scale back CbCR disclosures to exclude the disclosure of cross border payments utilising this argument. Whilst, undoubtedly, disclosing these would come with an additional compliance burden their exclusion may limit tax authorities ability to

detect BEPS in certain jurisdictions as they will not have full view of the global value chains which local companies within their borders may be part of (Finer & Ylonen, 2017).

In terms of responsiveness, on this issue the OECD appear to have attempted to balance their response, taking on board some concerns expressed about additional costs but only where these were not overridden by strong conceptual arguments.

#### **5.4.7 Confidentiality / commercial sensitivity**

The remaining four contested questions (2, 13, 14, 15) were argued by MNE's and Advisors on conceptual grounds and this achieved success with questions 2 & 14.

The confidentiality argument was a major feature of the consultation with several responses dedicating an opening paragraph to this issue as well as basing responses to specific questions around the sensitivity of the data being disclosed. This is similar to the findings of Chatzivgeri et al (2019) who, in their study of public disclosure of tax payments by extractive companies, also noted the tendency of MNE's and Advisors to argue for curbs to disclosures on the grounds of the commercial sensitivity and confidentiality. Seemingly in anticipation of this line of argumentation, Civil Society respondents drew on notions of corporate accountability through transparency (Oats & Tuck, 2019) to argue that the data requested in Action 13 is not confidential and is in fact in the public interest. Several Civil Society groups advocated in their responses for the data to be made public, rather than solely being filed with tax authorities – this is in line with asks made by tax campaigners over a number of years (Chatzivgeri, et al., 2019; Crawford, et al., 2014; Murphy, 2016).

Confidentiality and commercial sensitivity have been coded as conceptual arguments for the purpose of this study. Whilst loss of commercially sensitive data may result in an economic loss for organisations, the argumentation employed tended to go beyond this narrow economic loss. The issue argued tended to be the extent to which governments were entitled to ask for more information to achieve their stated purpose. As noted by Christensen (2018), several MNE's and Advisors were at pains to frame Action 13 as a risk assessment tool and therefore reduce the scope of the purpose of the Action. Commercial sensitivity was often used as an extension of this argument, a common sentiment being: 'the information requested is commercially sensitive and excessive for a risk assessment'.

The questions which appear to have been influenced by this argumentation affect how tax authorities are able to access information from MNE's. Question 2 asked Should existing rules on information exchange be amended to allow for sharing of information by associates

outside of a jurisdiction. And question 14 asked Should the CbCR template be filed in each jurisdiction in which the MNE is active. Argumentation submitted by MNE's and Advisors consistently stressed the confidentiality of the data concerned in these disclosures and advocated for data to be shared via established information sharing mechanisms so as to preserve its security. The current mechanisms on information exchange are set out in rules written by the OECD, with countries being required to sign up after meeting various conditions (OECD, 2017a). These mechanisms are criticised for being unfair in favouring developed countries, who can afford to maintain the institutional capabilities required to administer them (Fung, 2017; Grinberg, 2016; Mosquera, 2015). This perceived unfairness is made particularly acute for several reasons: Firstly, because developing countries tend to rely on in-bound investment from MNE's to a greater extent than developed countries (Durst, 2014) they arguably have more to lose from BEPS. Secondly, MNE's operations in developing countries will be more likely to be carried out through branches or permanent establishments, meaning only discrete country information will routinely be reported. This creates an information asymmetry when compared to developed countries, where MNE's headquarter as these jurisdictions' tax authorities will have access to more group-wide information (Durst, 2014; Grinberg, 2016). To address the perceived unfairness and as part of the wider BEPS Action Plan process, the OECD are undertaking to increase access to these mechanisms through a program of support for non-OECD countries to join established networks (OECD, 2022). In the Action 13 consultation and in respect of the CbCR report, rather than give developing countries automatic access the OECD encouraged countries to engage with their program of widening access.

This is therefore a complex area with regards to throughput legitimacy. Whilst the OECD have restricted access to data in response to corporate concerns, they are simultaneously working on a separate initiative to increase access globally. Is an area of key concern, however, and one which has a significant impact on the legitimacy of the OECD from the perspective of Civil Society, as discussed in 5.4.8.

#### **5.4.8 Global fairness**

Of the eight contested questions, Civil Society argued for expanded disclosures on the basis of achieving greater global fairness in five (2, 11, 12, 13 & 14) and were successful in respect of three 11, 12 and 13. Considering the questions:

It is interesting that the global fairness argument appears to have won out over the confidentiality argument with respect to the Masterfile but not with respect to the CbCR report. This is perhaps a result of wider representations made in the consultation. Although MNE's and Advisors

responded to question 14 specifically with the confidentiality argument, as noted by Christensen (2018), throughout the consultation MNE's and Advisors sought to frame the CbCR report as a high-level risk assessment tool only, and thereby possibly more suited to head office use. It was also noted in the present study that MNE's frequently criticised the CbCR report as potentially undermining the long-established ALP and potentially leading towards formulary apportionment. This argument was, in some instances even accompanied with criticisms of non-OECD country tax authorities, who were intimated to be likely to use the CbCR report to increase tax liabilities in contravention of established principles. This broad base of argumentation may have supported the confidentiality concerns raised by the majority of MNE's and Advisors in question 14. Also as noted above, the fact that the OECD are working on a project to increase information exchange may have made this an easier decision to justify. However, in the case of the Masterfile, Civil Society appear to have scored a victory in having this disclosed in each jurisdiction where an MNE is active.

Question 11 asked, should Action 13 include specific guidance on materiality? and question 12 asked should documentation be filed using a common language? Both questions concern the format of disclosures and both were argued on economic grounds by MNE's and Advisors who were in favour of flexible materiality and a common language for filing in order to minimise compliance costs. Civil Society argued that under-resourced tax authorities, particularly in the developing world, may be disadvantaged by not having documentation available in their local language. They also argued that countries would benefit from setting their own materiality thresholds, relative to the size and composition of their economy. The OECD appear to have valued the global accessibility of the information over potential compliance costs. This is a case where conceptual argumentation was favoured over economic and where the OECD appear to recognise the need to regulate for non-OECD members affected by Action 13.

Question 13 asked, should the Masterfile be filed in each jurisdiction in which the MNE is active? Unlike the CbCR report (Q14) the OECD sided with Civil Society in this instance, proscribing that the Masterfile should be filed in each jurisdiction where the MNE is active. MNE's and Advisors had argued on the basis of commercial sensitivity and confidentiality that the Masterfile should be retained at an MNE's head office and only shared through information exchange mechanisms.



#### **5.4.9 Transparency and confidence in the system of law**

Of the eight contested questions, Civil Society argued for expanded disclosures on the basis of increasing transparency in order to improve confidence in the system for three question (5, 9 & 15) and were successful in respect of question 15. As noted above, MNE's and Advisors had success on economic grounds with questions 5&9. Question 15 asked, Should details of APA's and MAP processes be filed as part of the Masterfile? The inclusion of these data points appears to validate Civil Societies argumentation that greater transparency is needed around these arrangements. MNE's and Advisors had argued that these were irrelevant to the purpose of the standard and contained highly confidential data. The OECD here appear to value Action 13's underpinning transparency motive.

### ***5.5 Conclusion on Responsiveness and Throughput***

The fact that the OECD took the majority view on board and regulated accordingly where stakeholders all agreed on a question (see 5.4.3), suggests that the consultation was a genuine attempt to engage with stakeholders rather than a PR exercise. In this sense the OECD demonstrated responsiveness to key stakeholders and hence created some throughput legitimacy (Schmidt & Wood, 2019). Arguably, however, it is easy to respond to your stakeholders if they all agree. Real difficulty occurs where there is conflict and to ensure a legitimate process the policy maker must interrogate the strength of respective lines of argumentation and decide according to the 'best' rather than the more recurring argument (Schmidt, 2013).

What can be seen from the analysis above is that where there is disagreement between stakeholder groups, in line with established thought, the OECD tended to favour well-made conceptual arguments (Reuter & Messner, 2015; Stenka & Taylor, 2010) and that winners did not come from only one stakeholder group. In some ways, this challenges the idea that Action 13 was entirely captured by corporate interests (Christensen, 2018). This is also potentially a positive observation in terms of responsiveness and throughput legitimacy, as it suggests the OECD were willing to engage with all stakeholders, provided they made strong arguments to support their requests.

Maintaining a legitimate level of responsiveness was potentially made challenging by the corporate lobby's tendency to coalesce on mass to present a united front, as they did with other BEPS Actions (Elschner, et al., 2018). However, this may have been balanced out in some ways as Civil Society were also successful in forming coalitions of interest, as a tax justice movement (Mikler & Elbra, 2018). Notably, the BEPS Monitoring

Group appear to have had some success in building consensus and presenting strong argumentation. Although significantly less numerous in numbers Civil Society scored some notable successes and appear to have found favour with arguments centred on global fairness. It is particularly interesting to note the OECD's responsiveness to arguments centred on developing country access to Action 13 documentation. This is because in terms of openness, there was a lack of representation from those in the developing world, as noted earlier in this chapter (5.2). Many studies expound on the effects of BEPS on developing countries (Durst, 2014; Fuest, et al., 2005; Jansky & Prats, 2015) and, as has been suggested elsewhere (Burgers & Mosquera, 2017; Fung, 2017), it behoves the OECD to consider how best to connect with developing countries and improve their access to its policy making if they wish to retain legitimacy.

In terms of contentions between corporate and civil society interests there were victories on either side. Whilst Civil Society were unsuccessful in having CbCR reports distributed to all countries where MNE's were active, they did have some success in informing their format and accessibility and in mandating the disclosure of Masterfile's containing APA's and MAP procedures. These victories would appear to advance transparency, particularly for tax jurisdictions in less well-resourced countries where information is scarce.

When examining for responsiveness and throughput it is important to draw a distinction between the consultation, as a discrete event, and wider efforts by civil society to achieve mandatory public CbCR. Broad based campaigns have been ongoing for a number of years to try to achieve this aim (Crawford, 2019) and the Action 13 disclosures come closer than others in format to the desires of civil society campaigners (Chatzivgeri, et al., 2019). Yet Action 13 lacks the public availability central to civil society demands (Murphy, 2016). If Action 13 (and the consultation) were to be judged in these terms it would appear to be another refusal of policy makers to side with tax justice campaigners in civil society (Crawford, 2019). However, whether CbCR was to be made public was never a question asked by the OECD in the consultation and this appears to have been outside of the scope of Action 13. Whilst this may taint the legitimacy of the OECD in the eyes of some (Murphy, 2016) this the results of this thesis are confined to considering the legitimacy gained through formal consultation. In this respect, the consultation has had some success.

MNE's and Advisors also had some success in limiting the scope of the disclosures and hence their costs and exposure to commercial risk as was also found by Christensen (2018). They were however unable to limit distribution of the Masterfile or control the level of materiality of the reports.

It is difficult to declare an overall winner in absolute terms, rather, in line with the critical orientation of this research it is apt to think of the consultation in pragmatic terms (Gallhofer, et al., 2015; Gallhofer & Haslam, 2017) as part of a continuum, where progressive elements did flourish and yet were also opposed. Also, in line with the theoretical framing of this research this understanding should be firmly embedded in an understanding of the ideological and political forces dominating at the time (Chua, 1986). As set out in the literature review, BEPS responded to a need for justice, transparency and accountability in the area of global tax; where MNE's had been perceived to take unfair advantage of their power and a set of rules which had not kept pace with global commerce and technology (Baker, 2013; Brosens & Bossuyt, 2020). To overhaul this in one initiative was undoubtedly ambitious on the part of the OECD and whilst it is easy to point to failings or take a cynical view of the motives, change did happen and it is within this context the responsiveness of the OECD should be judged.

Taking the broader context into consideration, it is accurate to say that the OECD did respond to stakeholder asks, in a mediated way indicative of throughput legitimacy. Whilst there are broader questions about the suitability of the consultation method, including transparency surrounding it and its openness to a plurality of views (especially from the developed world) this does suggest positive potentiality for groups wishing to engage with the OECD as a policy maker. Lessons for those groups appear to be: to make arguments on a conceptual basis and to form coalitions with interested parties in order to present a united front.

## ***5.6 Chapter summary***

This chapter addressed RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy.

Results were presented from statistical analysis of how stakeholders responded to 15 questions asked by the OECD in their Action 13 consultation, including the type of argumentation they used. From the conclusion above it can be said that there were victories for both corporate interests and civil society campaign groups. In line with the extant literature it is true that some aspects of Action 13 appear to have been constrained by corporate lobbying (Christensen, 2018). However, there also appear to have been victories for civil society who were successful in lobbying for more progressive aspects of the standard to be mandated. This finding challenges the dominant view of Action 13 being captured by corporate interest (Christensen, 2018) and suggests a level of throughput legitimacy was inherent in the consultation process

The next chapter will set out how stakeholder interviews were conducted to evaluate the output legitimacy of Action 13 and answer RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

## **6 Chapter 6: Interviews with tax professionals**

### **6.1 Introduction**

To answer RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output, semi-structured interviews were conducted with eleven tax professionals, to evaluate their perspectives.

This chapter sets out in detail the interview process undertaken and provides a critical evaluation of semi-structured interviews as a method of enquiry.

### **6.2 Interview method – semi-structured**

Interviews were semi-structured to allow some flexibility and adaptability in responding to the interviewees' answers, whilst still following a pattern of questioning which would allow assessment of output legitimacy and ensure consistency between interviews (Bell, et al., 2019, p. 211).

Interviews sought to assess the output democratic legitimacy of Action 13 and addressed both the objective and subjective legitimacy components of the policy output (Boedeltje & Cornips, 2004).

A list of interview questions was devised to test the objective and subjective output legitimacy of Action 13 as it manifested in practice. The questions are discussed in detail below but were derived from existing literature (Chapter 3), the final provisions of Action 13 (OECD, 2015) and comments made by stakeholders in response to the OECD's Action 13 consultation (OECD, 2014).

The questions were designed to elicit detailed reflections as to the efficacy of Action 13 and the role of the tax profession in shaping the rules in practice and provide a rich source of data to answer the research question.

#### **6.2.1 Output legitimacy - objective assessment**

Objective output legitimacy seeks to measure whether a policy has met its stated objectives (Boedeltje & Cornips, 2004).

The objectives of Action 13, as set out by the OECD (2015) are as follows:

1. To ensure MNE's give appropriate consideration to transfer pricing policy.

2. To allow tax authorities to carry out appropriate transfer pricing risk assessment.
3. To provide sufficient documentation to aid tax authorities in conducting a transfer pricing audit in respect of entities active in their jurisdiction.

To assess the efficacy of Action 13 in addressing these objectives, and therefore its output legitimacy, specific questions were developed to cover each aim in detail. The questions were developed to be relevant to professional advisors and to make use of their privileged access to information, questions are included in Table 17 below.

It is worth reiterating that at present the UK only requires filing of a CbCR report under Action 13. This will change for accounting periods ending on or after 1 April 2023, from when MNE's will be required to file the full suite of Action 13 documentation<sup>34</sup> e.g. Masterfile, Local File and CbCR. This implementation was planned for 2021 but has been delayed several times (HMRC, 2023). The fact that UK Headquartered firms are only required to submit CbCR reports in the UK necessarily limits the ability of interviewees to comment on whether the objectives are fully achieved. However, taking this limitation into account important conclusions can still be drawn about the legitimacy of Action 13. The CbCR element of the documentation is the most radical requirement imposed by Action 13. The information provided by CbCR gives tax authorities, including HMRC, greater visibility of MNE's global tax affairs than they have had before (Christensen, 2018). It also requires a new type of reporting whereas the information contained in Masterfile's and Local Files is already largely required to be kept on record by MNE's to be made available to HMRC on request (HMRC, 2023). From this perspective, CbCR potentially presents a new compliance and reporting challenge for MNE's. Therefore, from an output legitimacy perspective, the UK is an interesting context even if conclusions drawn must be viewed in light of the partial adoption of Action 13<sup>35</sup>.

## **6.2.2 Output legitimacy - subjective assessment**

Subjective assessment hinges on whether stakeholders perceive that their authentic preferences are reflected in the policy output (Brosens & Bossuyt, 2020). By its nature subjective assessment is open to contestation. And, whilst gaining the current opinion of tax professionals is

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<sup>34</sup> Amendments made to Paragraph 21 Schedule 18 Finance Act 1998 and s12B Taxes Management Act 1970 will apply to businesses with global revenues > €750m and be effective for accounting periods commencing on or after 1 April 2023

<sup>35</sup> Implementation of Action 13 in terms of timing and extent varies across jurisdictions, more details can be found in the OECD's summary review here: <https://www.oecd.org/tax/automatic-exchange/country-specific-information-on-country-by-country-reporting-implementation.htm#cbcrequirements>

felt to be valuable and insightful, to arrive at a fair assessment of the OECD's output it was felt that questions should also seek to evaluate whether the preferences expressed by tax professionals in the Action 13 consultation were met. Answers given to the Action 13 consultation were therefore used to construct questions which would enable measurement of whether the asks of MNE's and Advisors, made at the consultation stage had been met in practice.

To do this the coding carried out for measuring throughput legitimacy (4.7) was revisited to identify the preferences expressed by tax professionals during the consultation stage. The research conducted on the consultation sought to measure throughput legitimacy by correlating stakeholder preferences on questions specifically asked by the OECD to the final provisions of Action 13, see 5.3. This analysis also gave valuable insights into constituents' key concerns and suggestions as to how Action 13 should be drafted to meet their specific needs. These insights were used to add rigour to the testing of output legitimacy by providing a guide as to how constituents would subjectively assess the standard.

From the consultation responses several authentic preferences were expressed by Advisors and MNE's when commenting on the questions asked by the OECD:

- Compliance burden, MNE's and Advisors consistently argued for compliance burdens to be minimised and for information asks to be made compatibility with current accounting systems and other transparency initiatives
- Confidentiality, MNE's and Advisors were concerned that the data asked for by Action 13 was confidential and may be subject to breaches
- Flexibility, MNE's and Advisors argued for flexibility in terms of disclosure choices
- ALP, MNE's and Advisors lobbied to protect the ALP as the correct transfer pricing methodology

These opinions were widely expressed in the consultation; therefore, interview questions were constructed to gauge whether the final Action 13 met the interviewees' expectations in respect of them and hence created subjective output legitimacy.

The interview template used to guide the interviews is set out in Table 17 below. Questions highlighted red in the table were asked directly to participants, these were intended to be relatively broad and to start a conversation. Questions in black below acted as an aide memoir for the interviewer, to ensure interviews covered the pertinent points and as prompts should the need arise. In most cases interviewees answers were expansive and touched on the areas in the table with minimal probing.

The interviewer was also conscious to give participants space to discuss issues they believed to be of importance as this was a crucial reason for choosing semi-structured interviews as a method; to learn from those most involved with Action 13 in practice (Oats, 2012).



Table 17 Interview Template

Questions grouped by theme	Relationship to Output Legitimacy	Rationale
<p><b>Impact on Companies</b></p> <p><b>Questions to ask to start the conversation:</b></p> <p>Can you tell me how Action 13 has impacted your client's/organisation?</p> <p>Has Action 13 impacted attitudes towards TP documentation?</p> <p>Are there any benefits of Action 13?</p> <p>Are there any drawbacks of Action 13?</p> <p><b>Points to potentially follow up on/prompt:</b></p> <p>Do you view CbCR as core to TP documentation?</p> <p>Has Action 13 caused you to consider TP documentation differently?</p> <p>Has Action 13 improved TP documentation?</p> <p>Has Action 13 increased focus on TP documentation from preparers and others in the finance function/business?</p>	<p>OECD Objective 1</p> <p>Subjective evaluation of the impact on MNE's</p>	<p>Lankhorst &amp; Van Dam (2017) contend that Action 13 will change the balance of power towards tax authorities</p> <p>Christensen (2018) contends that Action 13 was watered down by corporate lobbying to merely focus on risk assessment</p> <p>Sawyer and Sadiq (2019) contend that Action 13 has had limited benefit other than some enhanced risk assessment</p> <p>MNE and Advisor consultation responses centre on limiting documentation requirements to</p>

<p>Has Action 13 increased admin burdens/required changes to accounting systems?</p> <p>Does Action 13 integrate well with other transparency or reporting initiatives?</p> <p>Do MNE's adopt a top down or bottom up approach to gathering data?</p> <p>Do MNE's tend to use line of business reporting?</p> <p>Has Action 13 caused confidentiality concerns?</p> <ul style="list-style-type: none"> <li>- Within groups e.g. is getting requisite info from subs easy?</li> <li>- Between competitors?</li> <li>- With certain tax authorities?</li> <li>- Disclosing identities of highly paid employees</li> </ul> <p>There was some concern that MNE's with 'non-standard' TP set ups may be persecuted wrongly as a result of CbCR – is this the case?</p> <p>Have clients altered their transfer pricing policies?</p> <p>Are you aware of any non-compliance?</p>		
<p><b>Interaction with tax authorities</b></p> <p><b>Questions to ask to start the conversation:</b></p>	<p>OECD Objective's 2/3</p>	

<p>Has Action 13 changed the way your clients/organisation interact with HMRC or other tax authorities?</p> <p>Are you aware of CbCR or other Action 13 reports being requested by jurisdictions outside of the UK?</p> <p>Have you observed differences in the way different jurisdictions use Action 13?</p> <p>Do you think the information is useful for tax authorities?</p> <p><b>Points to potentially follow up on/prompt:</b> Has CbCR resulted in greater attention from tax authorities?</p> <ul style="list-style-type: none"> <li>• Are more audits opened</li> <li>• Does CbCR encourage TA's to ask for further information?</li> <li>• Is CbCR data used by TA's as a basis for suggesting adjustments?</li> </ul> <p>Are you aware of CbCR being requested by jurisdictions outside of the UK?</p> <ul style="list-style-type: none"> <li>• Are clients informed when this happens</li> </ul>	<p>Legitimate output overcomes problems and shields from harm – there is a perceived information asymmetry between TA's and MNE's, has Action 13 addressed this?</p>	<p>Tran (2020) contends that Action 13 had the greatest impact in countries where TA's are well funded and active, this was also observed by Sawyer &amp; Sadiq (2019).</p> <p>Lankhorst &amp; Van Dam (2017) contend that Action 13 will change the balance of power towards tax authorities.</p> <p>Consultation responses highlighted compliance burden and confidentiality issues as MNE's and Advisors' top concerns about A13.</p>
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<ul style="list-style-type: none"> <li>• Do HMRC typically share the information quickly</li> <li>• Do HMRC ever deny these requests?</li> </ul> <p>Have you observed differences in the way different jurisdictions use CbCR?</p> <ul style="list-style-type: none"> <li>• Are some jurisdictions more aggressive than others?</li> <li>• Which?</li> <li>• Do you have any sense of why this is?</li> <li>• Has this discouraged MNE's from undertaking activities in certain jurisdictions?</li> </ul> <p>Are you aware of guidelines which restrict how tax authorities can use information?</p> <p>Do you know how tax authorities use CbCR e.g. to assess risk, profile tax payers or calculate adjustments?</p> <p>Is the filing system for CbCR reports easy to use?</p> <p>Are you aware of automatic checks on information by authorities?</p> <p>Are you aware of any penalties being issued?</p>		
<b>Tax impact</b>		

<p><b>Questions to ask to start the conversation:</b></p> <p>Have you seen a cash or accounting tax impact as a result of Action 13?</p> <p>Have behaviours changed as a result of Action 13?</p> <p><b>Points to potentially follow up on/prompt:</b></p> <p>Has CbCR increased cash tax?</p> <p>Has CbCR increased ETRs?</p> <p>Has CbCR changed client's appetite for risk?</p> <p>Has CbCR had an impact on group structures?</p>	<p>Objective output legitimacy in the wider sense of influencing tax payer behaviour</p>	<p>Hugger (2019) found no indication of increased cash taxes. Joshi (2020) and Hugger (2019) found increases in ETR of between 0.8-2%.</p> <p>CbCR painted as a risk assessment tool in consultation responses from MNEs</p> <p>Critical author's call for an increase in MNE tax contributions and cite the need to reform TP in order to achieve this (Christensen, 2018; Hugger, 2019; Murphy, 2016; Oats &amp; Tuck, 2019)</p>
<p><b>The role of the tax profession</b></p> <p><b>Questions to ask to start the conversation:</b></p> <p>Are you aware of any lobbying your firm did when Action 13 was at the consultation stage?</p> <p>Do you feel tax advisors have played an important role in disseminating the law?</p>	<p>Subjective assessment of legitimacy from the PoV of tax advisors and reflections on the clarity of the law (need to seek advice)</p>	<p>Sawyer &amp; Sadiq (2019) contend that advisors fill a key role in terms of disseminating the rules and that MNE's are often left in an uncertain position</p> <p>Consultation responses criticise a lack of clarity</p>

<p>Are the Action 13 disclosure requirements clear?</p> <p>Have you or has your firm participated in any industry wide forums to agree on application?</p> <p>Do you feel there are differences in how the law is being applied?</p>		<p>The final standard offers a degree of flexibility in what is disclosed and how.</p>
<p><b>The ALP</b></p> <p>Has Action 13/CbCR influenced your perception of the ALP?</p> <p>Do you believe the ALP is still the most appropriate transfer pricing method?</p> <p>Do clients ask you about alternative transfer pricing models?</p>	<p>Subjective output Assessment of the wider impact of Action 13 on this long-standing institution which is increasingly being seen as illegitimate</p>	<p>Strong support for ALP from consultation and Action 13 confirms adherence to the ALP as a fundamental notion. There is a slight challenge to this in the literature as Rogers &amp; Oats (2019) note more progressive attitudes may be emerging in the profession</p>
<p><b>Public Perception</b></p> <p>How do you feel increased public focus on MNE tax practices (including TP) has influenced practice?</p> <p>Do you feel public reporting of CbCR would change current practice?</p> <p>Are clients/MNE's resistant to this?</p>	<p>Subjective evaluation from the PoV of MNE's</p>	<p>Murphy (2016) contends that public CbCR can alleviate, to a considerable extent, MNE tax avoidance. This is contested by Rogers &amp; Oats (2019) who observe difficulties in</p>

<p>Do you feel public disclosure would lead to more informed conversations e.g. with financial journalists/tax justice campaigners?</p>		<p>transparency being translated to accountability.</p> <p>Consultation responses Suggest low public appetite &amp; conservatism in MNE's vis-à-vis public disclosure</p>
<p><b>Industry Specific</b></p> <p>Are any industries particularly affected by Action 13?</p>	<p>Subjective evaluation from the PoV of MNE's</p>	<p>Consultation responses note that the rules may be harder for some industries to comply with than others.</p> <p>Similar requirements are in place for financial institutions and extractive companies, these may compliment or overlap with Action 13</p>
<p><b>New UK Requirements</b></p> <p>Are you aware of the UK regulations set to come into force in 2023, which mandate the filing of Masterfile's?</p> <p>How do you feel this change will impact your clients?</p>	<p>Probing for a potential future study</p>	<p>UK Consultation on Masterfile becoming mandatory</p> <p><a href="#">Deloitte insight</a></p>

Did you respond to the HMRC consultation on these rules?		
Is the profession accepting of the new rules?		



### **6.3 Interview sample**

The interview sample of six tax advisors working in public practice (Advisors), and five tax professionals working in house in MNE's (MNE) is purposive, meaning participants were specifically selected (Bell, et al., 2019). This is because the research question requires that data be sought from interviewees with very particular knowledge. Action 13 data is only available to a limited few: tax professionals working within MNE's; external professional advisors engaged by MNE's; and tax authorities who receive the data. The potential research sample is therefore limited to this relatively small and oft times closed (Mulligan & Oats, 2016) group.

Where semi-structured interviews are concerned, sample size is a contentious issue (Bell, et al., 2019, p. 397). Rules of thumb as to the number of interviewees required to make a piece of research publishable range from 60 interviewees downwards, and numbers of interviewees making up the primary data in PhD thesis's ranged (in one study of interview sample sizes conducted in the UK in 2010) from 1 – 95 (Bell, et al., 2019, p. 397).

The key deciding factors in what constitutes an adequate research sample are, the theoretical orientation of the research and the nature of the underlying research question (Bell, et al., 2019, p. 398). Within these bounds there is still, however, considerable variation in practice, even with in singular disciplines. Tianjing Dai et al. (2019) analysed 639 interview-based articles published in the leading seven accounting journals between 2000-2014. The authors of this study analyse trends and try to establish some norms around qualitative interview analysis and observe significant deviation in number of interviews conducted (mean 26 with 68% ranging between 12-58) (Tianjing Dai, et al., 2019). The authors also, interestingly, observe significant deviation in the level of disclosure and detail given by researchers; the study found 20% of articles gave no specific number of interviewees with a further 3% only giving a vague number. Whilst these trends are interesting and highlight a divergence in practice, the authors opine that that there is no one size fits all and urge researchers to emphasize saturation rather than volume when deciding on sufficiency, and to be as transparent as possible as to how this judgement was made (Tianjing Dai, et al., 2019).

The critical qualitative nature of the analysis to be carried out in this study and the niche topic meant that the sample sought would naturally orientate towards fewer but more in dept interviews (Oats, 2012, p. 18). However, gaining these, relatively few, interviews still proved challenging. Several studies in the tax and accounting literature (Agyenim-Boateng, et al., 2017; Chen, et al., 2018; Rogers & Oats, 2012), note that it can be difficult to obtain interviews with specialist professionals, with response

rates to 'cold calling' typically being very low (Chen, et al., 2018; Maunganidze, et al., 2021). The sample in this study was, therefore, drawn from the researcher's extended professional network, with interviewees being reached through a process of introductions. Typically, the researcher contacted professionals working in international tax or transfer pricing, these were either the researcher's own ex-colleagues or contacts introduced by present colleagues in the Accounting and Finance department at the Robert Gordon University. Given the niche nature of the topic this first point of contact was, in most cases, unable to answer the interview questions themselves but were able, and very kindly willing, to introduce someone in their organisation with the required expertise. This process was lengthy, and several interactions went no further than initial contact, whilst others proved unfruitful when the nature of the topic became clear to prospective interviewees.

With these logistical challenges in mind, as far as possible, the sample has been chosen to gain representation from professionals working within MNEs, as well as tax advisors employed at a range of professional firms. This representation is important as it cannot be assumed that tax professionals working in this area are a homogeneous group (Mulligan & Oats, 2016). Furthermore, to gain a view which could be said to represent taxpayer's and professional firms rather than individual professionals, care was taken to source interviewees at an appropriate level in their organisation, following the advice of Baden (2016):

*"choose someone who is high enough up in the business that they will be reflecting a business perspective – in other words, avoid low-level employees who may not consider the business interests to be the same as their own."* (Baden, 2016, p. 13)

The sample in this study is in line with similar research: Sawyer & Sadiq (2019), studying Action 13 in Australia and New Zealand conducted a total of eight semi-structured interviews (6 Advisors and 2 Tax Officials); and Tran (2020), studying Action 13 in Vietnam and New Zealand conducted a total of twelve semi-structured interviews (10 Advisors and 2 Tax Officials).

Whilst relatively few, these individuals are experts and work at organisations who often form part of a feedback loop influencing these rules (Mulligan & Oats, 2016). Therefore, the insight which they provided has the potential to be highly illuminating. As discussed in Chapter 1 significant issues exist in relation to the opacity of data surrounding TMTP (Tax Motivated Transfer Pricing) (Picciotto, 2016). The individuals interviewed are therefore in a privileged position in terms of their access to TMTP data and are amongst the very few who will have detailed knowledge of the manifestation of Action 13 in practice. Engaging with

experts with applied knowledge in this field is therefore likely to be one of the best possible ways of gaining the depth of insight sought (Oats, 2012).

In addition to tax professionals the researcher attempted to conduct interviews with representatives of the UK's tax authority, HMRC. As recipients of Action 13 documentation and having power to open audits or request transfer pricing adjustments based on the Action 13 data, HMRC potentially have an even greater insight into the legitimacy of Action 13's output than MNEs and Advisors.

The researcher therefore contacted a professional acquaintance who has worked at HMRC for several years. This person very generously sought out, with some difficulty, the team responsible for reviewing Action 13 documentation, and requested an interview. After reviewing the interview template (Appendix 2 - provided to all interviewees before they agreed to participate), the policy lead in this department declined to be involved, stating in an email that:

*"because of restrictions on what we are able to say about our risk assessment processes and so on, there would be very little to be gained from an interview."*

This was unfortunate but understandable given the sensitivity of the work undertaken by HMRC.

Despite not getting a direct interview with HMRC, the researcher was successful in gaining an interview, with an ex-HMRC employee who had been involved at a senior level with Action 13 documentation before taking up a role with a professional firm (Firm 6). The perspective offered by this interviewee was extremely insightful and helped to illuminate some areas others were unable to cover. Care was however taken to ensure comments made by this interviewee were put in the context of their current position.

Action 13 applies the largest most internationally mobilised MNE's, those with global revenues of over €750million (OECD, 2014). Since the Big 4 accounting firms<sup>36</sup> dominate the landscape in terms of advising these firms in the area of taxation and transfer pricing (Sikka, 2010; O'Dwyer, 2022), it was felt important to obtain views from each of these firms. Cognoscente of Baden's (2016) advice (quoted above) senior figures were sought, to ensure that views gained were those of the firm, from someone with a high-level perspective. Of the interviewees obtained from the Big 4, four were senior figures in their firm's UK transfer pricing documentation team. This meant their views could reasonably be assumed to represent

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<sup>36</sup> Deloitte, EY, KPMG and PWC

those of their firm (particularly as several interviewees had responsibility for the formation and dissemination of firm policy in this area). However, relying on the position of interviewees and the reputation of their firms was not felt to offer sufficient justification for achieving saturation. Therefore, the responses of these interviewees were compared, as they were gathered, to assess the extent to which they deviated and offered unique insights. Except for Interviewee Firm 6 (whose HMRC experience offered a unique perspective) the other professional firm interviewees offered similar comments, which also re-enforced the views expressed by their firms in the OECD's Action 13 consultation. The similarity in views expressed gave comfort in terms of the interviews having captured a reliable representation of the views of the largest advisors active in this space.

Professional advisors, were able to offer a broad view of the implementation of Action 13, drawing on their experience with multiple clients. However, it was also felt important to gain the views of professionals working in house at MNE's. These professionals are privy to the internal workings of information systems and at the forefront of implementation of Action 13 reporting, and therefore able to offer a unique point of view. Although this experience is necessarily limited to one organisation, it nonetheless provides valuable insight, especially with regards to some of the concerns expressed by stakeholders in the consultation about difficulties gathering reportable data. In house professionals were also able to offer a broad and informed perspective on the rules, as Dowling (2014) observes, many of the world's largest MNE's have extremely well-staffed and technically sophisticated tax and legal departments, some of which can even compete with the large firms in certain areas. Five representatives from MNE's were interviewed, each has or had responsibility/oversight for preparation of Action 13 documentation. Again, although relatively few the interviewees were senior professionals able to offer a deep insight into the working of the rules.

The answers given by MNE's were to a large extent in accord with each other and the advisors interviewed, this gave some assurance as to the reliability of the perspectives being gained and the ability to reach saturation by interviewing a small number of well-placed individuals. The answers given also tended to accord with the views expressed by the majority of MNE's in the consultation and allowed these to be explored in further detail and context.

The sample of interviewees is set out in Table 18 and consists of eleven senior tax professionals (6 external advisors and 5 in house). When analysed in conjunction with the consultation this is felt to offer a

reasonable and reliable pool of data to draw on in terms of assessing the output democratic legitimacy of Action 13.

*Table 18 – Interviewees, roles and organisations*

<b>Interviewee</b>	<b>Job title</b>	<b>Organisation/Industry</b>	<b>Duration</b>
Firm1	Tax Director	Big 4 Accounting Firm 1	60 mins
Firm2	Transfer Pricing Manager – Transfer Pricing Documentation Lead	Big 4 Accounting Firm 2	50 mins
Firm3	Transfer Pricing Documentation Director	Big 4 Accounting Firm 3	50 mins
Firm4	Transfer Pricing Manager	Big 4 Accounting Firm 4	77 mins
Firm5	Partner – Transfer Pricing Lead	Mid Tier Firm 1	47 mins
Firm 6	Transfer Pricing Partner (previous HMRC TP senior leader)	Ex-HMRC, now in practice (firm redacted to protect anonymity)	45minutes
MNE1	Global Tax Lead – Treasury and Captive Insurance	Energy	68 mins
MNE2	Tax Compliance and Reporting Senior Manager	Financial Sector	35 mins
MNE3	Director of Tax Policy	Energy	42 mins
MNE4	Tax Director - Transfer Pricing & Reporting	Energy	50 mins
MNE5	UK Tax Manager	Energy	59 mins

As can be seen from Table 18, MNE’s were mostly from the energy sector, as this is where the majority of the researcher’s professional network work. This sector is interesting as extractive industries are subject to various forms of CbCR and transparency reporting and therefore this type of disclosure is well understood (Chatzivgeri, et al., 2019). However, it is acknowledged that a different set of issues may have emerged if the study had included tax managers working for digital consumer businesses as these were the primary targets of BEPS (Cobham, 2017). The researcher did try to contact interviewees from large consumer facing digital

businesses through LinkedIn, however none responded, confirming the issues noted by other scholars and listed above. This is a limitation of this study and presents an opportunity for future research. However, the sample gained for this study still provides an instructive group of experts able to provide valuable insight into the manifestation of Action 13 in practice and hence its legitimacy as a policy intervention.

## **6.4 Ethical considerations**

In addition to the questions to be asked, each potential interviewee was supplied with an informed consent form prior to agreeing to participate (Appendix 3). The informed consent form sets out the purpose of the study, how data will be stored and used and the period for which the data will be retained. These conditions were informed by the RGU research ethics policy and the informed consent form was based on a template obtained from the UK Data Service. Prior to each interview going ahead interviewees were given the opportunity to discuss their participation and clarify any details they wanted to know about how the data would be stored. Interviewees all confirmed before interviews were conducted that they were happy to participate based on the conditions set out in the informed consent form.

## **6.5 Analysis of interview data**

Interviews were recorded and professionally transcribed before being uploaded to NVivo 12 (NVivo) for qualitative content analysis to be conducted.

Whilst recognising the benefits of using NVivo, in terms of making the coding process efficient (Bell, et al., 2019, p. 540), care was taken to ensure that the analysis was driven by the data and method of enquiry rather than the software. There is a large volume of literature which questions the usefulness of NVivo<sup>37</sup>, see Jackson et al (2018) for a summary of this critical body of literature. According to Jackson et al (2018) concerns about NVivo can be summarised into four categories:

1. The software creates a separation between the researcher and the data
2. The software is predisposed to prefer a grounded theory approach over other methods
3. The software encourages mechanisation of thought and action at the expense of understanding and reasoning
4. The software encourages quantification rather than contextualisation

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<sup>37</sup> And similar computer aided qualitative data analysis software (CAQDAS) packages

Several counter arguments exist which debunk these concerns or at least suggest how they can be mitigated against in the research process (Jackson, et al., 2018). Most importantly, research texts suggest that the researcher should drive the process of and not allow themselves to be driven by the software (Smith, 2020, p. 142). Care was therefore taken to adopt an approach to content analysis which was robust, replicable, and firmly underpinned by the research philosophy (Lillis, 1999). The process is presented as linear below but was one of iteration and constant reflection, to ensure the coherence of the whole analysis (Lillis, 1999; Mulligan & Oats, 2016; O'Dwyer & Unerman, 2007)

Firstly, transcripts were read through to ensure punctuation and emphasis were correct. This included re-watching portions of interviews where there was any lack of clarity in the text. This process was laborious but is recognised as a crucial first step in, getting to know and becoming immersed in the data (Lillis, 1999; Oats, 2012).

Next a set of codes identifying responses to questions about the objectives set by the OECD and subjective concerns identified from the consultation were set up in NVivo. Coding was then conducted using these codes on the full data set. During this coding round potentially interesting themes which had not been pre-identified were also added and coded for (Mulligan & Oats, 2016; O'Dwyer & Unerman, 2007). This round of coding involved navigating back and forth across the data to ensure that all themes identified were fully coded across all interviews. Codes used in this round of coding are set out in full in Appendix 4.

Having completed a round of initial coding the coded texts were re-read, and a short description was written for each code to capture what it was trying to identify (Appendix 4) (Mulligan & Oats, 2016). This critical reading was carried out after a gap of some weeks from the first coding. Although this gap was occasioned by a busy period at work rather than as part of the research design, the gap was very helpful in allowing the researcher to step back and re-examine the data from a fresh perspective.

Following this second reading, the functionality of NVivo was used to sort the data by code. Codes were then read in isolation to ensure the data gave sufficient context and meaning to answer the research question (Mulligan & Oats, 2016). A process of rationalisation was also undertaken, where data coded multiple times was reviewed with a view to reducing the number of codes where there was overlap which did not add to the analysis (Mulligan & Oats, 2016).

Next a broad narrative analysis of each code was written up, paying close attention to agreement or contentions arising between interviewees (O'Dwyer & Unerman, 2007). Care was taken at this stage to allow the interviewees to tell their story (Mulligan & Oats, 2016), this is aligned with

the philosophical approach of the thesis, which requires the understanding of actors views within the context in which they operate (Chua, 1986).

Finally, the broad analysis by code was refined and edited in line with the underpinning theory, democratic legitimacy, to conclude on the output legitimacy of Action 13 in practice. At this stage links were established between individual codes and mapped back to the guiding theory. The most illuminating quotes were sought out to be incorporated into the narrative, with care and awareness that these should not be taken out of context. Findings were compared throughout to the extant literature and the findings from Chapter 8.

## **6.6 Critical reflection on semi-structured interviews**

The process undertaken in collecting and analysing interview data has been set out above to allow readers as much insight as possible into the mechanics and rationale underpinning the choice of method. However, it is recognised that there are several criticisms which can be levelled at this method of enquiry. These are set out below along with the mitigation put in place to address any potential weaknesses, as far as was practical.

In general, concerns are expressed in literature about the validity and reliability of qualitative research, when compared with quantitative methods which have built in statistical checks and balances (Lillis, 1999). These concerns centre on the validity of findings, which essentially rely on the subjective assessment of individual researchers (Smith, 2020). In this study, the researcher has expertise in the subject area and a shared professional background with interviewees. This allowed the interviewer to contextualise the responses received within the sphere of established practice, and therefore 'mine' in depth and detailed responses (Oats, 2012, p. 20). The researcher's technical specialism and experience in the field address some concerns of validity at least to the extent that they give assurance over the value of his subjective assessments. However, technical specialism and attachment to the field of study is a double-edged sword. The more familiar the interviewer is with the subject area and the established practice the more likely it is that the interviewer's subjective assessments will be driven by entrenched views (Oats, 2012, p. 20). These criticisms are inherently difficult to address, however, several suggestions have been adopted from the literature to ensure that the findings of this thesis are as robust as possible:

Firstly, the process undertaken in collecting and analysing data has been set out in explicit detail (6.2-6.5), noting where significant choices and judgements were made (Lillis, 1999). This ensures clarity and transparency over what was done.



Secondly, the researcher has explicitly stated their philosophical orientation vis-à-vis the research undertaken (Gallhofer & Haslam, 1997), see Chapter 4 (4.4.1) for full commentary on this. This allows the reader to orientate the research within the field of study and to understand the positionality of the author.

Thirdly, analysis and conclusions have been strongly underpinned by a guiding theory in *Democratic Legitimacy* (Scharpf, 1999). This theoretical lens adds process to the analysis (Laughlin, 1995) and a frame of reference for subjective assessments. The theory also encourages a balanced and comprehensive analysis of the entire policy creation process from inception to output (Scharpf, 2002).

These mitigations do not make the research *objective* in the sense of statistical analysis; however, they do set out a replicable process and give an honest account how subjective assessments were reached, thus allowing readers to contextualise findings and attach appropriate value to them (Gallhofer & Haslam, 1997).

Furthermore, in the context of the wider thesis, the benefit of an overall case study approach is that the findings of the interview analysis can be triangulated (Smith, 2020) with the quantitative analysis of comment letters presented in Chapter 8.

## **6.7 Chapter summary**

This chapter set out in detail how interview data was collected and analysed to provide an evaluation of the output legitimacy of Action 13. Details about the interview sample, question construction, analysis approach and research software employed are all given, with critical reflection on the suitability of the overall approach for answering the research question.

The following chapter presents findings from the interviews and answers RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

## **7 Chapter 7: Interview Findings – Evaluation of Output Legitimacy**

### **7.1 Introduction**

This chapter presents findings from the 11 semi-structured interviews, conducted to assess the output legitimacy of BEPS Action 13 in practice and answer RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output.

Before presenting the analysis, it is worth re-capping the key features of output legitimacy (see Chapter 3 for full coverage). Scharpf articulates that government 'for the people' is legitimised by its ability to provide an output which solves problems incapable of being solved by individual actors cooperating or through the operation of markets (Scharpf, 1999, p. 11).

Evaluation of output has in practice two components: objective and subjective evaluation (Boedeltje & Cornips, 2004).

Objective evaluation seeks to measure whether the policy is effective in meeting its stated objectives (Boedeltje & Cornips, 2004).

Subjective evaluation measures whether stakeholders are satisfied with the policy outcome. Subjective assessment deals with unintended consequences of legislation as well as identifying those who benefit and lose out most from a policy. A positive subjective evaluation is more likely if stakeholders recognise their own ideas or preferences in a policy outcome (Boedeltje & Cornips, 2004).

To evaluate output, both an objective and a subjective measure will be taken. In this regard interviews were conducted to assess participant's perceptions as to how well Action 13 meets its stated policy objectives (objective assessment of output); and to what extent Action 13 has proved acceptable to those in practice implementing it (subjective assessment of output).

### **7.2 Objective assessment**

The OECD set out three policy objectives for Action 13, each of these will be analysed drawing on participant views gathered from the interviews.

#### **7.2.1 Objective 1 – To ensure MNE's give adequate attention to transfer pricing policy**

In full, objective 1 seeks:

*"to ensure that taxpayers give appropriate consideration to transfer pricing requirements in establishing prices and other conditions for transactions between associated enterprises and in reporting the income derived from such transactions in their tax returns"* (OECD, 2015)

Advisors interviewed offered the view that Action 13 in itself had not had a marked impact on TP policies, for example, Firm 1 opined that:

*"[Action 13] hasn't changed behaviours, in the ways that some of the other [BEPS] actions have. So, if you compare it to something like Action 2, with hybrid, or Action 4, with the corporate interest restriction, I don't have any clients, this isn't to say that no one does, but I haven't heard of any clients actually changing operations in response to Action 13."* (Firm 1)

The view that Action 13 has had limited direct impact was shared by all advisors, however, Firms 4 & 5 gave the view that Action 13 is a component part of a wider culture change in the TP and international tax landscape:

*"There's, like it's more of a high-profile thing in the press. So, it's not like, do you know what I mean, it's maybe part of a wider thing that I think improves behaviours, to an extent, but in itself, I've never, I haven't heard of a single example of someone saying, well actually, now I'm preparing my CbCR, maybe I should change that."* (Firm 4)

This was shared by Firm 5 who commented on the general raising of awareness of TP as a tax avoidance technique and the negative publicity received by some high profile MNE's, particularly at the time of the UK Public Accounts Committee hearings on tax avoidance chaired by Dame Margaret Hodge (during 2013-2014):

*"I'm not sure whether this in isolation has changed risk appetite or whether the whole raising of the profile of transfer pricing has changed the risk appetites. I mean, at one point it was safer for me to say I was a banker than a transfer pricing expert."* (Firm 5)

None of the MNE interviewees reported any change in their organisation's policies, MNE 3's articulates the opinion held by the MNE interviewees e.g. that they were compliant and no change was required:

*"In terms of TP policies, well again, we had pretty clear, I mean, OECD based transfer pricing policies ... I don't think Action 13 has particularly impacted how we go about doing what we do on the intercompany side"* (MNE 3)

When asked explicitly if Action 13 had had any tax impact, interviewees were even more sceptical e.g. Firm 1 opined:

*"I don't think it has. Or, if there is, I suspect that it might be very hard to quantify because I don't think CbCR, in and of itself, will have led to significant increases in tax collected through controversy. ... Most of the issues that I think CbCR would have flagged to the tax authorities have been neutralised by other BEPS actions"* (Firm 1)

This opinion was common across the interviewees, although there was acknowledgement that the transparency added by CbCR may discourage particularly egregious structures. Some of the other BEPS Actions (e.g. Action 4) set out very specific rules and their effect may be easier to discreetly quantify. However, drawing on their experience at HMRC Firm 6 noted that Action 13 information will be being used:

*"you can look at the HMRC statistics of transfer pricing yield that they publish roughly each year and you can see the compliance yield increasing and that's a result of a more concerted and focused effort in, on including the PDCF<sup>38</sup> and part of that is CbCR"* (Firm 6)

The fact that Action 13 is used as part of a suite of information may explain why Advisors do not see it as having a large direct impact.

None of the MNE's interviewed reported any impact on their tax bill as a result of Action 13, MNE 4 making the point emphatically:

*"I don't think so, no, other than it's probably reduced our tax bill because of the costs involved, and therefore, we get tax relief on them, so..."* (MNE 4)

Where Action 13 seems to have had a direct impact is, unsurprisingly, in terms of preparation of documentation:

*"the biggest impact that I've seen from Action 13 ... is it's raised the profile of transfer pricing and transfer pricing documentation. When I first started working in transfer pricing, at best, documentation was seen as an insurance policy. Something you had to prepare once off, sat on the shelf for seven years in the hope nobody ever looked at it. Now, it's recognised that it's a fundamental part of a group's tax documentation."* (Firm 5)

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<sup>38</sup> Profit Diversion Compliance Facility

Firm 5 went on to explain that TP documentation was often viewed by the C-Suit and would be tabled for the audit committee to look at, this was noted as a major shift from when TP documentation would have remained within a tax department.

This was echoed to an extent by Firm 3 who opined that:

*"after kind of Action 13 came into play was, first of all that there was, there was definitely a shift towards clients recognising that, that transfer pricing documentation is a compliance requirement that needs to be, and so we saw a growth in this sort of, this outsourcing of that, of almost treating it like your tax returns, or something like that, and your clients going, okay, we need to do this, we want to do it properly"* (Firm 3)

Firm 1 also echoed this sentiment, commenting that:

*"I always think transfer pricing documentation's what tells your story. ... So, I think what it probably does is make people go, okay, well what I'm putting in my CbCR report, does that read across everything else I'm doing, like does this all tell a coherent story?"* (Firm 1)

Firm 2 offered a counterpoint, or at least, a different perspective on the impact of mandating compliance. This was that it had created a base level of compliance with respect to TP documentation, a *'lowest common denominator'*. Firm 2 acknowledged that this was beneficial for some groups but for others drove a mentality centred on complying at the minimum possible level when they may in fact benefit from doing a bit more analysis and work.

Firm 6 offered a slightly different perspective, noting that:

*"No, I think the clients that do good documentation, did good documentation before ... the biggest driver is, is after a transfer pricing enquiry. If they get stung, if they can't prove their assertions then, then once, once the horse has bolted the client will look to close that particular stable door."* (Firm 6)

Firm 6's view is out of sync with the other responses but interestingly suggests that the uplift in documentary compliance has not been universal. This is interesting but may be borne of Firm 6's prior experience working for HMRC, where they will necessarily have pursued MNE's with poor documentation. This previous experience may mean that their current employer is more likely to ask them to review problematic clients (this is a common role for ex-HMRC officials now working in practice).

Agreeing more with Firm 2 than Firms 1 or 6, MNE's were less sure about the impact on TP documentation, MNE's 3, 2 and 5 noted that it had prompted their organisation to review TP documentation policies. However, there was feeling amongst the interviewees that the documentation required by Action 13 was mostly a compliance, tick box rather than a value adding exercise e.g.:

*"I think it's, as a result of BEPS, I would say we, we're now actually more up to date on that paperwork. Whether we actually need to do it that regularly, I'm not so sure, to be honest. So, we probably prepare a lot of reports that we don't really need to do."* (MNE 5)

In line with this MNE 1 noted that the biggest benefits to documentation tended to relate to systems of information gathering rather than underlying policy:

*"It was an eye opener in many ways to realise that a lot of reportable data is scattered in the different financial reporting systems, mind you, [MNE 1] is a very big organisation, a very large group of entities, let's say, roughly 1,000 entities around the globe"* (MNE 1)

The picture presented by interviewees with respect to Action 13's impact on TP policy is therefore complex. Although there is limited evidence of it having an impact on TP policies it does appear to have forced MNE's to interrogate their systems to ensure they can evidence the legitimacy of their TP practice and therefore, in line with Objective 1 given *"appropriate consideration to transfer pricing requirements"* (OECD, 2015).

Other authors have commented that Action 13 is unlikely to have any radical impact on MNE's transfer pricing practice (Christensen, 2018; Sawyer & Sadiq, 2019) and this is largely confirmed by the findings. It is worth noting, however, that the MNE's interviewed were at pains to stress that they took a conservative approach to TP before Action 13 and were therefore unlikely to change policies because of having to document them, the attitude across MNE's is summed up by MNE 3:

*"we had pretty clear, I mean, OECD based transfer pricing policies so, I don't think ... Action 13 has particularly impacted how we go about doing what we do on the intercompany side"* (MNE 3)

It is worth noting that the sample interviewed consisted mostly of MNE's in the energy sector, who largely deal in physical products. Perhaps if the interviewees had been from consumer facing digital firms, the sentiment may have been different. As noted in Chapter 6, this could be an interesting area for future study.

Advisors, who deal with a spectrum of clients, may have been expected to comment on a variety of MNEs changing their TP approach to a greater extent, this was not the case but again may speak to their client's compliance rather than a failure on the part of Action 13. It does not appear that Action 13 on its own is regarded as having a significant increase in tax take, which adds weight to the findings of empirical studies in this area (Hugger, 2019; Joshi, 2020).

The rather underwhelmed response from interviewees does not necessarily mean that Action 13 has fallen short on Objective 1. Interviewees universally agreed that compliance in the UK was good and so in that respect MNE's were being forced to interrogate how they approach and document their TP approach (giving it "*appropriate consideration*"). In addition the fact that the mandatory documentation requirement appears to have raised the profile of transfer pricing, to the extent where it is discussed by very senior executives suggests more of an impact than is initially observed by interviewees.

Furthermore, Action 13 does appear to have had a more subtle influence, which may well help to achieve the OECD's overall objectives; this was reflected when interviewees were asked to comment on the attitudinal impact of Action 13. When asked about the impact Action 13 has had on attitudes to transfer pricing no interviewees immediately reported a major change as a direct result of Action 13 coming in. However, from further discussion around the question some interesting observations emerged.

Firms 1, 4 & 5 noted that the extra visibility provided to TA's by Action 13 may have caused clients to look more carefully at certain structures within their organisation, albeit alongside other considerations:

*"what it may have done is influence when people are thinking about what transactions to enter into. There's definitely, as part of the wider conversation, there is a, oh actually, this could be helpful when it comes to our CbCR position or, how is this going to look. But I wouldn't say it's ever the driver."* (Firm 1)

All firms agreed that businesses in the public eye for their tax affairs (particularly consumer reliant brands such as online retailers and coffee shops) were more likely to feel the need to consider the impression made by their CbCR report than less publicly visible businesses. There was again general agreement that Action 13 was part of a wider shift in the transparency landscape and so it would be difficult to split out the discrete impact of its impact on attitudes. However, this is clear that there was an impact.

MNE's interviewed noted that their attitude to TP had not changed because of Action 13, indeed all expressed the opinion that they had always taken a cautious and compliant approach to TP (as noted above). However, MNE's 1 and 3 noted that complying with initiatives like Action 13 (and more public CbCR) aligned with the prevailing attitude of their employees:

*"Employees want to know they're working for a company that shares their values... and if tax is, you know, societal contribution and purpose and all the rest of it, is one of those values then being quiet about what you do on the tax front may, may not square with that."* (MNE 3)

This observation was also made by Firm 1, who noted that the tax landscape has changed significantly during their time in tax, from a position where reducing tax rates by any legal means was unquestioned to a position where there is:

*"increased focus on sustainability and then, obviously, public kind of perception and, you know, everything that came out with like tax justice"* (Firm 1)

Interestingly Firm 1 saw this change (at least partly) being driven by junior members of staff:

*"if I was to say like, oh, here's something we can do to get the tax rate down for this client, but it's a big dodgy, I, I don't think our juniors would, they'd just be like, no, that's not acceptable, that's not what we do. And like, I feel like that is a change"* (Firm 1)

It appears therefore that Action 13 has not moved attitudes on its own but has been a component factor in a hegemonic shift in attitudes to tax transparency and the acceptability of tax avoidance and aggressive TP practice. Whilst this is a more subtle effect it could be regarded equally important and as powerful as strong mandatory filing rules in driving progressive behaviour in this area. Where attitudes in the tax profession tend towards achieving tax minimisation, the transfer pricing rules potentially offer a large scope for avoidance. TP is in an area where, even with improved documentation standards, the level of subjectivity and judgement make it hard for tax authorities to effectively challenge taxpayers (Bartelsman & Beetsma, 2003; Oats & Tuck, 2019; Rogers & Oats, 2019). Therefore, any movement in attitudes to align more with the progressive notions of corporate taxation can only be positive for the achievement of Objective 1 of Action 13 and for the BEPS project in general.



## **7.2.2 Objective 2 – Allow tax authorities to carry out an informed TP risk assessment**

In full, objective 2 seeks:

*“to provide tax administrations with the information necessary to conduct an informed transfer pricing risk assessment” (OECD, 2015)*

Interviewees were first questioned on the risk assessment capabilities of Action 13 documentation

Firm 1 offered the following reflection:

*“it's a very useful tool for HMRC to have. If you flag up as a risk to them, they will then pull your CbCR” (Firm 1)*

Firm 4 went on to explain that the data could be useful in gaining a high-level understanding but that its only one piece of a bigger picture and requires contextual reading:

*“I think the CbCR is just such a kind of fiction, like not a fiction, sorry, but like do you know what I mean, it's so different to any other reporting, I think maybe it, you know, you can some broad things like, okay, they've got x percent of their profits here. But, you know, I don't know what it really, you know, it does give you some data points, no, it does, but it would have to be conjunction with everything else.” (Firm 4)*

Firm 5 echoed these sentiments very closely, commenting that:

*“It would highlight something that stuck out like a sore thumb, like an IP company or a finance company, apart from the fact you have to tick the box but aside from that, everything's largely out of context cause there's no real narrative alongside it” (Firm 5)*

Firm 6 drew on their experience working for HMRC to largely confirm the perceptions of Firms 1, 4 and 5 (also 3 although not quoted above) about how CbCR data is used:

*“this is not something that you're, you're going to look at those CbCR figures and then say, right, I'm going to audit this and find an audit trail back to the statutory accounts and look for errors and create adjustments in that way. It was very much seen as something that provides an indication at a high-level prima facie indication that there's potential risks that require further, further questioning” (Firm 6)*

Firm 2's opinions were somewhat at odds with the other advisors. Whilst all interviewees were cautious in ascribing too much success to Action 13, Firm 2 was rather scathing in their commentary on the risk assessment utility of Action 13 documentation:

*"I have seen groups that have got like awful CbCRs that are completely benign from a tax perspective, and I've seen groups with brilliant CbCRs, that look amazing, that are terrible from a tax perspective. ... And CbCR is brilliant at basically highlighting what I, sort of red flags, but false positives. That's the main thing it does. It doesn't do tax risk; it does false risks most of the time."* (Firm 2)

This quote seems to suggest that CbCR are unfit for purpose and likely to indicate risk where there is none but potentially miss aggressive TP practices. This view does appear to be an outlier in the sample of advisors but highlights perhaps that there is some scepticism as to the usefulness of the documentation.

MNE's largely echoed the sentiments of Advisors, with respect to the utility of the information but highlighted that the information is potentially only useful when a number of reports have been filed, enabling trend analysis over time. This was an interesting perspective and one talked about in detail by MNE's 1 & 3:

*"you need three or four or five subsequent CbCRs of a multinational group to analyse the trend ... a couple of years after the CbCR reporting obligation has been introduced and we've produced quite a few CbCR's since, and then I believe the tax authorities have had their time, you know, to chew on it and, and, and to turn it around to come, come to us with, with tricky questions. I haven't seen much."* (MNE 1)

MNE 3 agreed with this point, noting that they believe the data is most useful when employed to interrogate trends.

*"the trend type of things that would be of more interest and you only get trends with several years, and you only get trends with several years if there's somebody in the tax authority that is measuring those trends and, you know, aggregating the data or, you know, pulling the reports, whatever they need to do."* (MNE 3)

It appears therefore, with one notable exception, that the interviews can see the risk assessment potential for the documentation, especially when a track record of filing has been established. This suggests an objectively legitimate meeting of Objective 2. It is interesting that the interviewees echo sentiments expressed in the consultation about the documentation

being useful as a high-level tool, with many quick to caveat that more information would be needed to conduct a thorough audit. However, if we consider that the wording of objective 2 is centred on “*informed transfer pricing risk assessment*”, the one stop information provided by CbCR appears to add to the arsenal available to tax authorities in terms of identifying potential TP audit targets.

To assess how the documentation was being used in practice, interviewees were asked about how Action 13 had affected their interactions with tax authorities. From this discussion a different perspective emerged which questioned whether the risk assessment potential of the documentation was being realised in practice.

Firm 1 elaborated on this:

*“I don't think the perception is that someone is sitting going through everyone's CbCR files looking for potential risks. ... I don't think any tax authority has the capacity to do that.... there's certainly a bit of a perception, and I can't speak for everyone, but there's a bit of a perception that these all sit in a room somewhere cause HMRC just do not have the bandwidth to deal with it”* (Firm 1)

Firm 3 broadly agreed with this perspective but made the interesting suggestion that rather than employing their staff to look through reports tax authorities were making use of technology to analyse the data. Firm 3 went on to note that they had seen limited evidence of Action 13 documentation leading to TP audits or adjustments, this view was shared by Firm 4:

*“we'd heard that HMRC were starting to use data analytics to, to audit it, and it's kind of, but I hear it was at a really basic stage, like, you know, kind of, they were getting a few metrics and things. I've not heard of any audits coming out of a result of CbCR data yet, so I'm not really clear on, to the extent which tax authorities are using it, and to the extent to which it's useful.”* (Firm 4)

Echoing their early point about TP tax take (7.2.1), Firm 6 noted that the data was being used, but as part of a broader suite of tools to tackle aggressive transfer pricing and has indirectly helped HMRC to increase tax yield:

*“you can see the compliance yield increasing and that's a result of a more concerted and focused effort in, on [transfer pricing] including the PDCF and part of that is CbCR so you would, you could say, not directly,*

*indirectly because it's another tool for them to use and they've been more active in using the tools in a more focused way.” (Firm 6)*

MNE’s 1, 3 & 5 were similarly sceptical about the extent to which Action 13 documentation was being used, noting that they had received no enquiries or questions from TA’s as a result of having made the requisite filings over a number of years. MNE 3 mentioned that Action 13 had been useful in focussing discussions around risk with two European tax authorities. However, these conversations were not initiated because of Action 13, rather the CbCR report was used retroactively to give shape to the discussions:

*“we’ve had two conversations with two tax authorities in Europe, both around risk and both have, both conversations have gone better because we’ve been able to, to, you know, to show our CbCR alongside other data, other tax related data, and so we’ve been able to, you know, have a far more focused, if you like, risk based conversation” (MNE 3)*

Only MNE 2 noted risks identified to date by tax authorities on the back of an Action 13:

*“So, we’ve not, we’ve not had anything from the UK, you know, where we have had queries is more around, so we’ve had, I think, queries from Jersey saying, you know, you’ve, you’ve not notified about this entity, or you’ve notified about that entity... But we’ve not had any queries about the actual numbers from any of the tax authorities.” (MNE 2)*

What seems apparent from the interviews, then, is that Action 13 alone has not triggered a large increase in TP enquiries (contrary to concerns expressed in the consultation). However, it does appear that the information is regarded as useful for assessing risk and has triggered the discovery of undisclosed entities in at least one jurisdiction.

Interviewees made interesting observations about the need to view the data as part of a trend and as part of a suite of other information available. In this sense the documentation could be said to legitimately meet the OECD’s objective.

What could challenge the legitimacy of Action 13 in practice is the perception of stakeholders as to the lack of usage of the data. Interviewees (except for Firm 6) were all quick to speculate, that the risk assessment potential of the Action 13 reports may be being constrained in practice by a lack of resources available to tax authorities to employ in reviewing reports. Whilst there were speculations about the TA’s making use of AI and other technology no concrete evidence emerged of this

happening. In accord with Tran (2020), it appears that there is a lack of understanding as to how TA's will utilise Action 13 data. Firm 6, with their HMRC experience, counter-balanced this to an extent with an assurance that the data was being used, if in a more limited way than might have been anticipated by other stakeholders.

The perceptions of the remaining 10 interviewees could be interpreted in a variety of ways. Firstly, that the concerns expressed do point to a genuine issue with TA's being able to utilise the data due to resource and capacity constraints. Secondly, it may be that the additional transparency associated with Action 13 and the operation of other BEPS Actions have curbed aggressive TP and there is therefore less for HMRC and other TA's to pick up on. Thirdly, it may be that the MNE's interviewed, and the clients serviced by the Advisors interviewed are largely compliant and unlikely to be targeted. Whilst a combination of these factors may be true the fact that that interviewees appear to question the extent to which Action 13 reports are used may undermine the legitimacy of the documentation requirements over the long term. This reflects, indirectly on the OECD, who it could be argued created effective disclosures but perhaps underestimated the ability of tax authorities to make use of them. This legitimacy gap could be closed, in the first instance, by encouraging tax authorities to communicate more openly about how data is used. Furthermore, it would be interesting, for a future research project to engage with tax authorities to assess the extent to which they may be using the information and the constraints which perhaps prevent its being used to its full potential.

### **7.2.3 Objective 3 – to provide tax authorities with useful information to conduct a TP audit**

In full, objective 3 seeks:

*“to provide tax administrations with useful information to employ in conducting an appropriately thorough audit of the transfer pricing practices of entities subject to tax in their jurisdiction, although it may be necessary to supplement the documentation with additional information as the audit progresses” (OECD, 2015)*

Interviewees were sceptical about whether this objective had been achieved, this is unsurprising given the views expressed on Objective 2 (7.2.2 above). However, interviewees did offer a range of perspectives on how the Action 13 documentation could be used for a TP audit.

Firm 1, speculated that it may better help tax authorities to scope their audits:

*"what it allows them to do is effectively broaden the scope of the enquiry because ... when you open an enquiry, you're then bound by the limits of that enquiry, you can't just find other things and like, oh, I have a question on this cause that's not what your enquiry is into. So, I think it maybe allows HMRC to be a little bit more educated into what they're enquiring into and making sure that they don't unnecessarily narrow the scope of their enquiry."* (Firm 1)

Firm 3 noted that it may encourage taxpayers to have their documentation ready in a timely manner:

*"I'm not sure how much it has. In that, so I suppose there's a higher expectation from tax authorities that you have your transfer pricing documentation ready in the event of audit."* (Firm 3)

Firm 2 was very sceptical of the documentation being used as a basis for an audit finding and any potential adjustments:

*"if you had a compliant minimum Action 13 report on a company, if it's in any way complex, which most companies generally are ... I would say the, you know, the inspector would be negligent by saying the adjustment is X"* (Firm 2)

Firm 4 opined that the documentation may help taxpayers to satisfy the requirements of an audit if it was well crafted. However, this interviewee was quick to state that Action 13 documentation is only one piece of a larger puzzle and would not be sufficient on its own to satisfy a TP audit, which would typically necessitate the sharing of much more detailed documentation.

Firm 5, explained that audit protection is a key selling point they present to clients as justification for doing a good job of preparing Action 13 documentation and possibly engaging their services in this regard:

*"The way I try to sell it, if you like, in terms of why you should proactively prepare your Action 13 documentation, your master file and your local file, is it's your first line of defence, it's your first opportunity to explain to a tax authority what you're doing and why it's correct. So, actually investing in it and doing it up front, rather than scrabbling around when it's requested."* (Firm 5)

MNE's confirmed that they had not been audited on transfer pricing by HMRC since the application of Action 13 and therefore were unsure how HMRC would use it. However, all expressed scepticism about its

usefulness, as captured by MNE 3 who refers to TP audits their group has been subject to outside of the UK:

*"we have been subject to transfer pricing audits in, in a number of countries, obviously, multinational group, tons of intercompany transactions, they don't look at the CbCR. They might, they might glance at it but, you know, it's not a be, obviated the need for, you know, endless documentation requirements or, send us all your trial data and send us all your trial balance and send us every invoice from the last three months and, you know, da, da, da, all your contracts, all the rest of it, so don't see that being achieved at all."* (MNE 3)

More than objectives 1 and 2, it appears that interviewees were sceptical about objective 3 being fulfilled. Interestingly, this perception does not appear to be based on much concrete experience of TP audits conducted by HMRC after Action 13's implementation but rather their prior experience of TP audits. Whilst there is some agreement that Action 13 may help HMRC in identifying audit targets and scoping their enquiry, the broad consensus was that much more specific data would be required to satisfy the queries TAs were likely to ask. From a taxpayer perspective the documentation may prove useful in defending against an audit but again interviewees opined that this would only be a first line defence. Objective 3 requires information to be provided which assists TAs in *"conducting an appropriately **thorough** audit of the transfer pricing practices of entities"*. The documentation therefore appears to fall short on this objective and hence output legitimacy, at least in the view of interviewees; none of whom intimated that the information could be used to *thoroughly* assess the TP practices of an MNE.

However, as will be discussed in 7.2.4, this position may change soon with imminent changes to the legislation.

## **7.2.4 New Regulations**

As outlined in Chapter 2 (2.9), the UK only requires filing of a CbCR report under Action 13. This will change for accounting periods ending on or after 1 April 2023, from when MNE's will be required to file the full suite of Action 13 documentation<sup>39</sup> e.g. Masterfile, Local File and CbCR. One possible reason why the UK government is now introducing these requirements is the implementation of BEPS 2.0; Pillar 2 of which requires MNE's to pay a minimum global tax rate of 15% (OECD, 2023). Countries which have signed up to the BEPS inclusive framework, including the UK

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<sup>39</sup> Amendments made to Paragraph 21 Schedule 18 Finance Act 1998 and s12B Taxes Management Act 1970 will apply to businesses with global revenues > €750m and be effective for accounting periods commencing on or after 1 April 2023

(OECD, 2014e), are required to implement and police Pillar 2 and therefore require information which gives their tax authorities an overview of MNE's global tax affairs. However, this information will also be used to ensure TP compliance and will supplement CbCR in this regard (HMRC, 2023) and so will impact on the output legitimacy of Action 13.

Interviewees were asked about their perceptions as to the likely impact of the incoming regulations and whether they will further help to achieve the objectives of Action 13. The responses are analysed below with a view to gauging their likely impact on the output legitimacy of Action 13.

Firm 5 viewed the new regulations with a degree of ambivalence:

*"I wouldn't say I have a strong feeling about them. I mean, as a UK taxpayer, I'm pleased that HMRC are finally get their act together and making it, making it clear that companies have to follow TP. As an advisor, it helps that there's a standardised format because we can say, say what the approach is"* (Firm 5)

Firm 5 did, however, express concern that although the regulations only apply to groups with global turnover > €750m HMRC may begin asking for Masterfile's from smaller groups which, in their opinion, could become onerous.

Firm 1 speculated whether new regulations would signal to clients that HMRC were having a 're-focus' on transfer pricing and cause MNE's to revisit their arrangements to ensure they had comfort on what they were doing. A similar point was made by Firm 3:

*"HMRC have gotten a bit disgruntled about the quality of the transfer pricing documentation they receive for UK entities, and that's what's driven this consultation is that, you know, basically, this is them saying, enough is enough, we want, you know, we want good quality transfer pricing documentation."* (Firm 3)

These opinions appear to reinforce the need for additional regulation on top of what already exists to fully meet Objective 1, giving adequate consideration to TP policies and documentation.

Firm 2 offered criticism of the new regulations, noting that:

*"unless you down the German model and have enough people in your tax office to do audits and to look at these things then it just comes down to, they'll be filed and no one will review them and so, someone will have spent loads of time producing it, you'll have an enquiry and it's kind of a*



*waste of time because as soon as the enquiry happens they go, oh, okay, well I've a master file, I've read your local file, I need 20 other things, which you, you instantly look at the PDCF guidance and compare it to Action 13 and go, PDCF guidance is what HMRC thinks, expects, clients to produce to give them on an enquiry and it's much, much more detailed than Action 13."* (Firm 2)

Firm 2 refers to the Profit Diversion Compliance Facility (PDCF), an HMRC initiative targeted at MNE's with TP policies which may fall foul of targeted anti-BEPS legislation<sup>40</sup>. Firm 2 notes that the requirements of PDCF go beyond the new Masterfile regulations and would be what HMRC would expect businesses to prepare in the event of an audit. Whilst it could be argued that the additional information may help HMRC to better target MNE's for audit and make more concise information requests Firm 2 appears to doubt that this will happen. Firm 2 went on to criticise the policy as a deviation from previous UK practice, which required MNE's to have sufficient documentation available to hand over to HMRC in the event of an audit:

*"Yeah. It's [HMRC's current approach of non-standard documentation] a good, good sensible, practical approach. If it's a really complex thing you need 20 pages or 200 pages. If it's a really simple thing you need a fag packet which says it's cost plus 5 and go away, yeah, and that's a really sensible thing. Forcing, mandating etc [per the new Action 13 regulations], just, someone had the bright idea, maybe cause they think it's clever and they can sort of show they're being tough on MNE groups, personally, I think it's just a big waste of time."* (Firm 2)

The new regulations do appear to be a diversion from the long-held approach to TP documentation in the UK, as confirmed by Firm 6 who offered a reflection from their time at HMRC:

*"an absolute article of faith throughout my time in HMRC was, all we need for documentation requirements in the general documentation require that the documentation should be appropriate to the risk required"* (Firm6)

Firm 6 explained that HMRC deadlines were such that clients had to keep on top of documentation because if they were to receive an enquiry, they would not be able to produce the requested documentation in time and may risk a fixed penalty. Firm 6 went on to explain why this worked well:

*"and generally, the P word [penalty], I think for, for the tax function, is something that, if they get charged penalties, it's something that's much*

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<sup>40</sup> The UK Diverted Profits Tax

*more serious that perhaps the extra, the extra tax or interest, you can deflect that say, oh, bloody tax authority, they don't understand transfer pricing, we're five years down the line, they've worn us out, here's the thing. But if you, if you incur a penalty for failing to do something, even if it's relatively small, it's, it's a kind of black mark and, you know, anecdotally, it's in some KPIs, I'll meet all my compliance" (Firm 6)*

MNE's 3 & 5 had little concern about the imposition of the new regulations:

*"we have the systems and processes in place to make sure that we can do what we need to do. One thing that we were keen on, and which is finding its way into the legislation, is that they were aligned with what the OECD were after, because of course, that's very consistent with what we do in other countries." (MNE 3)*

Of the MNE's interviewed MNE 1 was already voluntarily preparing the documentation noting, however, that it was a significant administrative exercise. MNE's 2 & 4 also appeared to have concerns about the administrative burdens the new reports would create:

*"it's going to be an absolute nightmare because of the amount of trade going through the UK and the way our biggest trader is structured within our financial system. So, yeah, we're going to have to go through a lot of different people and effectively pull, pull data from several different places" (MNE 4)*

These responses express probably the major criticism levelled at Action 13 by stakeholders, compliance cost (see 7.3.1 for more analysis) but MNE's do not appear to raise any conceptual concerns about provision of the information.

Overall, the new regulations appear to represent a stricter TP regime than HMRC have previously operated. In this sense it may be that they will further the achievement of Objective 1 and force MNE's to take greater care over their TP and associated documentation. The additional information may also aid in the achievement of Objective 3, which appears to be constrained at present due to the limited application of CbCR in detailed TP audits. Even if some doubt remains over whether the additional documentation will answer the requirements of all audits, it will undoubtedly fill some gaps.

Objective 2 is more difficult to predict from the answers given. Whilst more information should increase risk assessment potential, the concerns

expressed about the capacity of HMRC to utilise CbCR on its own may be exacerbated with more documentation added.

Conscious that the new regulations are not yet fully in force caution must be taken in interpreting the impressions of stakeholders at this stage. Yet the reflections above offer an insight from a privileged group and within the bounds of this limitation can still be employed to assess the objective output legitimacy of Action 13 in the UK.

### **7.2.5 Objective assessment of output legitimacy**

To be judged objectively as a democratically legitimate output Action 13 must meet its stated objectives and solve problems incapable of being solved by individual actors cooperating or through the operation of markets (Scharpf, 1999, p. 11).

Drawing on 7.2.1 - 7.2.4 above it appears that there are a mix of views in the tax profession concerning whether Action 13 has fully met its stated objectives in the UK.

To recap, the objectives are as follows:

1. To ensure MNE's give appropriate consideration to transfer pricing policy.
2. To allow tax authorities to carry out appropriate transfer pricing risk assessment.
3. To provide sufficient documentation to aid tax authorities in conducting a thorough transfer pricing audit in respect of entities active in their jurisdiction.

OECD (2015)

Interviewees' comments suggest that to date the implementation of Action 13 has somewhat improved documentation practices and may, as part of a wider shift, have raised the profile and encouraged greater consideration of TP by MNEs. Whilst interviewees were cautious in ascribing too much credit to Action 13 on its own, all agreed that Action 13 does appear to have played its part in changing attitudes in the tax profession to align more closely with broader societal notions of corporate citizenship (Mikler & Elbra, 2018). Despite limited evidence of its changing TP practices all interviewees agreed that Action 13 did necessitate the review of business structures and intra-group flows. This suggests that Objective 1 may be judged to be a legitimately achieved output. Furthermore, as discussed in 7.2.4, there may be scope for enhancement of legitimacy obtained from Objective 1 as the requirement to file more documents come into force.

Objective 2, interviewees agreed that the information currently provided is useful for TP risk assessment at a high level. From this perspective, again, the rules could be said to constitute a legitimate output. Despite this, the tax advisors interviewed do not consider Action 13 as having increased the number of queries received from HMRC on TP.

This led the interviewees to question whether the full potential of Action 13 documentation is being realised in practice. The perception of the tax profession was that TA's (HMRC in particular) were under-resourced and therefore unable to make full use of the data. This does not take away from the potential utility of the information and the legitimacy of the output as useful in theory, but, in the minds of these stakeholders at least, may erode the value of Action 13.

Objective 3, there was considerable scepticism about whether this objective has been achieved. On one hand, perhaps this is unsurprising given the interviewees' limited experience of interaction with tax authorities over Action 13 documents. However, this scepticism does appear to stem from Action 13 falling well short of the detail usually requested in TP audits. Whilst this may be partially addressed by the new regulations coming into effect from April 2023 there clearly remain questions over whether Objective 3 can be meaningfully realised. There seems to be a question of the right balance to be struck between providing information detailed enough to conduct an audit, and information which is of use in guiding authorities to audit targets. For those required to produce the information the preference may always be for less of information and the latter approach. In its present state Objective 3 appears to overstretch the capability of the CbCR document currently filed in the UK and this over-reach may challenge the legitimacy of Action 13, at least in the UK context and in the minds of MNE's and Advisors. This may be overcome to a degree with the requirements coming into force under new regulations. However, there does appear to be contention on this point and a degree of scepticism with regards to the shift in approach which the new regulations are anticipated to bring.

### ***7.3 Subjective assessment***

To recap Chapter 3 (3.2.3) Subjective assessment hinges on whether stakeholders perceive that their authentic preferences are reflected in the policy output (Brosens & Bossuyt, 2020). By its nature subjective assessment is open to contestation. And, whilst gaining the current opinion of tax professionals is felt to be valuable and insightful, to arrive at a fair assessment of the OECD's output it was felt that questions should also seek to measure whether the preferences expressed by tax professionals in the Action 13 consultation were met. Answers given to the

Action 13 consultation were therefore used to construct questions which would enable measurement of this group's satisfaction with the preferences they expressed at the time of the policy creation.

Drawing on areas of concern expressed by MNE's and Advisors in the Action 13 Consultation, the following sections examine these key stakeholders' perceptions as to whether their "authentic preferences" (Scharpf, 2002) are represented in the final Action 13 standard.

### **7.3.1 Compliance cost**

A key concern of the OECD's was to ensure that the requirements of Action 13 remained proportionate to the benefit to be derived from the additional documentation (OECD, 2015).

It became quickly apparent that the issue of compliance cost was a major concern for the MNEs and Advisors interviewed. This was also an overriding theme which came out of the consultation and so is clearly an issue where these stakeholders have strong preferences in terms of policy output.

When asked about the cost of complying with Action 13, all interviewees stressed that the regulations created a significant extra compliance burden, with associated financial costs. MNE 1 was at pains to stress the extent of the extra cost this created for business:

*"Still there with NGO's, the media but also politicians who believe that, you know, the creation of a simple extra report can be produced, you know, in a short timeframe for maybe a few thousand or a few hundred thousand. For a company the size of [MNE1], you're talking about many, many millions. Many, many millions of extra compliance burden that we will accept, this is the cost of doing business, to satisfy your licence to operate" (MNE 1)*

Other MNE's agreed, MNE 5 noted that the requirement occupied around 20% of some of their staff member's time and MNE 3 noted additional people had been employed to deal with Action 13 documentation.

MNE 1 stressed that MNE's are rarely believed by politicians and NGO's where the cost of compliance is concerned. Interestingly, this was conceded by Firm 6, who had worked for a tax authority prior to joining a Big 4 Firm:

*"It's always really onerous to comply with, I think there'll always be questions and it was something that I started to get an appreciation of some of the early work I did when I joined head office in HMRC and you'd*

*get industry representatives and you'd think surely, surely you just press a button and these numbers come out, it just isn't like that, it really isn't."* (Firm 6)

Advisors also referred to the large increase in compliance requirements, albeit noting that this did benefit them in terms of extra work and fees, especially in the early years of implementation:

*"I think the big four made a load of money with, you know, loads of presentations and sales pitches about CbCR in the first year, and helping clients in the first year but then, ... no one really needs your help anymore cause they've got the system, they just kind of roll it forward."* (Firm 4)

This was agreed by the other interviewees, who noted that the first year of compliance was the toughest but that it became easier. Interestingly Firm 6 explained that HMRC tend to take an approach which is sympathetic to the increased burden of requirements like Action 13 in the early years of implementation:

*"HMRC where they're introducing legislative measures that are fairly sort of onerous, there's often a, a sort of soft landing. So, there was a recognition in the early days in that perhaps your CbCR report that if you've made your best efforts to get the figures out then that would be treated as, as, as sort of being compliant. ... Obviously, that, that has long gone and there's an expectation that the groups know what they're, what they're doing and what the thresholds are."* (Firm 6)

However, to get to a position where high quality compliance was routine it appears that in some cases quite significant changes were required to existing accounting systems to facilitate Action 13 reporting and that these are still not fully automated:

*"I kind of see the CbCR piece as, as kind of almost two distinct, two distinct submissions. One around the actual numbers, and then two, around making sure we, we submit around the, the right entities, you know, in terms of all the country-by-country notifications."* (MNE 2)

The quote above from MNE 2 highlights an issue raised by all MNE's, that is identifying which entities within their group are within the scope of Action 13. This appeared to require a significant amount of work, as expanded on by MNE 1:

*"The reporting systems are very complex, the organisations are very complex, and you need to consult with a lot of different people internally*

*and externally to be very, very clear about what will go into your report”*  
(MNE 1)

This appears to have been compounded in some instances by different countries layering additional requirements on top of Action 13. Firm 3 commented that in theory what Action 13 should have done was create a uniform global TP standard which would have reduced compliance burdens, however the effect seems to have been the opposite:

*“Action 13, I think, sort of triggered that, in that it got, it, it got different countries thinking about documentation, but then the outcome wasn't just to adopt that consistent standard, we've actually seen lots of different things being done, so now it's a huge task for businesses to keep on top of all that compliance”* (Firm 3)

The level of additional work required was multiplied for the interviewees in the sample, who because of their industries (finance and extractives) are also required to comply with similar reporting requirements under European regulation<sup>41</sup>. When asked about whether these requirements overlapped with Action 13 and whether this simplified or complicated reporting obligations interviewees tended to view the two streams of reporting as separate and requiring separate reporting processes.

When asked about the proportionality of the compliance burden, interviewees were doubtful that the additional efforts with regards to preparing documentation were worth it:

*“I mean, sitting here as an advisor who prepares documentation, you know, I'm sort of slightly conflicted in terms of, you know, documentation projects are good for us, but I don't know that there's necessarily a significant benefit to preparing 15 documents that say basically the same thing”* (Firm 6)

Furthermore,

*“it is a huge cost and obviously, the big four have made money out of that so they're quite happy with that on one level, but the cost benefit piece is marginal, I'd say, on the whole, yeah”* (Firm 2)

Despite the extra costs, however, interviewees agreed that compliance with the rules is generally good, with a few possible exceptions. When asked whether in their experience across their client base (and from their

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<sup>41</sup> For Extractives Chapter 10 of the European Accounting Directive and equivalent provisions in the Transparency Directive and for banking The Capital Requirements Regulation No. 575/2013

knowledge) there was generally good compliance with the rules, Firms 1 and 2 commented that compliance was very good. Firm 2 observed that this may in part be due to a level of risk aversion which exists in tax departments, with regards to documentation penalties:

*"you don't, don't want to be in a tax department that has a penalty. For example, under UK legislation has a penalty of £300, yeah, for late filing and some other things. £300, I'm not, not saying me and you are paid loads of money but, I'm a bit like, if I got a £300 fine once in my life I'd be like, yeah, but it petrifies some groups, like they just don't want that on their record."* (Firm 2)

There was variety in the responses from other advisors. Firm 3 drew a distinction when responding to this question, noting that compliance was very good where there was a requirement to submit documentation routinely by a statutory deadline (as in the UK). However, in countries where documentation was required to be produced on request from the tax authority (within 30-60 days e.g.), Firm 3 noted that compliance was mixed:

*"there are probably two groups within that in that businesses that aren't very compliant and know they aren't very compliant, so because they've made a choice to, to not commit the time and resource to do it, and then I think there are probably businesses that think they are more compliant than they are"* (Firm 3)

This suggests that some MNE's may be producing sub-standard documentation where there is not an automatic filing obligation. Therefore the approach to CbCR and the imposition of the new mandatory filing rules for Masterfiles and Local Files may be important in ensuring compliance.

Firm 4 also mentioned different levels of compliance depending on an MNE's exposure to TP audits and their attitude to corporate responsibility:

*"a client that really cares about their ESG reputation and, you know, they've got a certain ethic in their organisation, and they're making loads of money, then they're, I think they're quite happy to pay for full compliance."* (Firm 4)

Firm 4 explained that for others the requirement was seen as a low value compliance exercise but for some it did present an opportunity:

*"HMRC don't audit the smaller taxpayers that much for transfer pricing. So, we kind of know that so we kind of have to be practical, but it's not*



*like the rules become simpler for the smaller taxpayers, if you see what I mean. And some smaller taxpayers, like they will, they'll just, they'll want to be, you know, makes sure they're getting things right. I mean, there might be opportunities as well. I know that sounds a bit dirty but it's not really, like, you know, do you know what I mean, if they're doing something wrong and we help their model and their model happens to result in, you know, a better tax answer then happy days, you know."*  
(Firm 4)

Firms 5 and 6 noted that the requirements could be onerous, especially for smaller groups and commented that whilst compliance was generally good it was not universal in their experience.

MNE's, commenting more narrowly on their own compliance, all noted that they made efforts to comply with MNE's 1 and 3 mentioning a motivation to comply with societal expectations in terms of transparency:

*"Happy to oblige, you know, we understand that in, in, in a age, day and age where there's a call for more transparency and explain how the complex multinational groups, how they operate, I can understand the objective of the CbCR"* (Firm 1)

Compliance and compliance burden are therefore contended issues. On the one hand there appears to be a high degree of compliance, even if there may be variances in the quality of documentation. This suggests compliance is achievable and affordable for firms, which are after all the largest global MNE's. There also appears to be, as well as the legal obligation, an intrinsic motivation for some MNEs to comply well so as to be transparent and align themselves with notions of good corporate citizenship vis-à-vis their tax affairs (Dowling, 2014; Mikler & Elbra, 2018).

However, there does also appear to be a genuine economic cost associated with complying which is of a magnitude that caused all interviewees to question the proportionality of the rules. The OECD gave a commitment in Action 13 that the requirements would be proportionate to the usefulness of the documentation and given the perceptions of interviewees about the lack of use of the documentation (7.2.2) this proportionality is questionable.

In terms of the wider context, the number of reporting requirements facing large firms is growing e.g. public CbCR as mandated by the EU<sup>42</sup>. In

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<sup>42</sup> Implemented via amendments to Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches

this context there may be calls for various regulators to rationalise their asks with respect to this type of data especially where they cannot be justified as proportionate to their benefit in use.

### **7.3.2 Confidentiality**

Concerns were expressed in the consultation about the sensitivity of data contained in the Action 13 documentation and for the potential for this to be misused. Concerns expressed were twofold. Firstly, there were concerns that data shared with tax authorities may leak or be misused. This was particularly the case where information sharing between tax authorities was concerned. Secondly there were concerns that data which would have previously been held in head offices or in individual parts of MNE groups would have to be widely shared around MNEs to prepare Action 13 reports. This was seen to present a threat as the data may be read out of context or be leaked.

None of the MNE interviewees highlighted any concerns around confidentiality from their experience. There was an assumption that data was being shared between tax authorities, but no interviewees seemed concerned about the data being leaked or misused. When questioned about concerns expressed in the consultation around data being shared around MNE groups there were similarly no concerns raised.

Commenting on their client base as a whole, Advisors offered a more nuanced perspective but nevertheless raised few concerns:

*"generally, there does seem to be an acceptance amongst my clients that, you know, transfer pricing is global in nature and therefore, you are going to have to share information in order to comply with those requirements. So, that generally does seem to be accepted as a principle."* (Firm 3)

Firms 2 and 5 noted that some MNEs can be more secretive than others, Firm 5 offered the following example:

*"I remember a German group and a Japanese group in the past and, for example, where HMRC requested it, we arranged for the German group to submit it direct to HMRC on the basis it wouldn't be shared with the local subsidiary, which was an interesting discussion to have. But I, I'm not aware that many groups have raised that in reality as a major concern."* (Firm 5)

Firm 2 also echoed the last point made by Firm 5:

*"I've never actually seen it a massive issue in terms of, like, I think most MNE groups trust tax authorities most of the time, there have been some leaks and what have you but they do trust, there is a mostly trusting relationship."* (Firm 2)

Firm 6, referring to their experience in HMRC, noted one instance they had seen of information being misused by a tax authority but indicated that this was rare and treated very seriously:

*"those sort of things quickly get escalated up, maybe even up beyond, beyond the competent authorities [TA's] ... to sort of potentially diplomatic or ministerial [level] if it's, if it's serious enough."* (Firm 6)

Interestingly Firm 6 did not regard commercial sensitivity as a threat but rather information which pertained to individuals, such as directors or highly paid employees:

*"The sensitivities come, I think, with salaries and sort of GDPR concerns and that sort of data but, but at least for the CbCR it's not in the, in the level of detail"* (Firm 6)

It appears therefore that concerns expressed about confidentiality in the consultation have not been seen in practice by the interviewees in this study. This may suggest that the OECD took these concerns seriously when implementing Action 13 and by listening to the genuine concerns expressed by stakeholders created a democratically legitimate output (Scharpf, 2002). However, aligned with civil society comments (e.g., the BEPS Monitoring Group) the lack of evidence of confidentiality concerns in practice may raise questions about the legitimacy of these concerns and the argumentation employed by MNEs and Advisors on this issue in the consultation. Particularly as restricting access to the data, in the name of confidentiality, may have disproportionately disadvantaged TA's in the developing world (Burgers & Mosquera, 2017). Overall, however, this does appear to be an area where reporting entities were satisfied or at least have accepted the new requirements to share data as few issues have arisen in practice.

### **7.3.3 Clarity and flexibility**

Concerns were expressed in the consultation by MNEs and Advisors around the need for clarity and flexibility in Action 13, where new requirements and terminologies were being introduced. In particular, MNE's were at pains to argue for flexibility in adapting the reporting to their accounting systems and business models.

Interviewees from professional firms agreed that the regulations were in the most part clear in principle. As stated by Firm 5, areas of judgement tended to relate to issues of specific measurement rather than uncertainty about the purpose of the regulations:

*"I don't think there was any sort of really confusing areas or grey areas that needed sort of clarity. I think most questions came around, so specific items like, you know, on the CBCI, you know, how do we calculate the number of staff when we've got part-timers or what do we do with this asset."* (Firm 5)

However, some MNE's gave more reserved answers for example MNE 5:

*"[complying] can be difficult to try and understand, what do they actually need. What do I put in and what do I leave out, you know, that, that can quite difficult to ascertain actually, without the help of, of a big four, or, or, or other, someone who can be trusted"* (MNE 5)

This was echoed by MNE 1 who highlighted that the drafting of the rules was done by a number of parties with different disciplines:

*"if you're looking to, to find consensus about reporting obligations, you're better off wearing one hat, either you have the accountants hat on or, you have a very formalistic legal hat on, or you wear another hat but, but then at least, you know, the scope of the rules and definitions are written in a certain way and now it's a bit of a, yeah, a mix of, of written by people in different backgrounds, is my view, personal view."*

MNE's 2, 3 and 4 tended to agree with advisors that the rules were generally clear, and any interpretation required pertained to specific disclosures. MNE 2 highlighted that this was in some way helped by the style of the drafting, which affords MNE's a degree of flexibility in reporting:

*"think it's, it gives you the flexibility that you kind of require because it lets you, it lets you either do it from a statutory basis or, you know, much more kind of useable for us is going from a group basis and the group consolidated position"* (MNE 2)

In terms of supplementary guidance provided by the OECD again MNE's 2, 3 and 4 appeared to find this useful:

*"I say surprisingly, cause normally stuff from tax authorities is quite cumbersome to follow, we found the, the OECD guidance actually quite helpful. It was quite prescriptive as to how to do stuff, what to put in, things like that."* (MNE4)

In terms of dissemination of the rules it appears that despite the apparent clarity of the drafting, the tax profession played a key role in ensuring

MNE compliance. The quote from Firm 1 captures to a large extent, how advisors viewed their role:

*"[in addition to] making sure clients are aware of these obligations, we have responsibilities to make sure they're meeting their obligations as well, and I think in a lot of cases ... I think we're a quality check as well"* (Firm 1)

Providing a possible explanation for the extent to which advisors were engaged Firm 1 commented that:

*"Quite often though, that tax function is a couple of people and, in a lot of cases, it all kind of comes back to bandwidth. They kind of know what they need to do but they don't really have time to get it all done. And it is, I think, seen as more of an admin, compliance kind of burden. So, it's like one of those things that like is on the top of no one's to do list."* (Firm 1)

This help does appear to have been predominantly in the first year of implementation with clients then adopting the reporting into their compliance routine. Advisors did confirm that there was a spectrum in terms of servicing clients, with some largely self-sufficient, others asking a few questions and still others farming out the entire reporting process to their advisors (the latter was a rare scenario). This was borne out by MNE's with some mentioning that they consulted their advisors and others, like MNE 1 did not feel the need:

*"[MNE 1] is a big organisation. Also, a very sizeable tax function, so we were comfortable, you know, to, to deal with all those developments coming at us"* (MNE 1)

These comments appear to bear out the findings of Sawyer and Sadiq (2019), who noted the key role played by professional firms in disseminating the rules and facilitating compliance in practice.

In terms of clarity of the law, there appear to be few issues highlighted. Notwithstanding the role played by large professional firms in establishing practice, there did not appear to be any significant issues of contention or ambiguity. Furthermore, OECD guidance and subsequent supplementary guidance issued by HMRC was praised for its usefulness. These findings suggest that the OECD addressed concerns about usability of the standard and in that sense addressed reporting entities authentic preferences, thus enhancing Action 13's output legitimacy in their eyes.

Flexibility was a key ask of MNE's and Advisors in the consultation and appears to be being utilised in practice. There were questions (as posed by civil society) over whether too much flexibility may offer MNE's the opportunity to obfuscate the rules (BEPS Monitoring Group, 2014). However, in the absence of any evidence of obfuscation, it is at least

interesting to note that different approaches may be being taken, which may result in some inconsistency across complying companies. This may impact negatively on tax authorities if they are presented with information in a multitude of formats. Conversely, it may improve information quality if the reports more closely mirror MNE operations. Without talking to tax authorities, it is impossible to conclude on this, but it is an issue worth noting for further study and one which could impact the legitimacy of the rules.

### **7.3.4 Erosion of the ALP**

The consultation highlighted concerns from MNE's and Advisors about the long-enshrined Arm's Length Principle (ALP) being eroded because of Action 13. It was clear in the consultation that MNE's and Advisors considered the ALP as an important cornerstone of TP policy and wished to retain it.

The ALP stipulates that transactions between entities within an MNE should be priced as if they were between unaffiliated third parties (Davies, et al., 2014).

However, the ALP is often easy to manipulate and hard to police (Cristea & Nguyen, 2013). Given that many of the transactions within MNE's relate to part finished goods, proprietary intellectual property or management services provided in respect of a specific project, there may be no directly comparable price. This makes determining an ALP a challenging and highly subjective exercise (Rogers & Oats, 2019). As far as tax authorities are concerned this is a task made more difficult by the complex and often indeterminate interaction of accounting information and international tax rules (Avi-Yonah, 2016).

Critics also raise the issue that MNE's are integrated entities under common control and direction (Murphy & Sikka, 2017). This is however not how MNE's are treated for the purpose of transfer pricing tax laws. Under the ALP, MNE's are viewed as a collection of independent entities capable of transacting at arm's length, the 'separate legal entity principle'. This means that companies (or LLP's) under the common ownership and control of a group, will be treated as independent corporate concerns for the purpose of calculating accounting profits and taxable income (Murphy & Sikka, 2017). Critics attack the artificiality of this conception, noting that the overarching profit motive of the MNE creates an incentive for MNE's to establish entities in low tax jurisdictions and shift profits to them (Picciotto, 2015). Under the current system this type of activity is not only legal but is highly prevalent and therefore MNEs in some industries may become uncompetitive should they fail to take advantage of the savings afforded through TMTP (Dowling, 2014).

Proposals for reform of the ALP often take the form of calls for unitary taxation or 'formulary apportionment' (FA) (Picciotto, 2016). FA involves allocating taxable profits to jurisdictions based on a pre-determined formula (Rogers & Oats, 2019). Historically these calls have been met with dismissal from policy makers, being regarded as difficult to agree and enforce and contrary to 'globally established standards' (the ALP) (Rogers & Oats, 2019). However, in the wake of recent challenges levelled at the global tax system as well as a limited but growing body of evidence highlighting the extent to which MNE's employ TMTM means; FA proposals are beginning to gain more credibility (Rogers & Oats, 2019).

Interviewees agreed that concerns expressed in the consultation had not been realised in practice with none highlighting any changes to the application of the ALP because of Action 13. A particular concern expressed in the consultation had been that tax authorities may use CbCR data to force companies to apportion profits formulaically, however, no interviewees reported this happening:

*"We've not seen, you know, any evidence of tax authorities like trying to stray away from the arm's length principle and say, yeah, you know, we've got this share of people, we should get this much profit or anything like that. ... I'm not aware of any evidence of anything like that happening."* (Firm 3)

What did emerge, however, is that attitudes towards transfer pricing models and the application of TP policies may be shifting in a more general sense. Whilst interviewees were reticent to attribute this change wholly or substantially to Action 13, several (Firm 1, 3, 4; MNE 2) note that the added transparency provided by Action 13 may have caused reflection on how figures arrived at under the ALP appear to readers of CbCR reports:

*"I think it [the ALP] still stands. I don't think it's changed how people think about things. I think it has possibly changed, again, how people think about how things will be perceived. ... So, it's more about looking at the different, like methodologies that you can use and kind of going, which one is really suitable for my business, and which one can I justify, rather than, which one gives me the best tax answer."* (Firm 1)

It is important to take interviewee responses to this question in the context of policy developments ongoing at the time of the interview, particularly the implementation of BEPS 2.0 (Pillar 2). This piece of legislation may lead to types of formulary apportionment and was mentioned by all interviewees and noted as having a much more profound affect than Action 13. Interviewees reflections did, however, suggest that Action 13 may have helped to move MNE's and advisors attitudes (if very slightly) to align more with broader societal concerns about deficiencies

with the ALP expressed by NGO's and others (Cobham, 2017; Rogers & Oats, 2019) as documented by Firm 1:

*"So, CbCR comes up on pretty much all of my clients both, as a standalone topic and when we're now looking at BEPS pillar 2. And also public CbCR is discussed but it's actually been fundamental to a lot of work clients are doing around BEPS pillar 2 and actually gathering data and how do we begin to look at the compliance for this. So, it's kind of become a hot topic again"* (Firm 1)

It appears, therefore, that Action 13 may have laid some of the groundwork for BEPS 2.0. Considering this in terms of output legitimacy it appears that the OECD's approach has been one of moving slowly and incrementally towards more radical changes, possibly cognoscente of stakeholder opposition to a major overhaul of well-established principles. The apparent success of this was evident from the more relaxed attitude of interviewees compared to the views expressed in the consultation. Whilst respondents to the consultation saw the ALP as an essential cornerstone of the TP policy landscape, interviewees were more open minded to its changing and attributed this in part to Action 13.

### **7.3.5 Subjective assessment of output legitimacy**

Drawing on the findings from 7.3.1 - 7.3.4 it appears that Action 13 has largely addressed the authentic preferences of MNEs and Advisors (at least those interviewed) and, in that sense, is a legitimate policy intervention. The only major threat to legitimacy identified is the proportionality of the compliance burden created by Action 13, which may continue to be challenged as the number of reporting requirements on MNE's continues to grow.

In the wider sense it is interesting to note the contentions between Civil Society and MNE's and their Advisors on confidentiality and erosion of the ALP. Civil Society campaigners continue to advocate for public CbCR and a move away from the ALP (Cobham, 2017), Action 13 did not deliver these radical changes and therefore may face legitimacy challenges in the eyes of campaigners. It could therefore be concluded that the OECD prioritised maintaining output legitimacy with MNE's and Advisors over wider civil society interests. This, however, means looking at Action 13 in isolation and failing to consider the broader trajectory of OECD policy in this area. If we take a broader view, however, and pay attention to the interviewees' comments on how policy is moving beyond CbCR, it does appear that Action 13 may in some ways have laid the groundwork for more radical changes to be implemented by subsequent legislative interventions<sup>43</sup>.

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<sup>43</sup> BEPS 2.0 & EU CbCR requirements for example



To conclude, if viewed as part of a continuum shift in attitude and legislative approach to TP; Action 13 could be regarded as having played its part in moving the dial to better align with societal expectations whilst, crucially, bringing along MNE's and Advisors who may have otherwise resisted. The attitudinal shift in these stakeholders was observable in the difference in responses to interview questions compared to attitudes displayed in the consultation. With regards to confidentiality and the ALP; in the case of the former, concerns expressed in the consultation were largely debunked and in the case of the latter attitudes appear to have moved to align more closely with progressive ideas about reform of TP methodology. This moving of attitudes demonstrates that the OECD were able to maintain a sense of subjective output legitimacy with the stakeholders subject to regulation whilst moving towards a more progressive policy outcome, aligned with broader stakeholder expectations in the long term.

#### ***7.4 Conclusion on output legitimacy***

The interview findings present a complex picture of Action 13's manifestation in practice, with both positive and negative implications for output legitimacy.

From the interviews conducted, it appears that Action 13 has, to some extent, achieved objective output legitimacy by increasing awareness of TP, improving documentation standards, and facilitating risk assessment. All of which furthers the stated objectives of the Action (particularly objectives 1 & 2). From a subjective output legitimacy perspective, the clear and flexible way in which this has been achieved appears to have kept stakeholders subject to the regulations satisfied so far as the usability of the legislation is concerned.

However, it does appear that Action 13 is not viewed to have increased the tax take from TP audits and furthermore, is expensive to comply with and is felt more generally to be underutilised by HMRC. Each of these views poses a threat which may undermine both objective and subjective evaluations of Action 13's legitimacy.

Objective 3 may be addressed in the fullness of time with the introduction of new regulations but for now it remains (in the view of interviewees) largely unsatisfied.

The issue of compliance cost is concerning in terms of its potential impact on legitimacy. As commented on by several of the interviewees, this is often an issue which policy makers and campaigners brush aside, assuming businesses big enough to fall within the ambit of these types of rules have sufficient resources and sophisticated enough systems to cope with additional reporting requirements. Yet, interviewees were at pains to

stress that the costs and labour resources required to comply are more significant than is often recognised and that these activities do not add value to businesses. Businesses are unlikely to ever vote for more reporting requirements but where the compliance issue may become acute is with the proliferation of new reporting requirements in this area (BEPS Pillar 2 Reporting, EU CbCR, Carbon Tax Reporting) as well as some overlapping requirements relating to ESG disclosures. As new requirements are asked for there may be calls for rationalisation and scaling back of requirements which are not perceived to add value. This could be particularly concerning for Action 13 when linked with the other major criticism picked up from interviewees, namely, that HMRC are not seen to be using the reports, which clearly undermines their value. Whilst HMRC were not interviewed as part of the study and so caution must be taken in drawing too firm a conclusion from this observation. It is notable that stakeholders do not appear to believe that the information is being reviewed or used to inform HMRC's activities to any great extent, despite it apparently being useful as a risk assessment tool.

The overall picture is therefore one of disclosures which in theory are useful and meet their objectives, but which may be underutilised in practice, whilst creating considerable cost for MNE's. This dynamic creates a tension between the objective output legitimacy (largely achieved) and the subjective output legitimacy, which calls into question the value of producing costly reports with little impact. The detractions from legitimacy in terms of HMRC's usage, although they do not directly reflect on the quality of Action 13's drafting and therefore the OECD's ability a policy maker still taint the CbCR reports in the eyes of stakeholders. MNE's and Advisors will view the regulations in terms their manifestation in practice through the work of HMRC (and other TA's).

The views above present the view of stakeholders with privileged insight into the manifestation of Action 13 in practice and in that regard raise some interesting challenges to legitimacy as well as confirmation of the potential of CbCR reports. However, they represent one side of the debate – to obtain the full picture it is necessary to triangulate these perspectives with those gained from Chapter 5, including those of Civil Society. This is done in Chapter 8.

## 8 Chapter 8: Combination of consultation and interview findings

This chapter combines the empirical findings presented in Chapters 5 & 7 to give a full assessment of the Democratic Legitimacy of Action 13, this process is conceptualised below in Figure 44:

Figure 44 – Combination of mixed methods data to conclude on democratic legitimacy

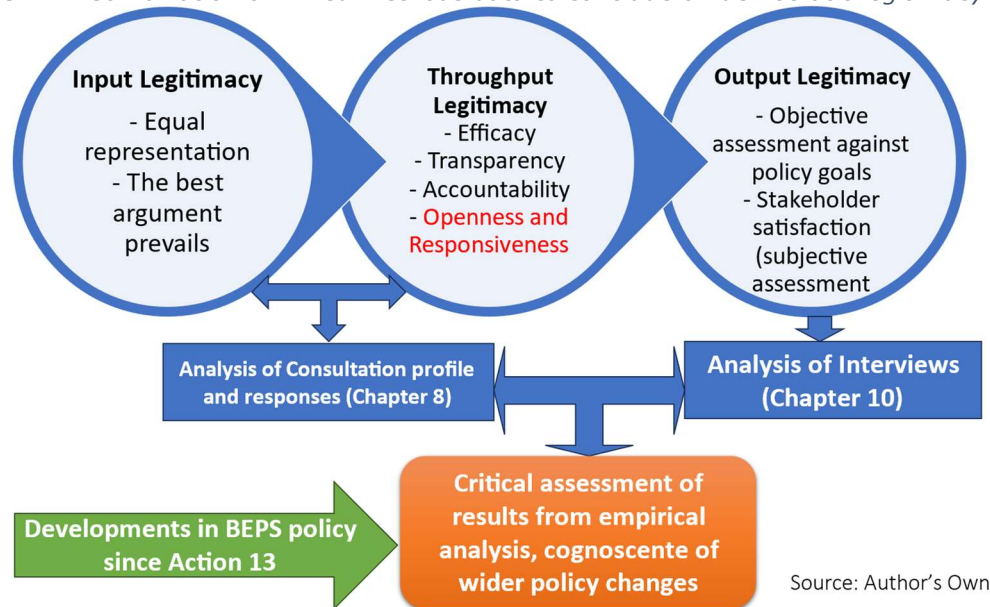


Figure 44 outlines the streams of data which will be drawn together from the thesis. In addition, cognoscente of the critical orientation of this research (Chua, 2019), and the dynamic arena which Action 13 was introduced as a policy intervention (Baker, 2013). It is necessary to root these observations within the wider context (represented by the green arrow in Figure 44) to draw a meaningful overall conclusion on what this means for legitimacy.

As a reminder of this context and its bearing on democratic legitimacy, Action 13 was introduced, as part of the wider BEPS reform, as a response to public outcry at the ability and tendency of MNE's to avoid taxes (Baker, 2013). The BEPS project was seen by tax campaigners as a golden opportunity to overhaul the global tax system, which they perceived to have fallen out of step with how MNE's operate in the 21st Century (Devereux & Vella, 2014). However, BEPS in general, and Action 13 in particular were widely criticised for not going far enough and tightening only the most obvious loopholes, rather than addressing structural failings in the global tax system (Avi-Yonah & Xu, 2017; Murphy, 2016). In line with this broader critique, Christensen concludes that Action 13 was compromised and watered down by corporate lobbying

and thus failed to deliver its potential as envisioned by Civil Society advocates (Christensen, 2018). Whilst it is irrefutable that Civil Society did not get everything they wanted from Action 13 this does not mean that areas of the standard do not address issues of concern to Civil Society advocates. The findings in this thesis offer a more nuanced understanding of Action 13's creation and manifestation in practice and the implications for the OECD maintaining its legitimacy in this policy making arena.

In terms of input and the vertical openness element of throughput legitimacy (Schmidt, 2013), analysis presented in Chapter (5.2) shows that the consultation lacked a plurality of views and representation from developing countries. This finding contributes further to the work of other scholars who express concerns about the lack of developing country participation in the BEPS process in general (Burgers & Mosquera, 2017; Fung, 2017). This challenge continues to beset the OECD, in fact in November 2023 developing nations voted through the UN General Assembly to create a tax charter giving the UN primacy in this area over the OECD (a move heavily contested by the US, UK and EU) (Robin & Medina, 2023). The lack of plurality in the Action 13 will have undoubtedly added, if in a small way, to the feeling of imbalance of power in global tax regulation and encouraged challenges to the dominant hegemony.

However, when the consultation was analysed in terms of throughput responsiveness (5.3) a more complex and perhaps positive picture emerged in terms of global fairness. Despite the unbalanced demographic of consultation respondents, the OECD appear to have taken on board conceptual arguments made by civil society respondents, relating to global fairness. On the issues of materiality, language of filing and Masterfile distribution, the OECD sided with Civil Society despite most respondents (MNE's and Advisors) holding contrary views. The treatment of the three issues mentioned suggests a willingness to address issues relating to the imbalance of power in global tax regulation and hence maintain legitimacy by engaging with a wider group of stakeholders' genuine preferences. Furthermore, this shows the OECD's capability in terms of taking on 'good' rather than 'prevailing' arguments from the consultation, a sign of more sophisticated throughput legitimacy (Schmidt & Wood, 2019).

However, the global fairness argument deployed by Civil Society was not universally successful and in fact, MNE's and Advisors did have success in arguing for more restricted global distribution of information to protect their commercial interests. This confidentiality centred argumentation seemingly convinced the OECD to restrict distribution of the CbCR reports and information flows to tax authorities from MNE subsidiaries. This was a significant area of tension in the consultation and appears to have created something of a schism within the standard. Whilst developing countries are enabled in terms of receiving Masterfile's automatically and setting

their own materiality and language requirements, they must still subscribe to established information sharing mechanisms to receive CbCR information and details about cross border payments. As documented in literature, the current information sharing mechanisms require significant investment in institutional capacity (Fung, 2017) and therefore disadvantage less well-off nations. The consultation outcome could then be said to represent something of a tie with some progressive elements and some constraints in terms of global fairness.

Correlating this finding with the views of expressed by interviewees in Chapter 10 provides an interesting perspective. When questioned about confidentiality concerns MNE's and Advisors largely disavowed the commercial risk of sharing Action 13 information globally. This suggests that attitudes have moved in the MNE and Advisor stakeholder groups since the time of the consultation, perhaps because having filed Action 13 data for several years these concerns have not materialised.

Taking these findings together then, the constraints imposed in Action 13 to mitigate confidentiality concerns have potentially limited its impact in practice and therefore its throughput and output legitimacy in the eyes of Civil Society. From an MNE and Advisor perspective, however, the picture is more complex, the OECD listened to these concerns and pulled back from mandatory filing of CbCR in all jurisdictions but did mandate automatic sharing through information exchange mechanisms. In addition they did mandate global filing of Masterfiles. This could be seen to be an important step in terms of disabusing these key stakeholders of their concerns with respect to confidentiality. Indeed, taking a step back to view Action 13 as part of a broader sweep of policy changes in this area, which has seen information exchange becoming central to the next wave of BEPS initiatives (OECD, 2022), this could be seen to be a crucial step in removing barriers. Furthermore, it appears that the manifestation in practice of Action 13 has played some part in better aligning attitudes held by MNE's and Advisors by society more broadly with respect to the confidentiality and sharing of TP related data.

In terms of the corporate influence observed in BEPS in other studies (Christensen, 2018; Elschner, et al., 2018), this study confirmed that MNE's and Advisors voted together as a block in the Action 13 consultation (see 5.4 and Figure 42) . However, as discussed above, their influence did not appear to be overwhelming, MNE's and Advisors heavily deployed arguments about the cost to them of complying with Action 13, however these arguments only appear to have been successful when unopposed by strong conceptual argumentation. This accords with what authors in the accounting literature have found e.g., that policy makers tend to favour conceptual over economic argumentation (Reuter & Messner, 2015; Stenka & Taylor, 2010) and suggests that this theorisation may also be

applied in the field of taxation. This also suggests a legitimate process in terms of throughput, which was not entirely captured by corporate interests.

In terms of output legitimacy, interviewees reported that Objectives 1 & 2 of Action 13 were ostensibly achievable in theory with the legislation in its current form. There were, however, concerns as to whether the risk assessment potential (Objective 2) of the documentation was being fully realised in practice. There appears to be a widely held view that HMRC (and other TA's) are not making extensive use of the information. Certainly, interviewees did not report an increase in transfer pricing audits because of Action 13 nor had they experienced any questions coming from tax authorities directly raised by Action 13 documentation. There are several ways this perceived lack of engagement on the part of the tax authorities could be explained. Firstly, a positive interpretation might suggest that Action 13 has improved practice, reducing the need for tax authority intervention. Conversely, and as was speculated by interviewees, it may be that tax authorities lack the resource capabilities to effectively utilise the volumes of data they receive. Without engaging with the tax authority on this point (which may prove an interesting area for future study) it is impossible to say which if either is true. The implication, however, is that those subject to the legislation may feel they are complying with regulations which achieve little in the way of outcomes. Compounded with widely expressed views of interviewees that Action 13 is expensive and resource intensive to comply with, this could create an output legitimacy challenge in the long term. At present this challenge appears to be counterbalanced, to an extent, by a willingness to be more transparent on the part of tax practitioners, both in MNE's and acting as Advisors. All interviewees recognised the need for greater transparency around TP to address concerns about corporate tax avoidance, this echoed a general sentiment also expressed in the consultation. Interestingly several interviewees noted that these concerns emanated from within their organisations as well as being voiced by campaigners and media commentators.

Unlike the first two objectives, Objective 3 appears to be unfulfilled, at least in the eyes of MNEs and Advisors. It is notable that several responses in the consultation from MNEs and Advisors made the point that Objective 3 was excessive, and that Action 13 should be confined to focussing on risk assessment only, Christensen (2018) also commented on this point in his study of the consultation. Perhaps then these stakeholders were unlikely to accept the imposition of Objective 3 and remain hostile towards it. Whilst this cannot be ruled out, the examples and commentary provided by interviewees do appear to show a genuine concern that CbCR reports do not contain enough information to conduct a *thorough* audit, as required by Objective 3. These concerns appear to be borne of experience

of previous TP audits which required MNEs to supply high volumes of detailed accounting information, in some cases even ledgers and lists of individual transactions. The gulf between what MNEs and Advisors are used to supplying as audit information and the high-level data in CbCR reports therefore appears to challenge the output legitimacy of Objective 3 of Action 13. As noted in 7.2.4, the imposition of new documentation requirements may overcome this challenge to an extent, but it will likely remain a point of contention and potentially a threat to the legitimacy of Action 13. That is unless the documentation submitted under Action 13 can be shown to streamline audit requirements.

In terms of achieving its objectives then, Action 13 is arguably capable of achieving its first two objectives with the third remaining constrained and potentially challenging the legitimacy of Action 13.

The picture in terms of subjective output legitimacy (stakeholder satisfaction) is more complex. Civil Society views expressed in literature suggest a dissatisfaction with the fact that CbCR reports were not made public (Murphy, 2016) and that information is not shared with all countries by direct filing (Burgers & Mosquera, 2017). This was also strongly communicated in the consultation. As noted above MNE's and Advisors see the need to comply but question the value of the exercise given the apparently minimal usage of reports. Despite this it appears to be accepted rather than opposed by MNE's and Advisors, in the words of MNE 1: "*Happy to oblige, you know, we understand that in an age, day and age where there's a call for more transparency*" (MNE 1). This acceptance may have allowed Action 13 to play its part in moving attitudes to align more with socially accepted norms with regards to responsible tax practices (Mikler & Elbra, 2018), particularly around transparency of information and the ALP. When compared to the consultation, interview responses suggest that Action 13 has had some impact on attitudes. Although Action 13 did not directly challenge the use of the ALP (Picciotto, 2016), it does appear that Action 13 has played its part in softening attitudes towards revisions to the ALP in favour of some type of formulaic apportionment. This softening of opposition has been a long process (Rogers & Oats, 2019) and whilst it is not fully responsible, Action 13 does appear to have played its part in this. The story is similar in terms of information sharing, as noted above, concerns about confidentiality were a major feature of the consultation but when asked about these concerns with respect to information sharing all interviewees seemed relaxed about information being distributed widely amongst tax authorities.

The movement on these issues represent significant steps forwards towards a more transparent and globally equitable TP system and more notably a real shift in attitude within the tax profession (Rogers & Oats,

2019), which has arguably been crucial in preparing the ground for BEPS 2.0.

If viewed as a single policy intervention from inception to manifestation in practice, Action 13 presents positive and negative aspects of democratic legitimacy. Unquestionably, the consultation could have benefitted from greater plurality and representation from developing nations and therefore lacks input legitimacy. The OECD do appear to acknowledge this and attempt to build some redress for this into the policy with positive throughput legitimacy but appear to have been influenced by MNE and Advisor concerns about confidentiality. These concerns, from interview evidence, appear to have been somewhat overwrought. Whether they represented genuine fears about commercial sensitivity at the time of the consultation or were more cynical attempts to water down the standard is unclear. However, they do appear to have compromised the standard, at least in the eyes of more progressively minded Civil Society campaigners (Murphy, 2016). In practice the standard appears to meet two of its objectives with some work to do on achieving the third and is therefore at least a partially legitimate output. There are, however, aspects of its implementation by tax authorities which may render it open to challenge over time due to a lack of subjective output legitimacy.

This discreet view is instructive, but policies do not exist in a vacuum and to gain a full appreciation of the democratic legitimacy of Action 13 it is necessary to consider these findings within the broader context. Bearing this in mind it is interesting that MNE and Advisor attitudes observed in the interviews (conducted 2022/23) appear to have softened somewhat when compared to those expressed in the consultation (2015). In particular, views on the confidentiality of data and transparency in general and also the long-held supremacy of the ALP. Views expressed by tax professionals on all these contentious issues appear to have become more aligned with progressive attitudes and the campaign demands of tax activists. There was reticence amongst the interviewees to ascribe this change substantially to Action 13's influence. However, Action 13 was undeniably an important component of a changing policy landscape which was radical and challenging at the time, as can be seen from the consultation (see Chapter 5). It seems reasonable therefore to credit Action 13 as having played some part in moving attitudes, if only as a component part of wider measures. Therefore, if we consider Action 13 in pragmatic terms as a step on the road towards more progressive policy (Gallhofer & Haslam, 2017; Gallhofer, et al., 2015), the OECD appear to have played a longer game. By writing policy which has influenced the attitudes of potential opponents to progressive change, in MNE's and Advisors, they could be said to have maintained their legitimacy with corporate stakeholders allowing them to address broader legitimacy concerns expressed by civil society in the long term.



Whilst there does not appear to be any active campaign to repeal Action 13, there does appear to be some scepticism amongst required to comply about the value of doing so, given what they perceive to be a lack of use of the information by tax authorities. Therefore, to defend Action 13 going forward it would, be advisable for tax authorities, if they find the data useful, to articulate how it is being used to and therefore its value.

This chapter brought together the evaluations of input and throughput legitimacy offered in Chapter 5 with the evaluation of output legitimacy offered in Chapter 7 to give a synthesised view of the overall democratic legitimacy of Action 13.

The next and final chapter will present the overall conclusions of the thesis along with its limitations and recommendations for future work.

## **9 Chapter 9: Conclusion, recommendations, and limitations**

This chapter outlines how the aim and objectives of the thesis were achieved, highlighting the main findings and contributions of the research as well as its limitations. Recommendations are then offered on where further research in this area may be fruitful.

### **9.1 Achievement of thesis aim**

The aim of this thesis was to critically evaluate the democratic legitimacy of Action 13 of the OECD's BEPS Action Plan by answering the following research questions:

RQ 1: Did the OECD effectively garner and mediate between diverse stakeholder interests in the Action 13 consultation process in order to create a legitimate standard in terms of throughput legitimacy?

RQ2: Has Action 13 manifested effectively in practice and can it be considered a legitimate policy output?

In answering the research questions, the following objectives were met as summarised below:

#### **9.1.1 Objective 1 - Understand criticisms of MNE tax motivated transfer pricing behaviour**

Objective 1 is central to understanding the rationale of why study is required in this area and the potential for research to contribute to better understanding of this important issue.

The ability and propensity of MNE's to avoid corporate income tax by shifting their profits to low and no tax jurisdictions became the focus of intense scrutiny from wider society after the 2008 financial crash (Oats & Tuck, 2019; Eccleston, 2018; Mikler & Elbra, 2018). This scrutiny sparked calls for reform and in response to the OECD's BEPS Action Plan was created (OECD, 2014a). The thesis starts by outlining that one of the biggest opportunities afforded to MNEs to shift profits arises from the rules governing TP being out of step with how business is conducted in the 21<sup>st</sup> Century (Devereux & Vella, 2014; Klassen, et al., 2017). The OECD as architects and custodians of the current TP system are often the focus of this criticism, increasingly facing challenges to their legitimacy. The first objective of the thesis contributes to the overall aim by highlighting the importance of the underlying issue which Action 13 seeks to address and therefore the value of a critical evaluation of the Action.

### **9.1.2 Objective 2 - Gain an understanding of the international transfer pricing political and legal landscape including criticisms, calls for reform and the role played by the OECD;**

Having set out the case made for reform; the thesis explores the dominant role of the OECD in formulating transfer pricing rules (Chapter 2). The point that the tax avoidance behaviours of MNE's are largely enabled by the current TP rules, which are formulated in a complex policy arena and which the OECD have a large degree of responsibility for is further explored. Understanding of this dynamic is essential for anyone seeking to understand both calls for reform and factors which may constrain change. This knowledge underpins the thesis's aim, to contribute to understanding whether the OECD's attempt at reform through Action 13 have been legitimate.

### **9.1.3 Objective 3 - To critically examine why some question the legitimacy of OECD regulatory interventions in TMTP**

This objective clarifies why the thesis aim has been constructed to analyse Action 13 using democratic legitimacy as a guiding theoretical framework. To do this the thesis critically engages with the extant academic literature on BEPS and Action 13 and highlights the central role of democratic mandate and deliberative policy making in upholding the OECD's right to continue to regulate in this space (Chapter 3). Critiques around lack of legitimacy on these two factors continue to be levied at the OECD and so arguably any OECD tax policy must be judged in terms of how it addresses them. Chapter 3 (3.6) concludes that to date there has been no full evaluation of the democratic legitimacy of Action 13 as it has manifested in practice and so highlights how this thesis will contribute to knowledge and why this contribution is worthwhile.

### **9.1.4 Objective 4 - To understand the OECD's mode of policy creation and map this against models of democratic legitimacy**

Objective 4 seeks to clarify how the theoretical framing of democratic legitimacy will be applied to the empirical case study of Action 13. This objective is achieved by setting out the processes by which OECD tax policies come to be adopted by countries. In particular, the ways in which countries (OECD and non-OECD) and non-governmental stakeholders (Civil Society, MNEs and Advisors) can contribute to the policy making process are highlighted. Having described the process a critical evaluation of how the process can create democratic legitimacy (Scharpf, 2002) is

presented (Chapter 3) as a theoretical underpinning for the empirical chapters of the thesis.

The use of democratic legitimacy theory to frame the comprehensive empirical analysis of a single tax policy intervention from creation to manifestation and maturity in practice is a novel approach. The use of lobbying literature from the discipline of accounting to inform the analysis of throughput legitimacy further adds to the novelty of this approach and contributes to knowledge by applying theories developed outside of the tax field.

### **9.1.5 Objective 5 - To examine the OECD's use of stakeholder input in the creation of Action 13 with a view to evaluating the input and throughput legitimacy created by this process;**

This objective contributes to knowledge by providing a critical evaluation of the input and throughput legitimacy of Action 13's creation process. This objective was achieved by utilising an experimental approach to analysing the OECD's consultation on Action 13, along with content analysis of consultation documentation (approach outlined in Chapter 4). The approach taken responds to calls for tax researchers to engage in case study research which draws on diverse sources of information and utilises methods employed in other fields of study (Christians, 2010; Elschner, et al., 2018), in this case the field of accounting.

Chapter 5 provides new and detailed empirical evidence to further substantiate the claims of other authors about the lack of representation from developing nations in OECD policy creation (Burgers & Mosquera, 2017; Fung, 2017) and therefore concerns about input legitimacy.

In terms of throughput legitimacy, the findings present a more nuanced picture which concludes that the consultation process showed elements consistent with throughput legitimacy and was not entirely captured by corporate interests, as documented elsewhere (Christensen, 2018). The statistical analysis conducted showed that the OECD were responsive where there was agreement across stakeholder groups and that there was a level of mediation between corporate (MNE and Advisors') and Civil Society interests. Notably, the analysis contributes by highlighting attempts made by the OECD to address some issues of global fairness. Whilst these attempts do not necessarily nullify concerns about the lack of input they do demonstrate that the OECD is aware of the need to address legitimacy challenges stemming from its past tendencies to regulate in favour of its members (Burgers & Mosquera, 2017; Fung, 2017). This observation, however small, contributes as a counterpoint to the

prevailing narrative of the OECD as entirely dominated by developed country interests.

Applying theory developed in the accounting literature, which differentiates argumentation into conceptual and economic streams, the analysis identified that strongly made conceptual arguments were likely to win out over economic arguments. In this regard, although underrepresented in terms of pure numbers, civil society were able to influence the standard where they made strong conceptual arguments. This finding suggests the OECD were responsive to the most pertinent arguments and hence the consultation showed a level of throughput legitimacy.

#### **9.1.6 Objective 6 - To gain informed stakeholder views as to the impact of BEPS Action 13 in the UK with a view to evaluating the output legitimacy garnered from this legislative change**

Objective 6 contributes to knowledge by gathering empirical evidence through interviews and analysing this data to provide insight into the output legitimacy of Action 13. This is the only independent academic study of Action 13 in practice in the UK which garners evidence from tax professionals involved in preparing and submitting Action 13 documentation at a time when the rules are in maturity.

Interview data presents a complex picture of output legitimacy and draws several conclusions. Firstly' it is notable that the Action 13 requirements do not appear to be strongly opposed, rather interviewees largely appeared to be content to comply and even see some value in doing so. Data from interviews suggests Action 13 is ostensibly able to meet its first two objectives of raising the profile of TP and enabling tax authorities to conduct a TP risk assessment. However, compliance with Action 13 is perceived to be an expensive exercise whose impact is constrained by lack of capacity in tax authorities. This conclusion must be treated carefully because, firstly, the study did not hear from HMRC in terms of how much risk assessment is being aided by Action 13 and secondly the cost of compliance appeared to be quite an emotive issue. However, it does appear that there is room to improve understanding of how (and indeed if) Action 13 documentation is being used as a risk assessment tool by tax authorities.

As for Objective 3 of Action 13, which requires the standard to enable tax authorities to conduct a thorough transfer pricing audit, interviewees did not regard this objective as being met. Interviewees were not convinced that the CbCR template provided sufficient information to meet the needs of this objective and in some cases felt strongly that the CbCR document

was insufficient for HMRC to use as the basis for an audit. There may be some improvement to output legitimacy in terms of Objective 3 of Action 13, with the introduction of new documentation requirements for accounting periods from April 2023. However, it appears that this objective is for the present unsatisfied which, at least partially, undermines the legitimacy of Action 13.

### **9.1.7 Objective 7 - To synthesise findings on the input, throughput and output legitimacy of Action 13**

This objective addresses the overall thesis aim by combining the findings of Chapters 5 and 7 to provide a comprehensive evaluation of the democratic legitimacy of Action 13.

By comparing attitudes expressed in the consultation to those expressed in interviews several interesting observations can be made. Firstly, the concerns expressed by MNE's and Advisors centred on the confidentiality of Action 13 data appear to have been overwrought. Whereas the consultation responses submitted by MNE's and Advisors showed strong reluctance to information sharing (on the grounds of commercial sensitivity). Interviewees appeared relaxed about having CbCR and other Action 13 documents shared and expressed no concerns that this put their organisations at risk. This is important as argumentation centred on confidentiality appears to have gained traction with the OECD and may be, at least partly, responsible for the circulation of CbCR reports being restricted. This restriction impacts utility of Action 13 data by all jurisdictions but potentially most so developing nations (Burgers & Mosquera, 2017) and therefore potentially the overall output legitimacy of Action 13. The fact that this limitation is in response to a concern which does not appear to have materialised presents a challenge to the throughput legitimacy of Action 13. However, the knowledge that commercial confidentiality concerns may be unfounded also removes a barrier to any future revisions and relaxing of information sharing and may present an opportunity for improving the output legitimacy of Action 13 and subsequent policies.

The movement of attitude on confidentiality was not the only attitudinal shift which appears to have occurred between the consultation and the interviews. As set out in Chapter 8 attitudes in the tax profession to tax transparency and the ALP also now appear to be more aligned with progressive notions of responsible tax behaviours as expressed by wider society. Whilst it may be very challenging to separate out the discrete impact Action 13 had in terms of precipitating this attitudinal shift. The chapter concludes that Action 13 is likely to have played some part in shifting attitudes in the tax profession. This is an important shift because

the OECD have subsequently gone on to propose more radical and wide-reaching policies under BEPS 2.0 which go much further than anything proposed under Action 13. Having reviewed the consultation (Chapter 8) and noted the resistance of MNE's and tax advisors to changes in this area it seems unlikely that an initiative like BEPS 2.0 Pillar 2 would have been accepted in 2015. It may therefore be true to say that Action 13 laid some of the groundwork in terms of shifting attitudes for BEPS 2.0 to be accepted. However, from the OECD's perspective the fact that attitudes have shifted means that the policy continuum which they direct can continue to evolve in a more progressive direction, which may help to maintain their legitimacy in the long term. Even as the OECD faces growing challenge from the UN (Robin & Medina, 2023).

## **9.2 Contribution and significance of the work**

The aim of this thesis was: *To critically evaluate the democratic legitimacy of Action 13 of the OECD's BEPS Action Plan.* Drawing on the work done in completion of objectives 1-7 it is possible to conclude the following:

The creation of Action 13 (and the BEPS Action Plan in general) received criticism for being dominated by developed country and corporate interests (Burgers & Mosquera, 2017; Fung, 2017). Results from empirical work carried out in this study on the Action 13 consultation add weight to these criticisms and suggest a lack of input legitimacy. Despite this, more positive findings emerged from analysis of throughput legitimacy, with evidence of the OECD mediating between corporate and civil society interests and prioritising global fairness in aspects of the standard. This finding contributes to the body of existing knowledge by challenging the dominant narrative and showing there is hope for progressive policy emerging from the organs of the OECD, even whilst broader institutional reform is sought through the UN's Global Tax Forum. This finding is significant for those wishing to engage with the OECD through formal policy consultation processes, especially those in non-corporate groups who may feel less able to articulate their arguments in technical legal language. The lessons which appear to emerge for such groups is that strong moral and conceptual argumentation has influence in this policy setting. This is especially true when stakeholders coalesce and seek to present a unified front when arguing their point.

Through interviews with tax professionals the thesis found that Action 13 legitimately meets two of its three stated objectives in practice but falls short on the third. This suggests Action 13 is partially objectively legitimate. Despite only partially meeting of its objectives, Action 13 does appear to be accepted by those required to comply, despite some concerns about the proportionality of the cost of complying and some reservations about the extent to which reports are being used. This

acceptance suggests a level of subjective legitimacy, which appears to be underpinned by an overall understanding of, and agreement, with the policy objectives. To date this appears to be the only academic study which assesses the impact in practice of Action 13 in the UK as a mature policy. These findings therefore make a significant contribution to knowledge by giving insight into the success in practice of this important initiative.

These findings will potentially be of interest to HMRC, as they highlight scepticism amongst MNE's and Advisors as to how much HMRC are using Action 13 reports. There may be good reason for HMRC to retain a level of confidentiality around what they are doing with these reports. However, in the absence of evidence to the contrary or some dialogue from HMRC to explain how they are reviewing reports, MNE's and Advisors may take the view that Action 13 documentation is a tick box exercise, whereby reports are filed and forgotten. Whilst legal obligation may ensure continued compliance, a lack of perceived importance attached to the documentation could undermine any hopes of the transparency gained from Action 13 promoting good behaviour for fear of drawing the attention of tax authorities. This finding will also be of interest to campaign groups, who advocated for these rules but who do not have access to the reports themselves and are therefore limited in their capacity to assess the efficacy of Action 13 as a policy.

### ***9.3 Limitations***

Chapters 4 & 6 critically reflect on the philosophical and methodological strengths and weaknesses of this study which will not be repeated in detail here. Rather this section will set out some of the overarching constraints and limitations of the research project.

Firstly, by virtue of being part time this PhD was spread over six years, which resulted in both positive and negative implications for the research. The downside was that the international tax policy landscape is extremely fast moving, already the OECD have moved on to the next phase of BEPS (OECD, 2022) and so the conclusions drawn here may to an extent be overtaken by current events. This gave a scoping challenge in terms of identifying which new developments should be included in the analysis and which left out and meant inherent interest in the policy under review (Action 13) diminished as the project went on and new regulations emerged. To mitigate the risk of findings becoming irrelevant, the research was framed around democratic legitimacy theory. This theoretical framing meant that the results could be linked to the wider policy agenda of the OECD and in that sense contextualised within the wider ongoing program of reform. However, the author notes that conducting future research in this area (as is planned) will need to be



done in a shorter time span if it is to be considered relevant and impactful in policy debates. As a positive, the long period of research means that Action 13 has had a chance to mature as a policy over the course of the PhD and therefore the results can be said to reflect the policy as it has bedded in. As can be seen from the results (Chapter 8), the extended timeframe of the research allowed reflection on how attitudes have changed since the introduction of Action 13 and for tax professionals to be able to draw on successive periods of reporting in framing their answers. This is a key contribution of this study, which adds to research conducted to date which primarily focussed on pre and early implementation of Action 13 (Sawyer & Sadiq, 2019).

Another limitation is the relatively small interview sample and the fact that 4/5 MNE's interviewees worked in the energy sector, meaning findings are potentially limited and could be further enriched. It would be instructive to conduct similar interviews with professionals working for or advising large tech firms, online retailers and consumer franchises. As was well publicised when BEPS was introduced (All Party Parliamentary Group for Responsible Taxation, 2016), these industries were the primary focus of policy makers and the public for their tax avoidance behaviour. The researcher made numerous attempts to contact tax professionals working in these industries but (as noted in detail in Chapter 6) securing such interviews can be challenging without prior connections or introductions. It is possible that professionals working in these industries would have a different view of Action 13, stemming from their business models being more susceptible to challenge in terms of transfer pricing, this view in turn may impact the assessment of Action 13's output legitimacy. This could be an interesting area for further study.

In addition to tax professionals from the industries noted above, the research is limited by not hearing directly from HMRC, the UK's tax authority. The views expressed by MNE's and Advisors about the perceived lack of use of Action 13 by tax authorities are interesting themselves and provide important evidence to inform an assessment of legitimacy. However, the other side of the story is missing and hearing directly from tax authorities would help to understand the validity of these views and indeed would give greater insight into the impact and hence legitimacy of Action 13. Engaging with tax authorities in the future may be an interesting way to expand this study.

#### ***9.4 Recommendations for further research***

As well as expanding the interview sample as suggested above, another area for further research on this policy could be its implementation in other jurisdictions. By comparing the experience of tax professionals and tax authorities (if accessible) across the world it may be possible to

identify common issues with the policy and areas of emergent good practice in terms of its implementation and administration. Furthermore, it would be instructive to explore the interaction of Action 13 data with the newly agreed BEPS 2.0 Pillars (OECD, 2023) which are likely to require CbCR type information to administer.

This study referred to coalitions and interest groups (CIG) in the context of lobbying the OECD on the consultation for Action 13. A detailed analysis of these group's submissions was not carried out as part of this research, however, building on the work of other authors (Elschner, et al., 2018; Mulligan & Oats, 2016) it would be interesting to understand how the formation of CIG's may have impacted BEPS and the latest BEPS 2.0 standards more widely. An analysis of submissions and engagement with lobbyists through interviews may prove insightful in terms of understanding the key influences on the rules and what will determine whether they meet stakeholder expectations in practice.

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## 11 Appendix 1 – Descriptive Statistics

The following sections display in full the output from SPSS 28 which is summarised and interpreted in Chapter 4.

### 11.1 Tests of Normality

Normality of the categorical variables used to code stakeholders response to consultation questions was carried out using the Descriptive Statistics > Explore function in SPSS 28. Normality was assessed using the results of the Kolmogorov-Smirnov statistic (Pallant, 2020, p. 64) and by inspecting the data presented in Histogram's. This analysis was carried out for each of the 16 questions asked by the OECD as well as the coding created to express whether each constituent formed their argumentation based on conceptual or economic rational.

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to restrict additional forms etc - Y1/N0/2 No Answer	.313	137	<.001	.765	137	<.001
ec1/con02/No clear argumentation	.253	137	<.001	.793	137	<.001
Constituents will lobby for tax authorities to share risk ratings - Y1/N0/2No Answer	.354	137	<.001	.719	137	<.001
Constituents will lobby to restrict info from associates at 3-5 - Y1/N0/2 No Answer	.284	137	<.001	.779	137	<.001
ec1/con02/No clear argumentation	.351	137	<.001	.679	137	<.001
Constituents will lobby for LOB to be allowed - Y1/N0/2 No Answer	.322	137	<.001	.765	137	<.001
ec1/con02/No clear argumentation	.216	137	<.001	.805	137	<.001
Constituents will lobby for separation of CbCR from the other requirements of Action 13 - Y1/N0/2 No Answer	.352	137	<.001	.740	137	<.001
ec1/con02/No clear argumentation	.412	137	<.001	.629	137	<.001

Constituents will lobby for flexibility Top Down vs Bottom up - Y1/N0/2 No Answer	.263	137	<.001	.804	137	<.001
top 1 bottom 0 No preference 2	.432	137	<.001	.610	137	<.001
ec1/con02/No clear argumentation	.307	137	<.001	.781	137	<.001
Constituents will lobby for flexibility Entity by Entity vs Consolidation - Y1/N0/2 No Answer	.223	137	<.001	.795	137	<.001
Entiy1 cons0 No preference2	.389	137	<.001	.672	137	<.001
ec1/con02/No clear argumentation	.283	137	<.001	.789	137	<.001
Constituents will lobby for flexibility cash vs accruals - Y1/N0/2 No Answer	.253	137	<.001	.763	137	<.001
Cash1 Acc0 No preference 2	.376	137	<.001	.688	137	<.001
WHT should be included - Y1/N0/ 2 No Answer	.291	137	<.001	.761	137	<.001
Covers cash vs accruals and WHT - ec1/con02/No clear argumentation	.242	137	<.001	.779	137	<.001
Constituents will lobby to exclude cross border payments - Y1/N0/2No Answer	.241	137	<.001	.798	137	<.001
ec1/con02/No clear argumentation	.253	137	<.001	.793	137	<.001
Constituents will lobby for nature of business to be included as a data point Y1/N0/2No Answer	.267	137	<.001	.782	137	<.001
ec1/con02/No clear argumentation	.298	137	<.001	.726	137	<.001
Constituents will lobby for greater flexibility in materiality - Y1/N0/2 No Answer	.402	137	<.001	.674	137	<.001

ec1/con02/No clear argumentation	.335	137	<.001	.759	137	<.001
Constituents will lobby for English as the main language for filing - Y1/N0/2 No Answer	.301	137	<.001	.758	137	<.001
ec1/con02/No clear argumentation	.274	137	<.001	.783	137	<.001
Constituents will lobby to restrict documentation penalties Y1/N0/2 No Answer	.426	137	<.001	.625	137	<.001
Constituents will cite confidentiality as a concern - Y1/N0/2No Answer	.398	137	<.001	.686	137	<.001
ec1/con02/No clear argumentation	.454	137	<.001	.560	137	<.001
Constituents will lobby for Masterfile's to be filed in parent company jurisdictions only - Y1/N0/2 No Answer	.306	137	<.001	.783	137	<.001
ec1/con02/No clear argumentation	.419	137	<.001	.621	137	<.001
Constituents will lobby to restrict access to CbCR at levels 3-5 - Y1/N0/2 No Answer	.346	137	<.001	.748	137	<.001
ec1/con02/No clear argumentation	.454	137	<.001	.563	137	<.001
Constituents will lobby to exclude APA's & MAP rulings - Y1/N0/2 No Answer	.276	137	<.001	.778	137	<.001
ec1/con02/No clear argumentation	.389	137	<.001	.633	137	<.001
Constituents will argue to scale back the scope to exclude providing enough info to conduct an audit - Y1/N0/2 No Answer	.437	137	<.001	.605	137	<.001
ec1/con02/ No clear argumentation	.427	137	<.001	.622	137	<.001

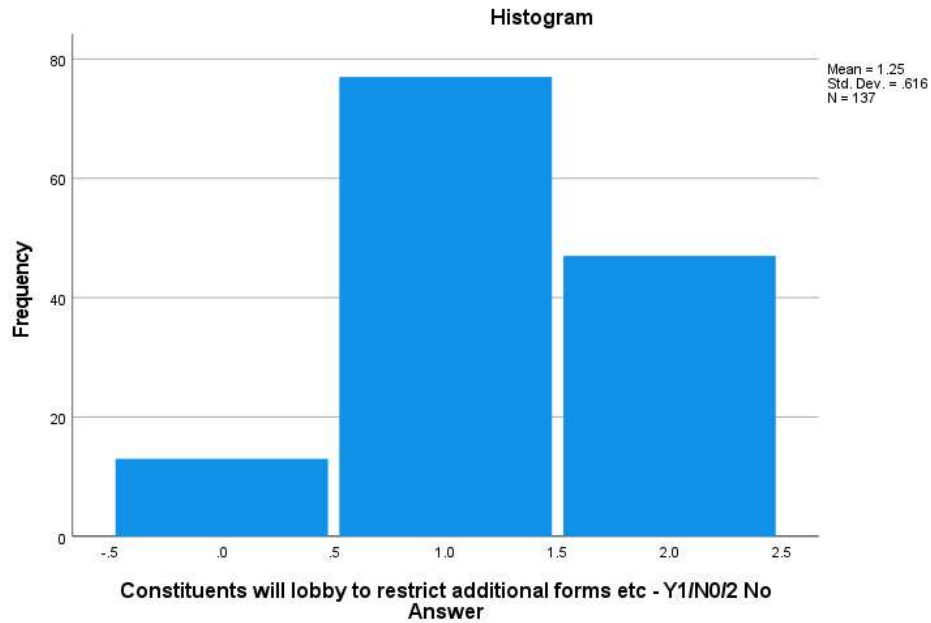
a. Lilliefors Significance Correction

11.1.1.1 Comments are requested as to whether work on BEPS Action 13 should include development of additional standard forms and questionnaires beyond the country-by-country reporting template

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to restrict additional forms etc - Y1/N0/2 No Answer	.313	137	<.001	.765	137	<.001

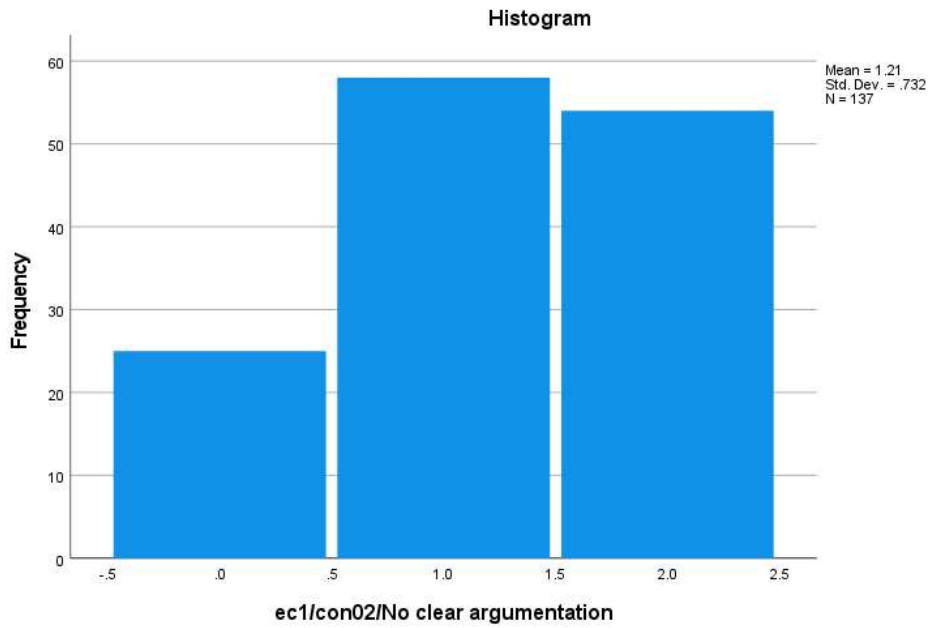
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.253	137	<.001	.793	137	<.001

a. Lilliefors Significance Correction



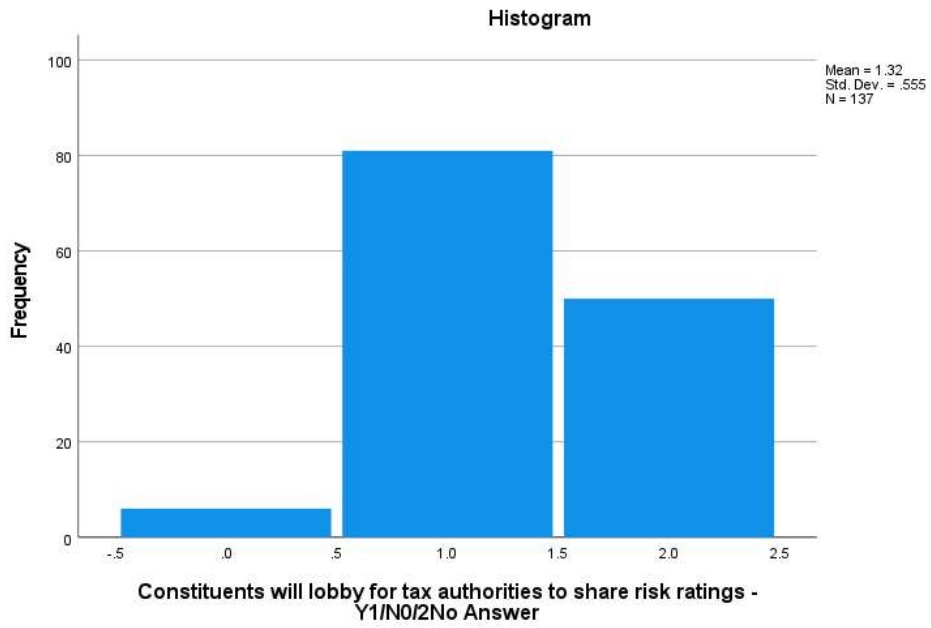
11.1.1.2 Comments are also requested regarding the circumstances in which it might be appropriate for tax authorities to share their risk assessment with taxpayers.

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for tax authorities to share risk ratings - Y1/N0/2No Answer	.354	137	<.001	.719	137	<.001

a. Lilliefors Significance Correction

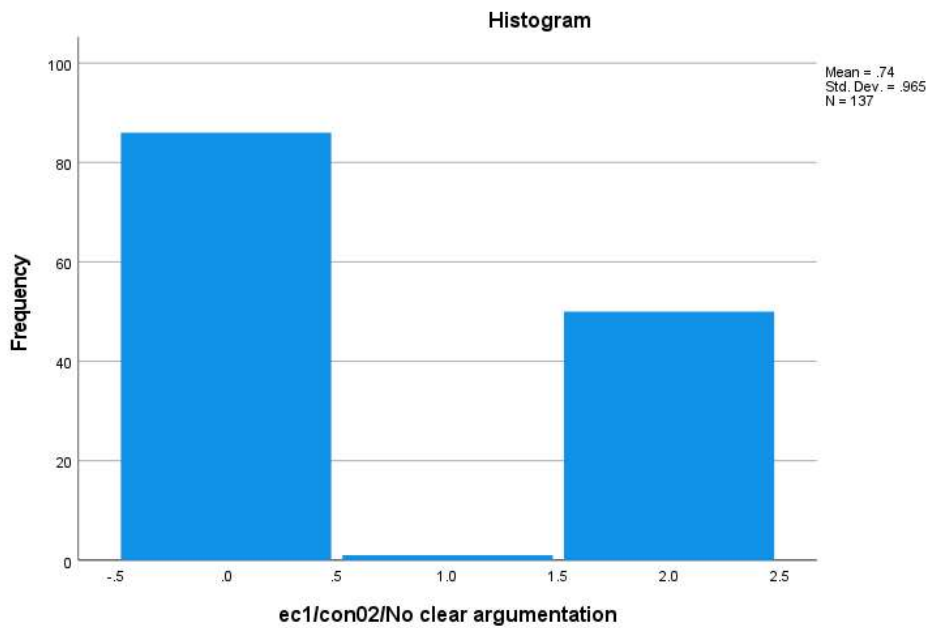




### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.405	137	<.001	.616	137	<.001

a. Lilliefors Significance Correction

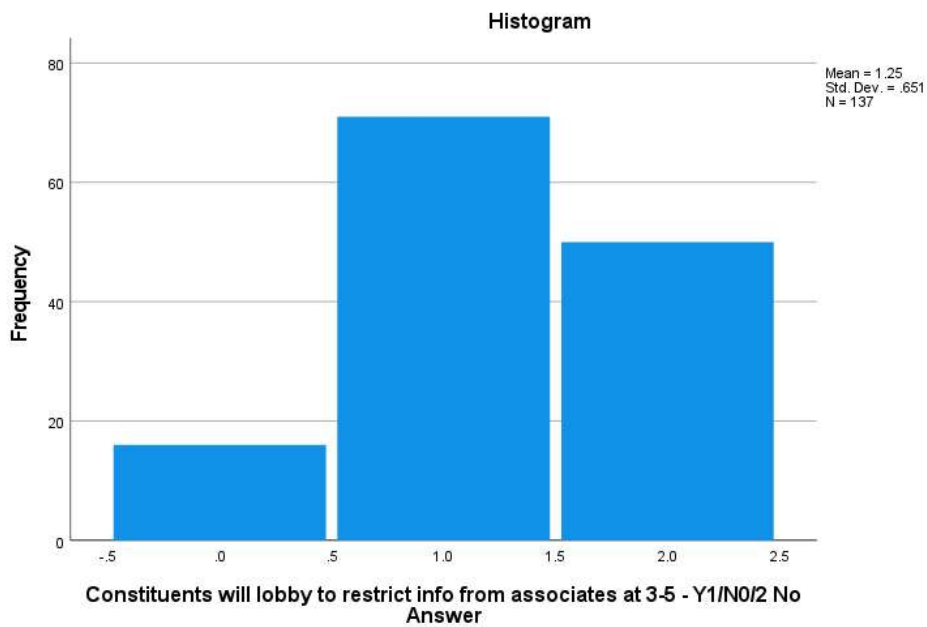


11.1.1.3 Comments are specifically requested on the appropriate scope and nature of possible rules relating to the production of information and documents in the possession of associated enterprises outside the jurisdiction requesting the information.

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to restrict info from associates at 3-5 - Y1/N0/2 No Answer	.284	137	<.001	.779	137	<.001

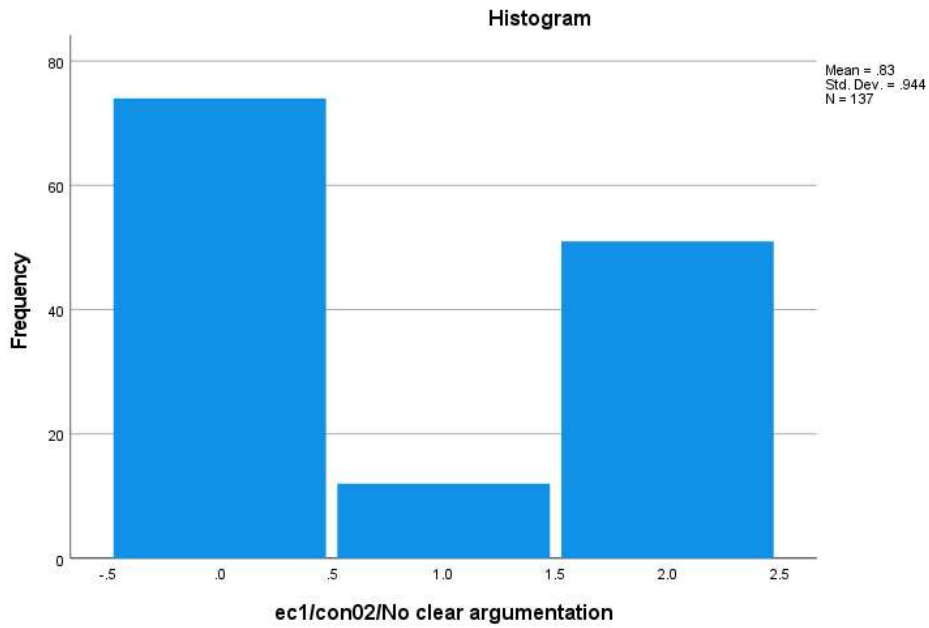
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.351	137	<.001	.679	137	<.001

a. Lilliefors Significance Correction

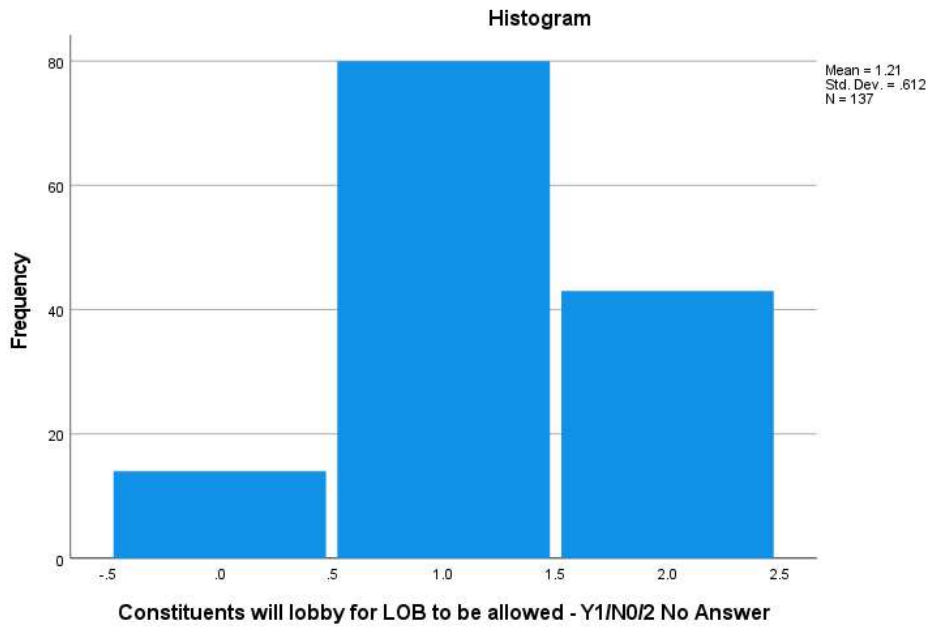


11.1.1.4 Comments are requested as to whether preparation of the master file should be undertaken on a line of business or entity wide basis.

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for	.322	137	<.001	.765	137	<.001
LOB to be allowed - Y1/N0/2						
No Answer						

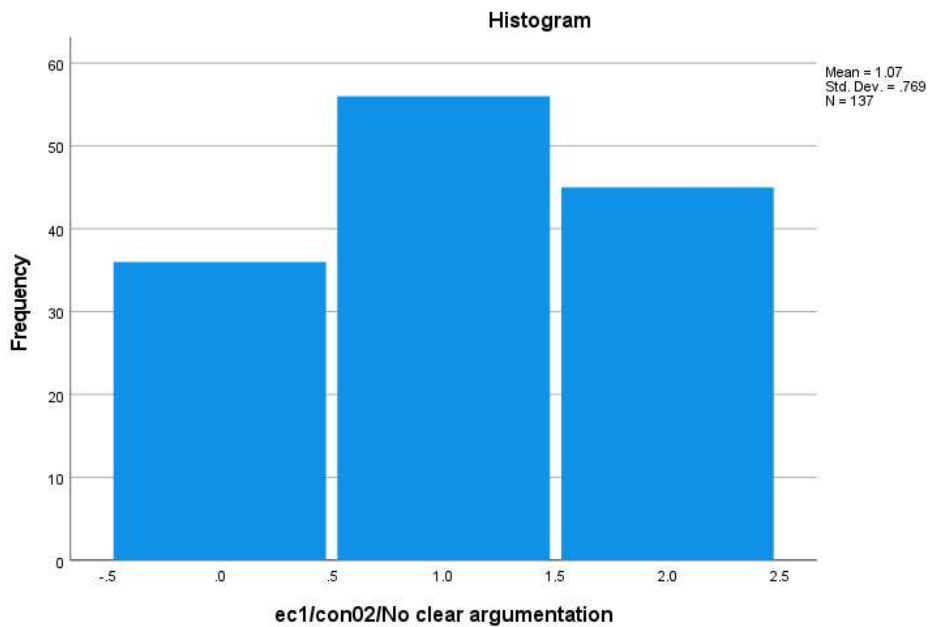
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.216	137	<.001	.805	137	<.001

a. Lilliefors Significance Correction

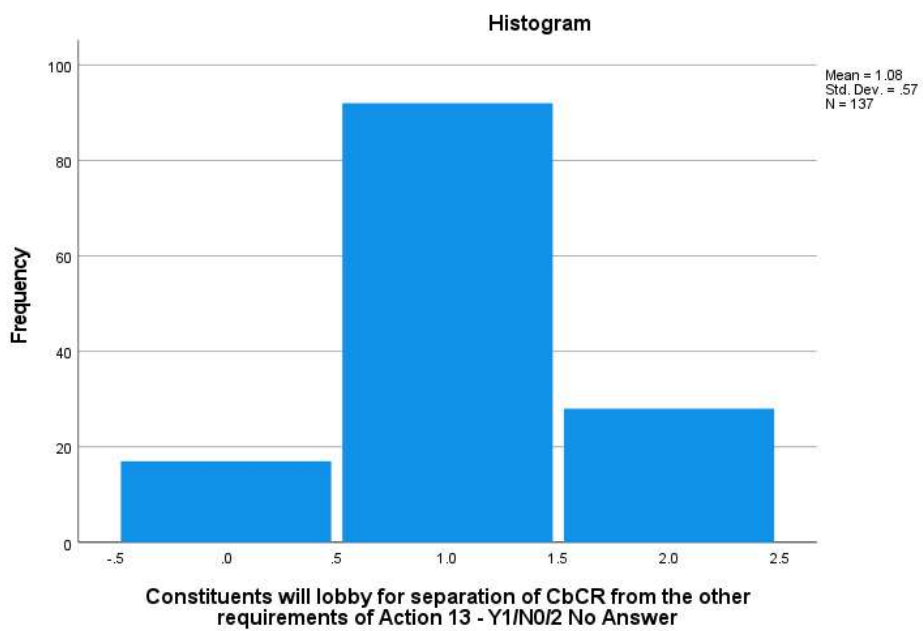


11.1.1.5 *Should the country-by-country report be part of the master file or should it be a completely separate document?*

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for separation of CbCR from the other requirements of Action 13 - Y1/N0/2 No Answer	.352	137	<.001	.740	137	<.001

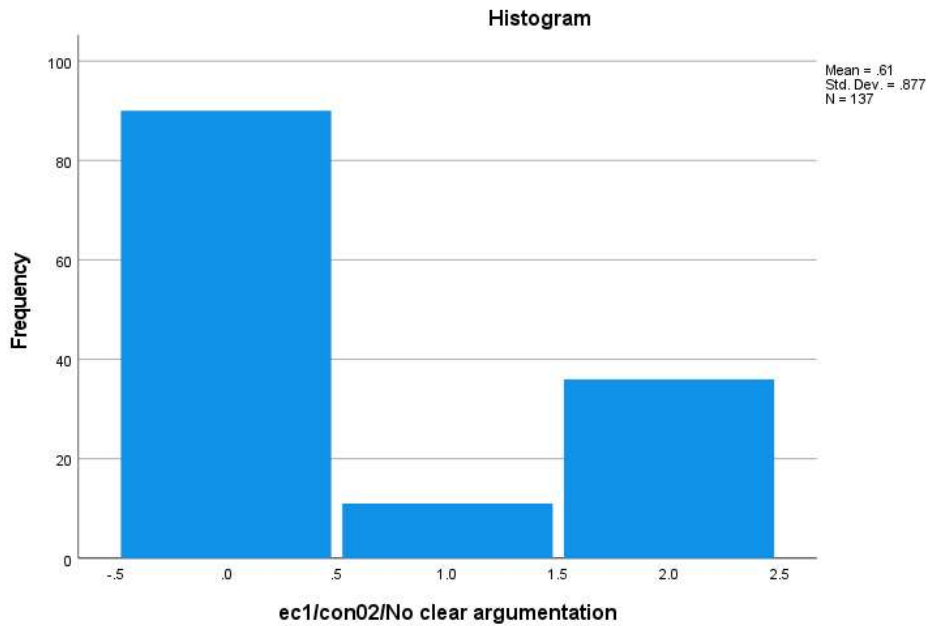
a. Lilliefors Significance Correction



**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.412	137	<.001	.629	137	<.001

a. Lilliefors Significance Correction

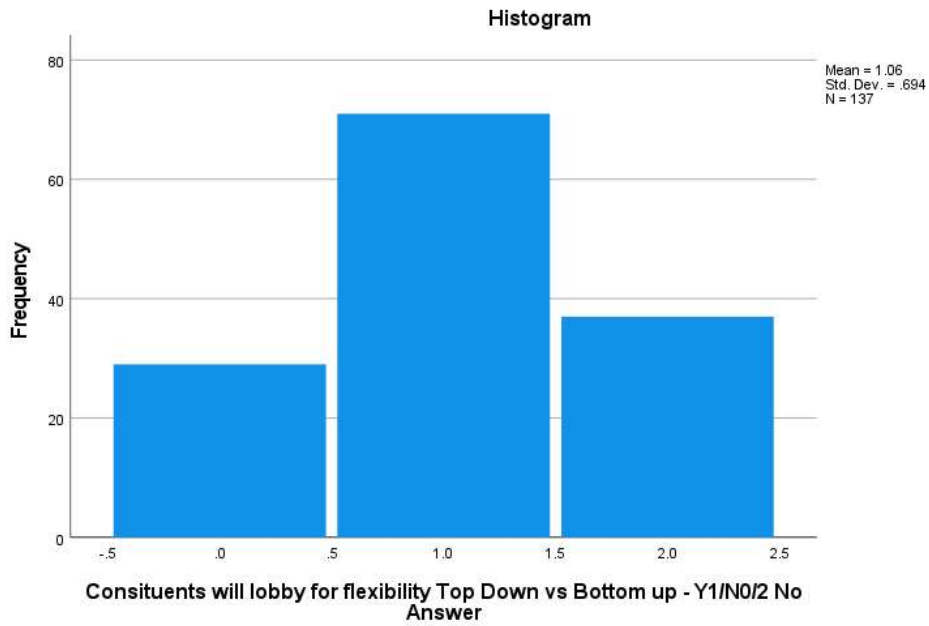


11.1.1.6 *Should the country-by-country template be compiled using “bottom-up” reporting from local statutory accounts as in the current draft, or should it require (or permit) a “top-down” allocation of the MNE group’s consolidated income among countries?*

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for flexibility Top Down vs Bottom up - Y1/N0/2 No Answer	.263	137	<.001	.804	137	<.001

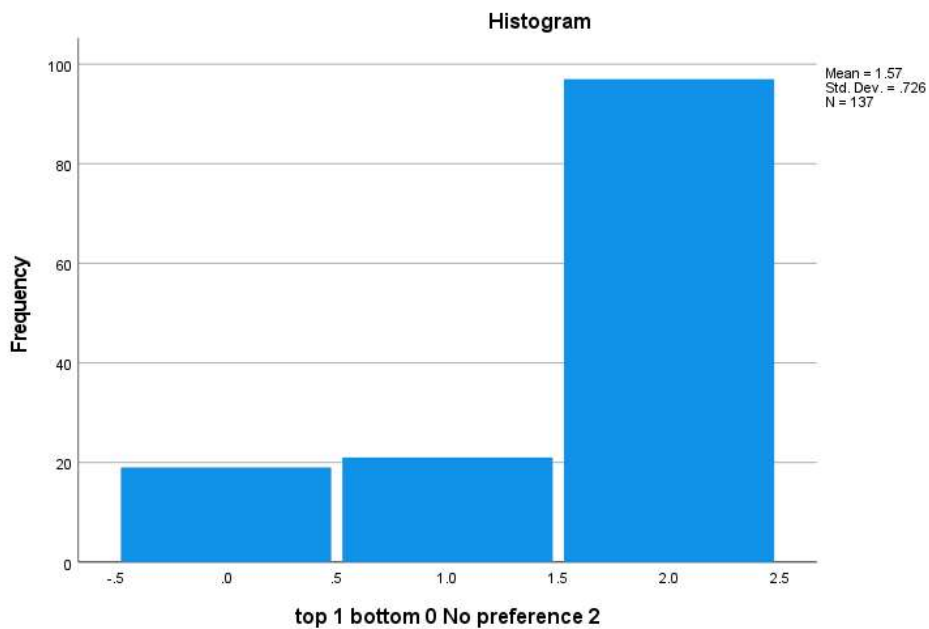
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
top 1 bottom 0 No preference 2	.432	137	<.001	.610	137	<.001

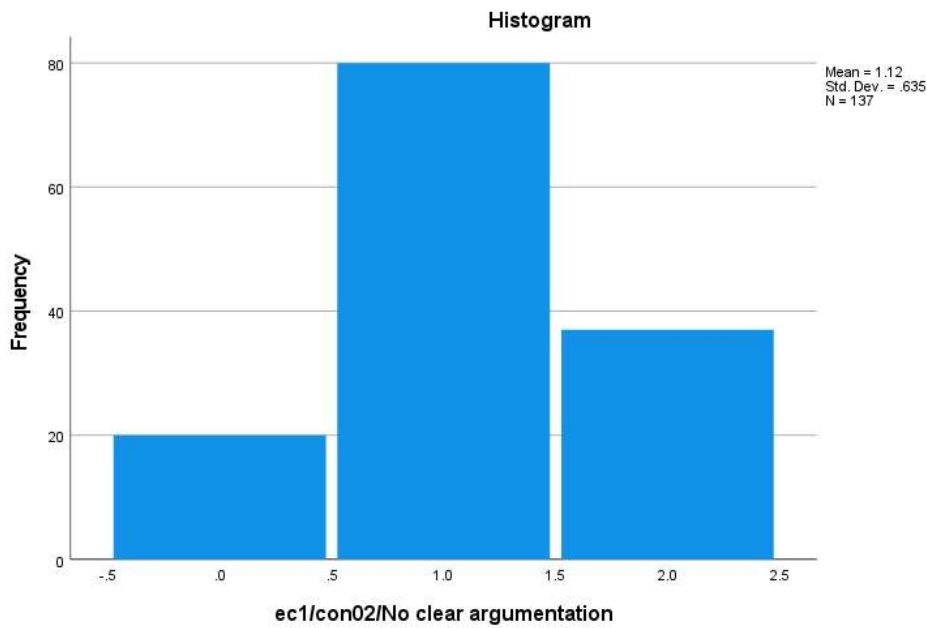
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.307	137	<.001	.781	137	<.001

a. Lilliefors Significance Correction



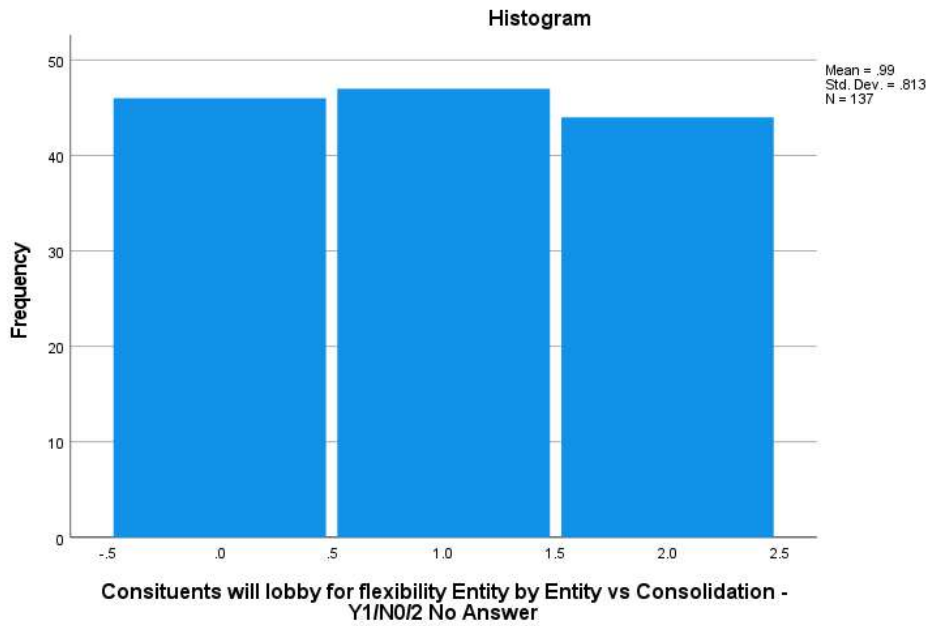
11.1.1.7 *Should the country-by-country template be prepared on an entity by entity basis as in the current draft or should it require separate individual country consolidations reporting one aggregate revenue and income number per country if the “bottom-up” approach is used?*

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for flexibility Entity by Entity vs Consolidation - Y1/N0/2 No Answer	.223	137	<.001	.795	137	<.001

a. Lilliefors Significance Correction

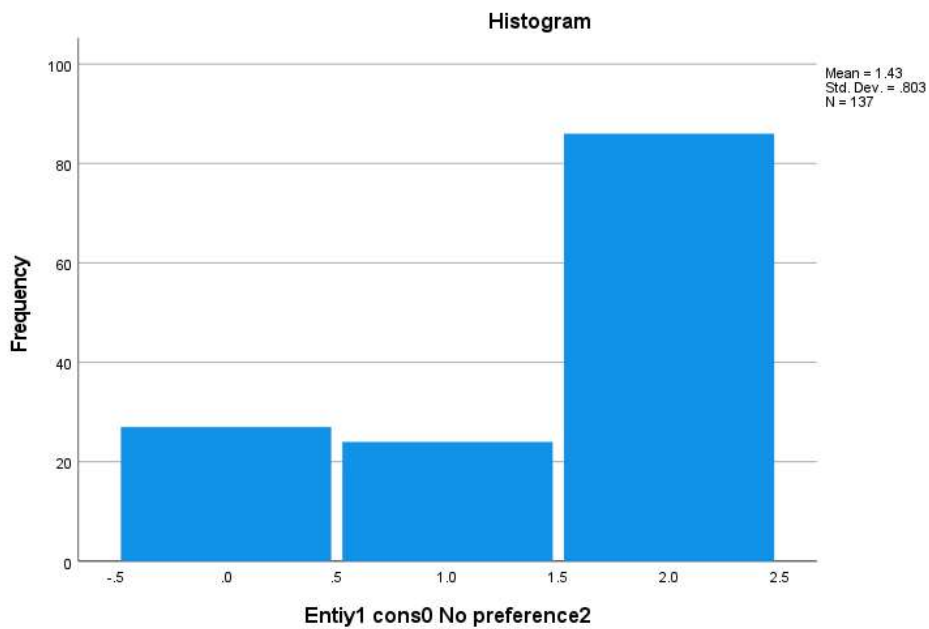




### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Entiy1 cons0 No preference2	.389	137	<.001	.672	137	<.001

a. Lilliefors Significance Correction

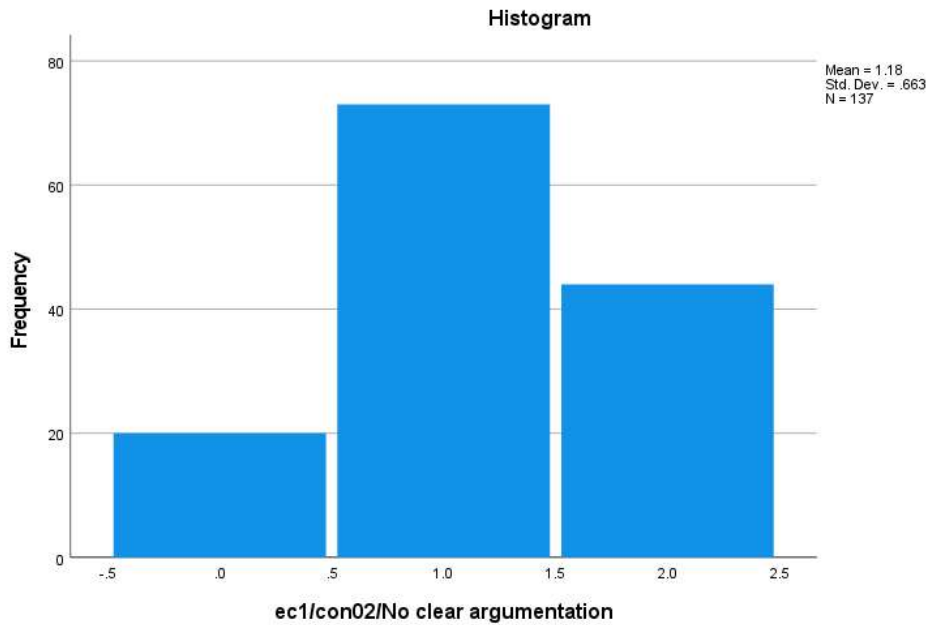


### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Entiy1 cons0 No preference2						

ec1/con02/No clear argumentation	.283	137	<.001	.789	137	<.001
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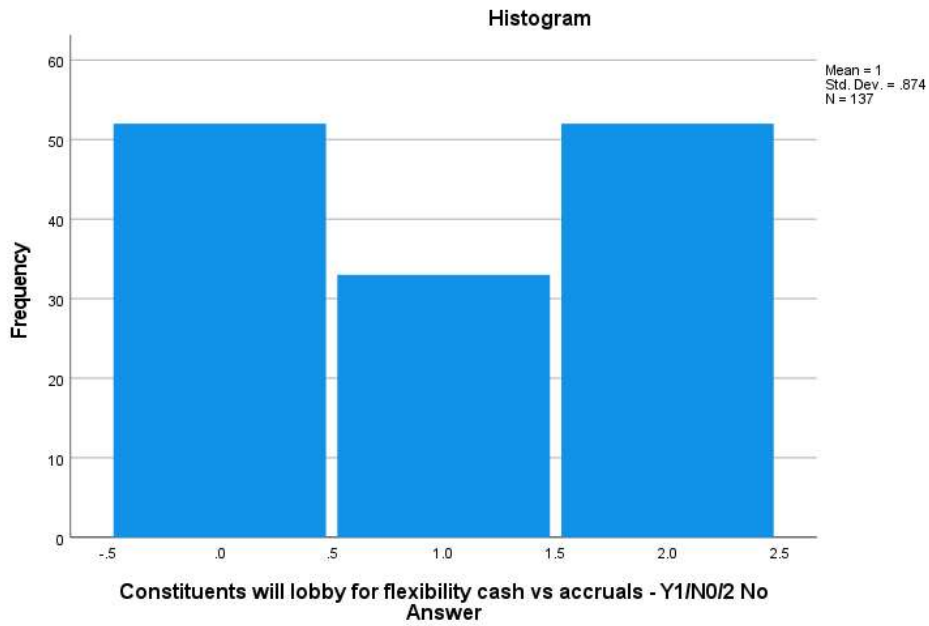
a. Lilliefors Significance Correction



11.1.1.8 *Should the country-by-country template require one aggregate number for corporate income tax paid on a cash or due basis per country?*

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for flexibility cash vs accruals - Y1/N0/2 No Answer	.253	137	<.001	.763	137	<.001

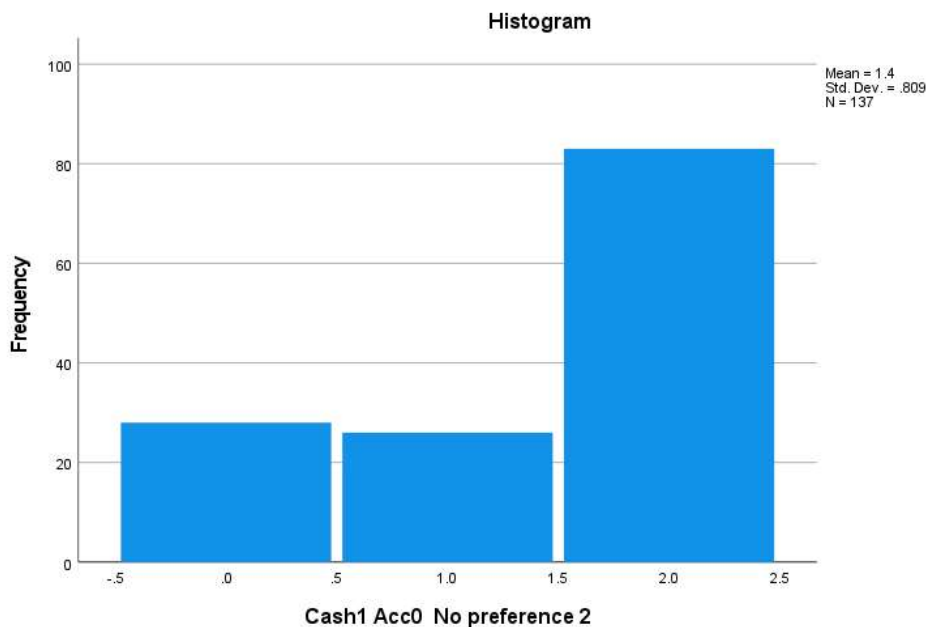
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Cash1 Acc0 No preference 2	.376	137	<.001	.688	137	<.001

a. Lilliefors Significance Correction

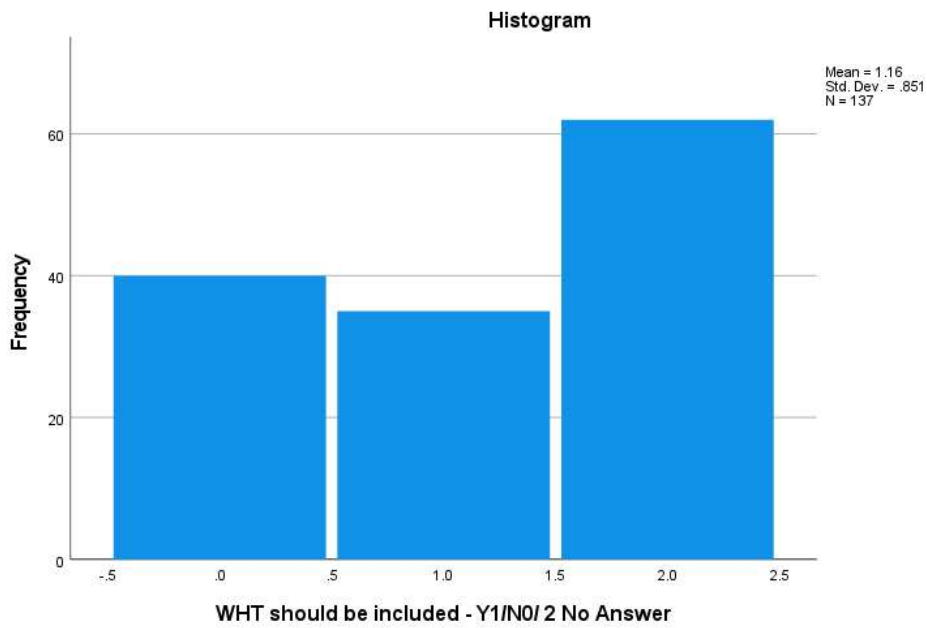


11.1.1.9 *Should the country-by-country template require the reporting of withholding tax paid? Would a requirement for reporting withholding tax paid impose significant additional burdens on taxpayers?*

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
WHT should be included - Y1/N0/ 2 No Answer	.291	137	<.001	.761	137	<.001

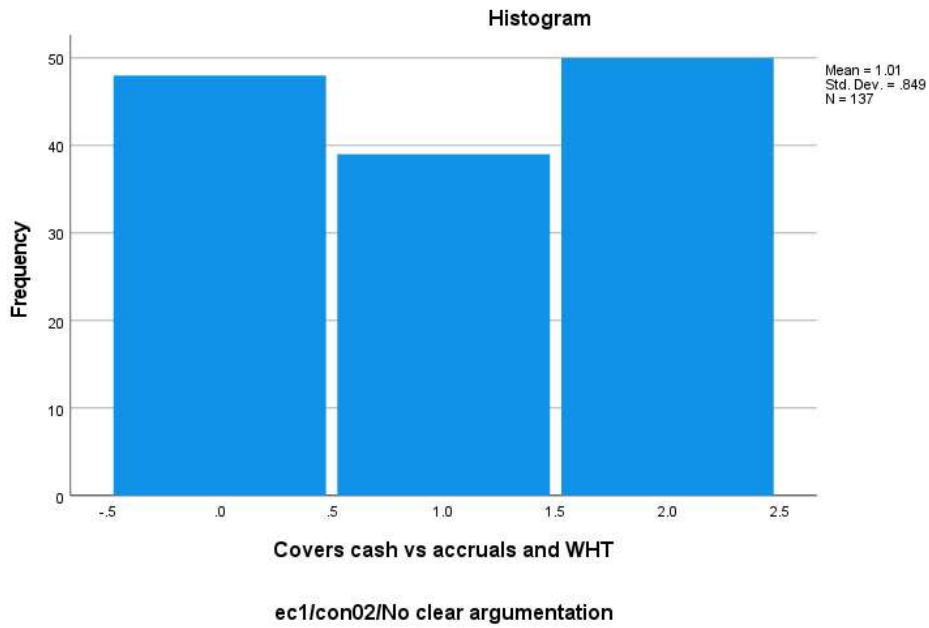
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Covers cash vs accruals and WHT - ec1/con02/No clear argumentation	.242	137	<.001	.779	137	<.001

a. Lilliefors Significance Correction

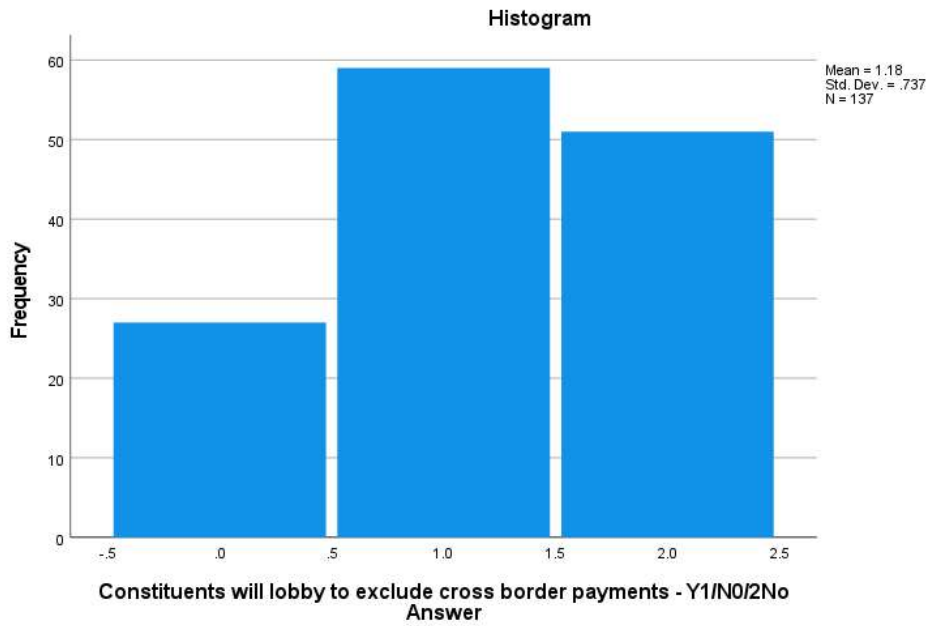


11.1.1.10 *Should reporting of aggregate cross-border payments between associated enterprises be required?*

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to exclude cross border payments - Y1/N0/2No Answer	.241	137	<.001	.798	137	<.001

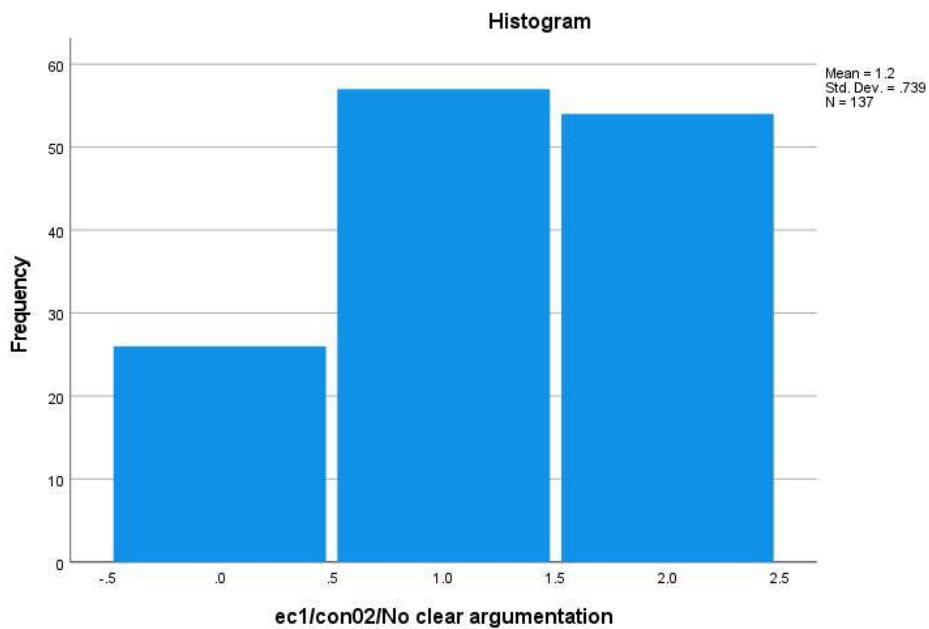
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.253	137	<.001	.793	137	<.001

a. Lilliefors Significance Correction

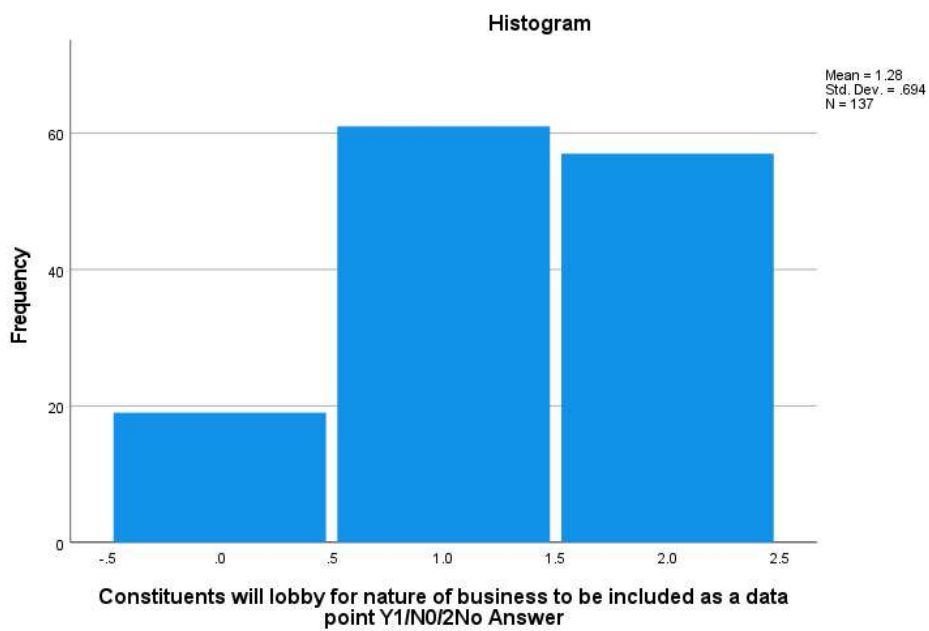


11.1.1.11 Should the country-by-country template require reporting the nature of the business activities carried out in a jurisdiction?

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for nature of business to be included as a data point Y1/N0/2No Answer	.267	137	<.001	.782	137	<.001

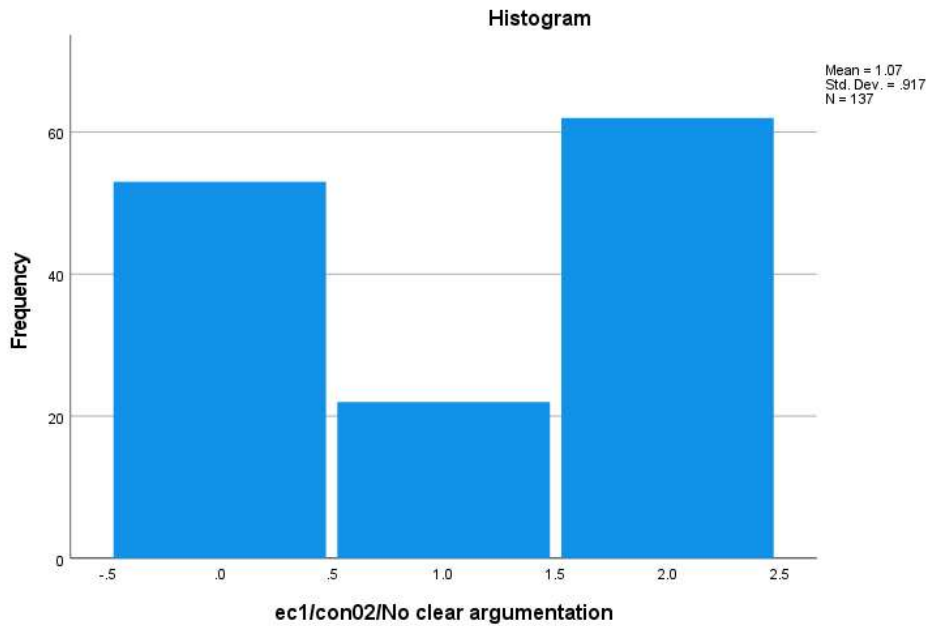
a. Lilliefors Significance Correction



**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.298	137	<.001	.726	137	<.001

a. Lilliefors Significance Correction

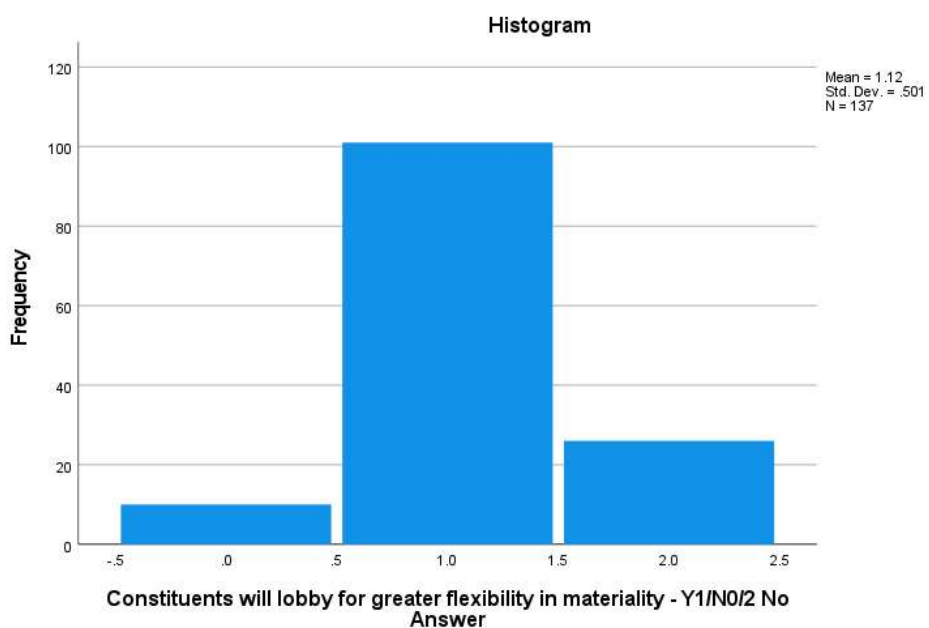


11.1.1.12 Comments are requested as to whether any more specific guideline on materiality could be provided and what form such materiality standards could take

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for greater flexibility in materiality - Y1/N0/2 No Answer	.402	137	<.001	.674	137	<.001

a. Lilliefors Significance Correction

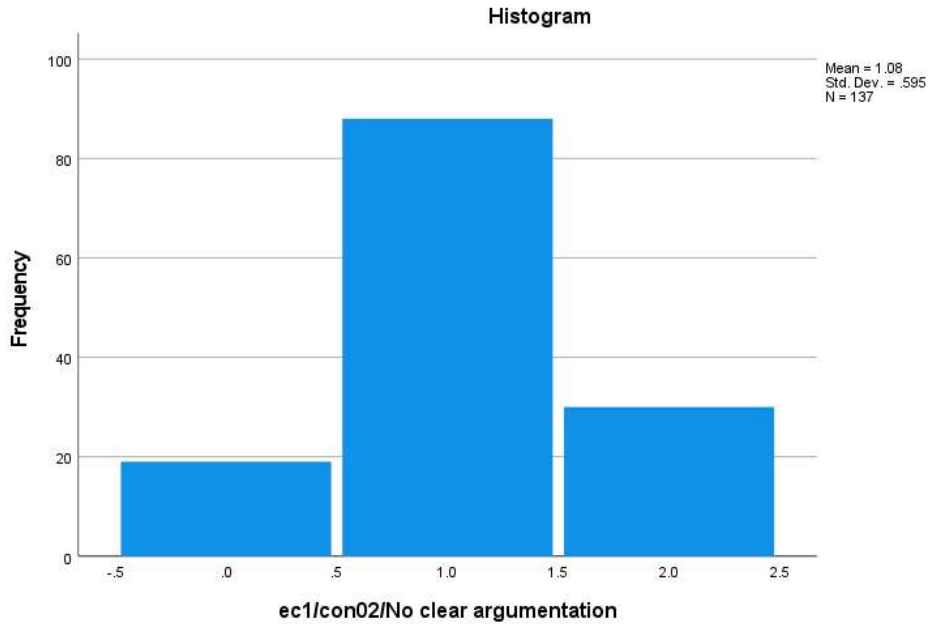




### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.335	137	<.001	.759	137	<.001

a. Lilliefors Significance Correction

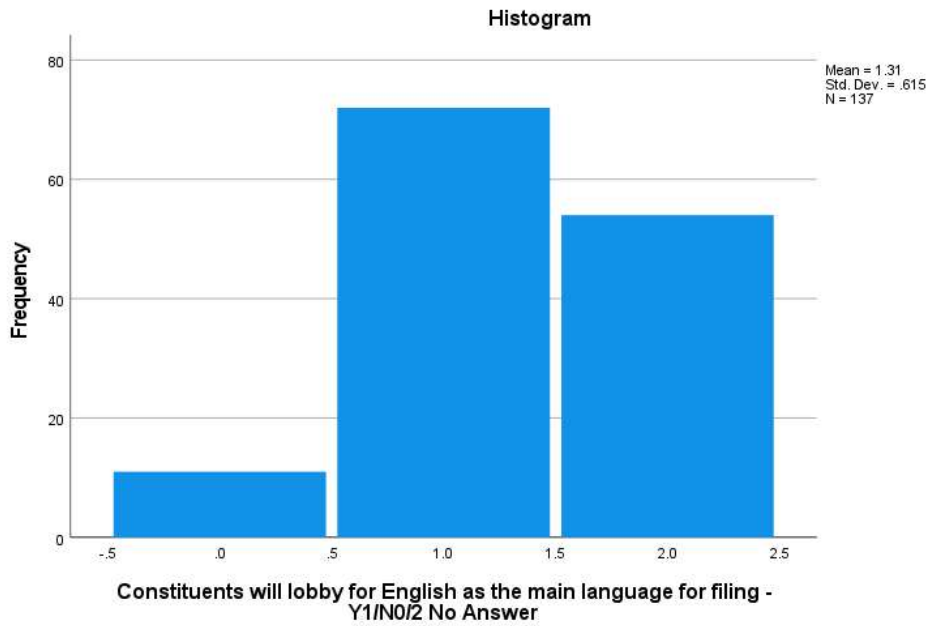


11.1.1.13 Comments are requested regarding the most appropriate approach to translation requirements, considering the need of both taxpayers and governments.

### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for English as the main language for filing - Y1/N0/2 No Answer	.301	137	<.001	.758	137	<.001

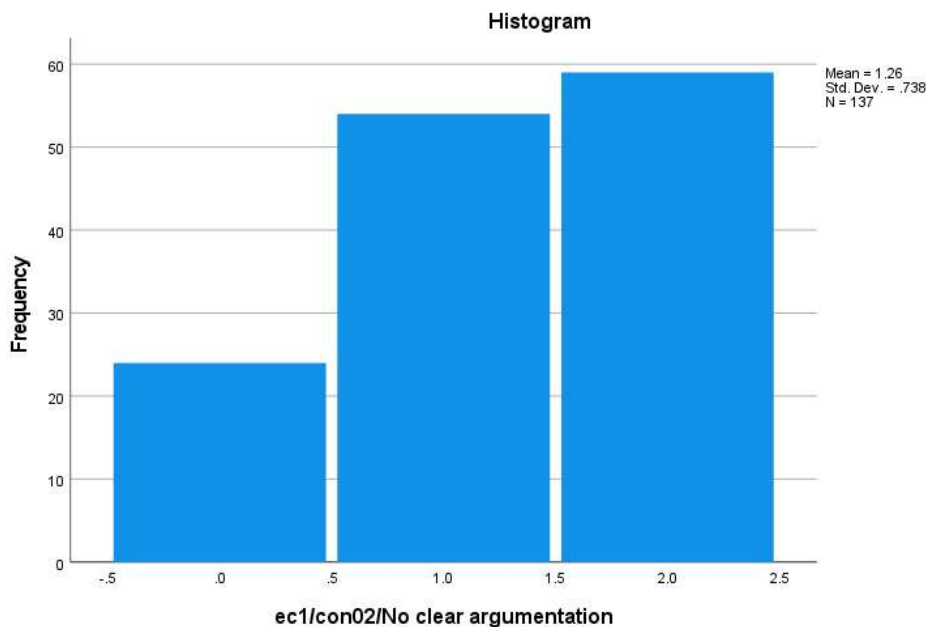
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.274	137	<.001	.783	137	<.001

a. Lilliefors Significance Correction

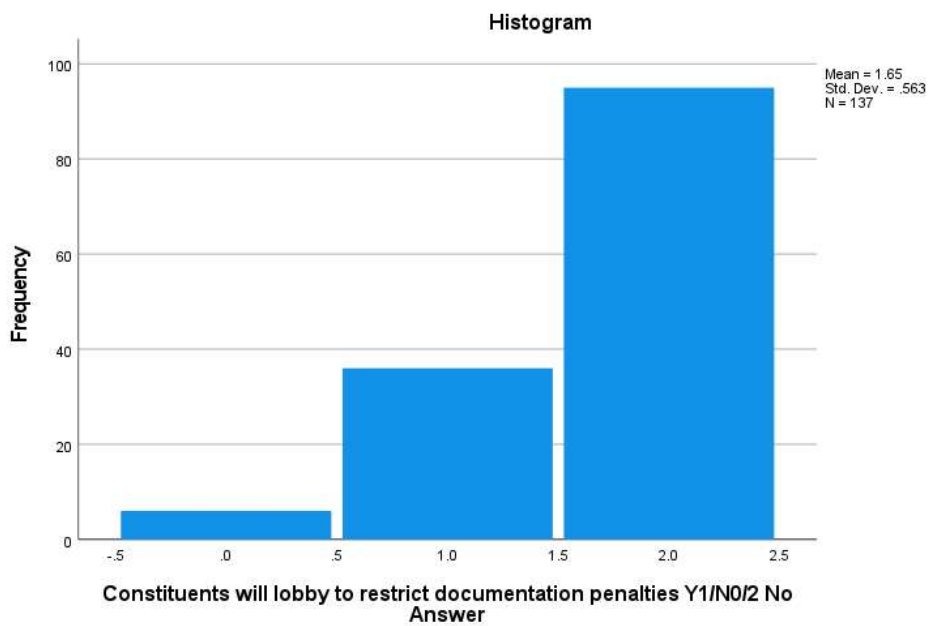


11.1.1.14 *Should the standard include documentation related penalties*

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to restrict documentation penalties Y1/N0/2 No Answer	.426	137	<.001	.625	137	<.001

a. Lilliefors Significance Correction

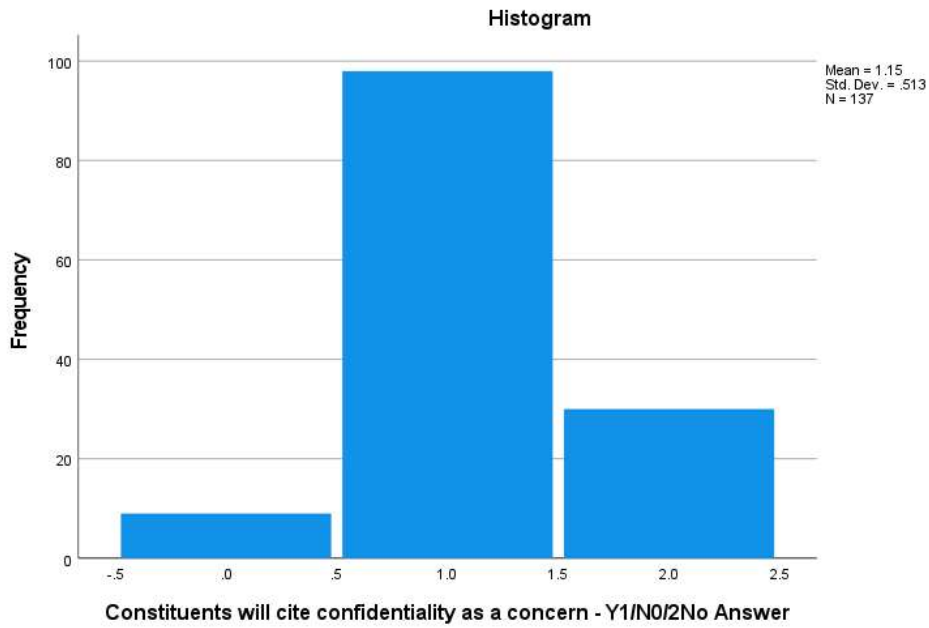


11.1.1.15 *Comments are requested regarding the most appropriate mechanism for making the master file and country-by-country reporting template available to relevant tax administrations*

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will cite confidentiality as a concern - Y1/N0/2No Answer	.398	137	<.001	.686	137	<.001

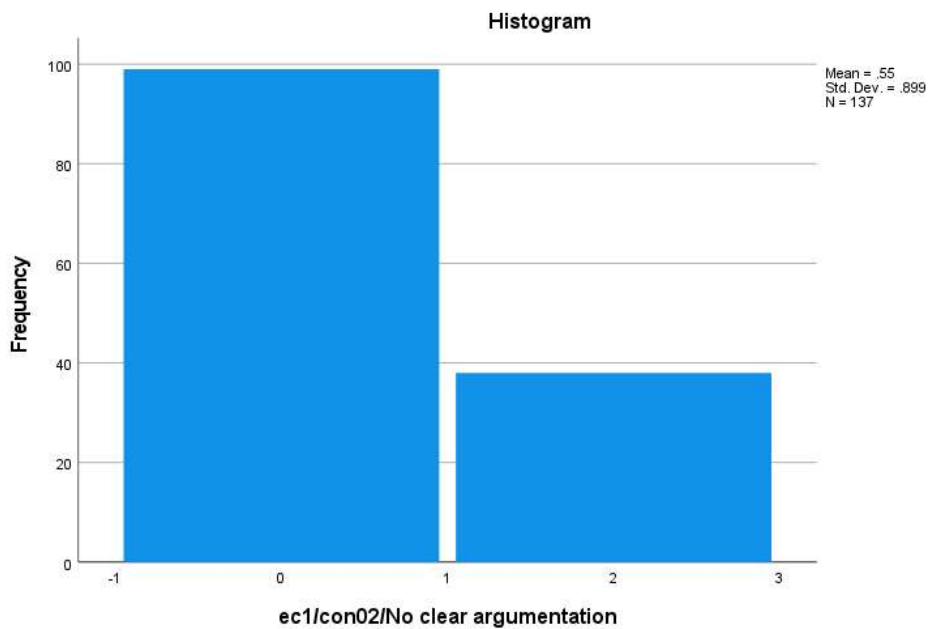
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.454	137	<.001	.560	137	<.001

a. Lilliefors Significance Correction

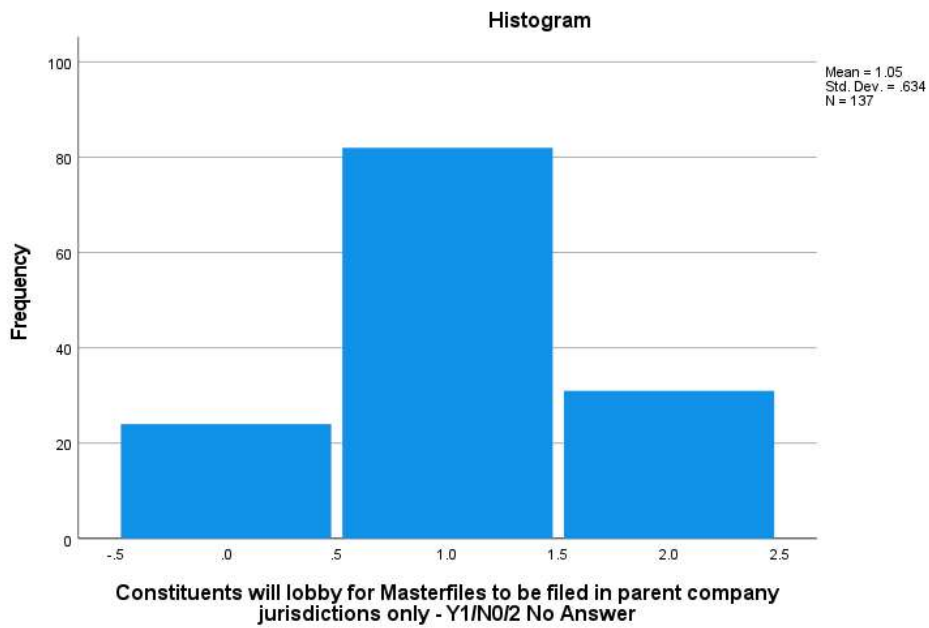


### Tests of Normality

Kolmogorov-Smirnov <sup>a</sup>	Shapiro-Wilk
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	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby for Masterfile's to be filed in parent company jurisdictions only - Y1/N0/2 No Answer	.306	137	<.001	.783	137	<.001

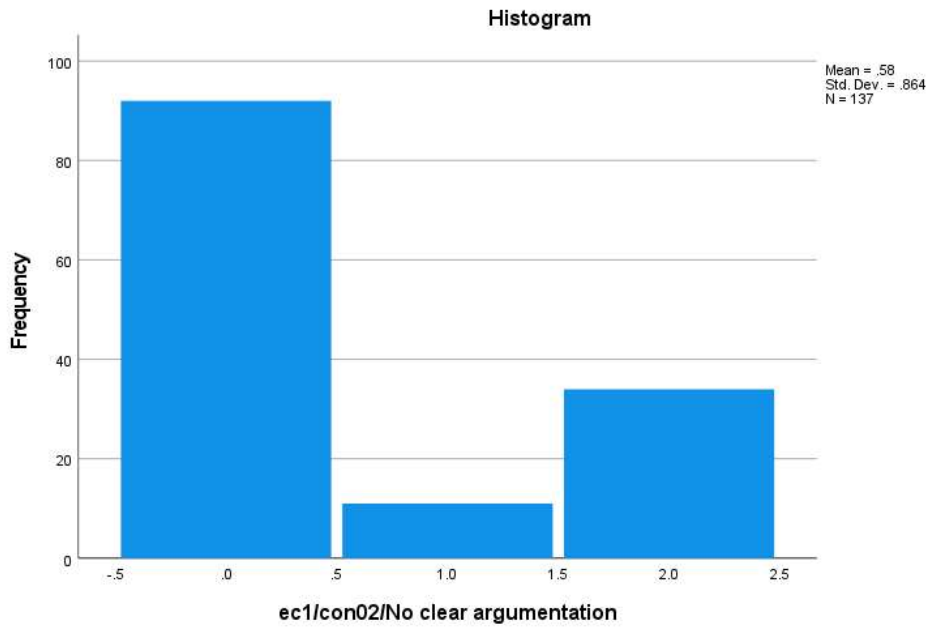
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.419	137	<.001	.621	137	<.001

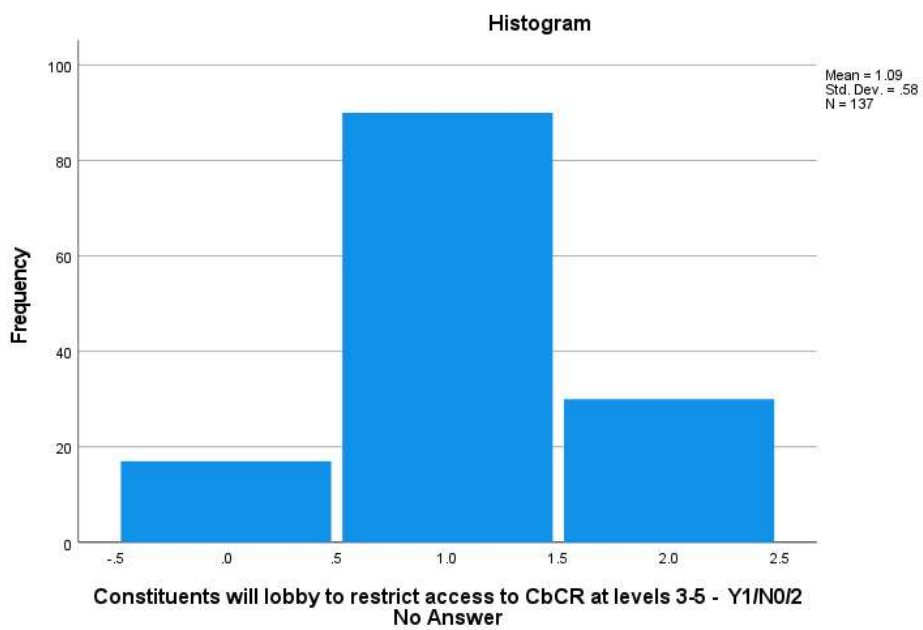
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to restrict access to CbCR at levels 3-5 - Y1/N0/2 No Answer	.346	137	<.001	.748	137	<.001

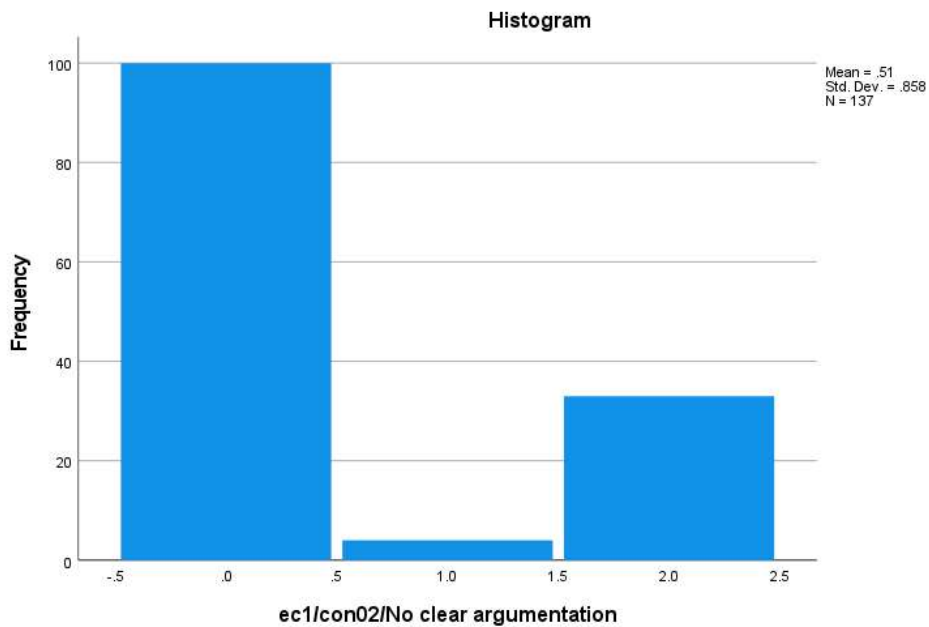
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.454	137	<.001	.563	137	<.001

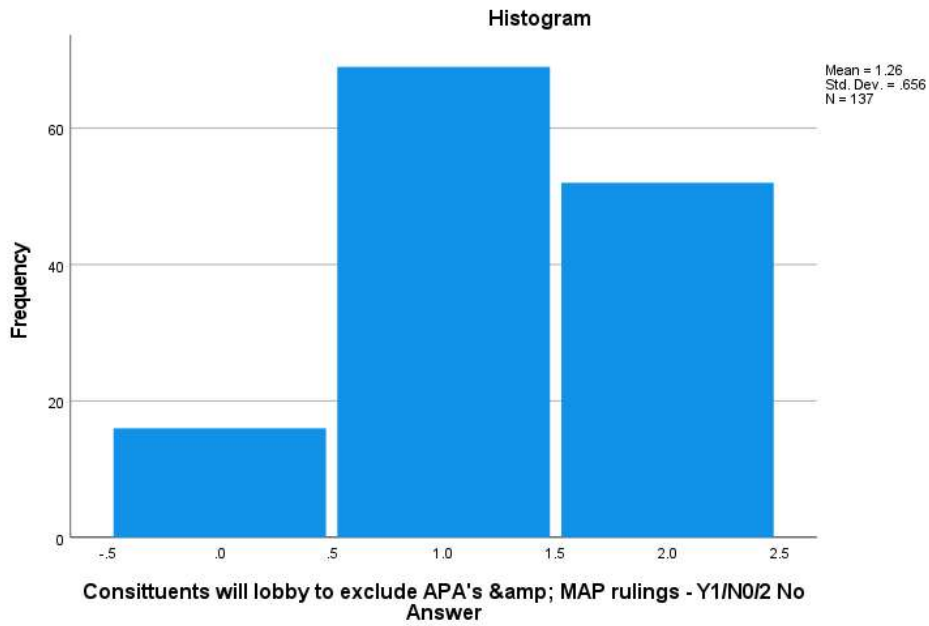
a. Lilliefors Significance Correction



11.1.1.16 Comments are specifically requested as to whether reporting of APAs, other rulings and MAP cases should be required as part of the master file

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will lobby to exclude APA's & MAP rulings - Y1/N0/2 No Answer	.276	137	<.001	.778	137	<.001

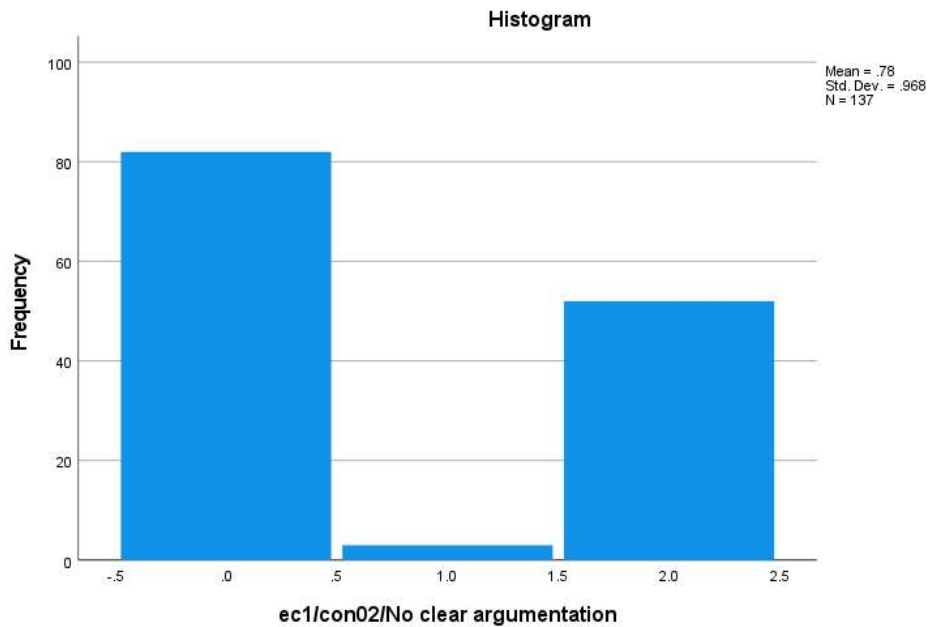
a. Lilliefors Significance Correction



### Tests of Normality

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con02/No clear argumentation	.389	137	<.001	.633	137	<.001

a. Lilliefors Significance Correction



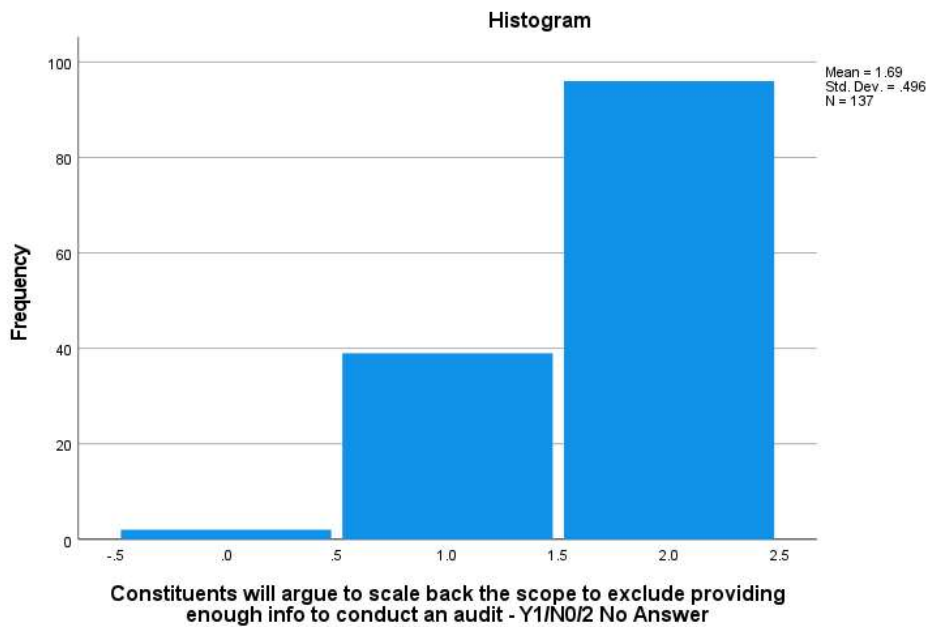


11.1.1.17 Scale back the scope of the standard to exclude the objective 3 (readiness for an audit)

**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
Constituents will argue to scale back the scope to exclude providing enough info to conduct an audit - Y1/N0/2 No Answer	.437	137	<.001	.605	137	<.001

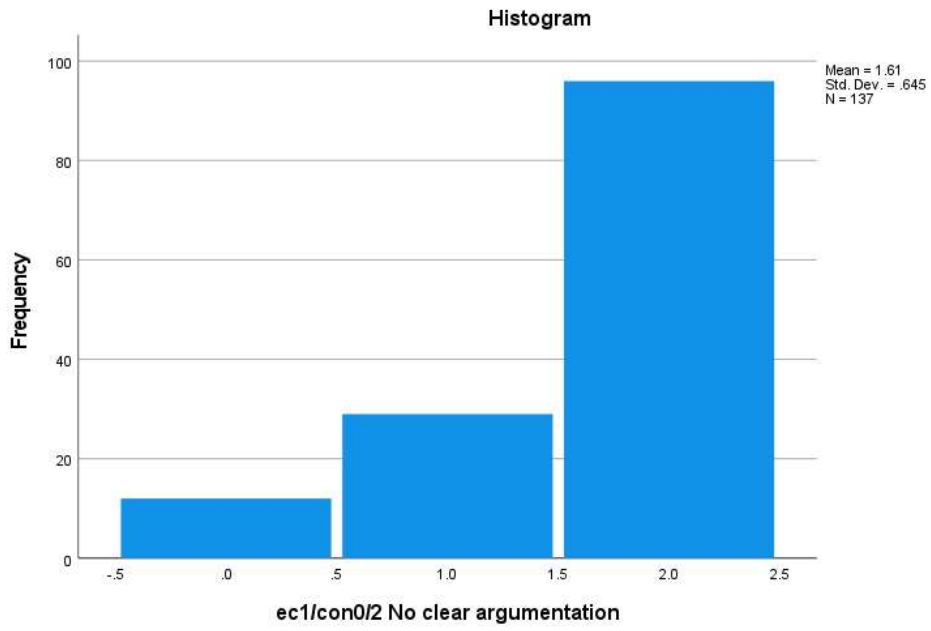
a. Lilliefors Significance Correction



**Tests of Normality**

	Kolmogorov-Smirnov <sup>a</sup>			Shapiro-Wilk		
	Statistic	df	Sig.	Statistic	df	Sig.
ec1/con0/2 No clear argumentation	.427	137	<.001	.622	137	<.001

a. Lilliefors Significance Correction



## **12 Appendix 2 – Interview template**

### **Martyn Gordon PhD Study – Semi-Structured Interview Questions Action 13**

#### **Objective 6 of the thesis:**

To gain informed stakeholder views as to the impact of BEPS Action 13 in the UK, with a view to measuring the output legitimacy garnered from this legislative change.

#### **OECD Objectives for Action 13:**

4. To ensure multi-national enterprises (MNE's) give appropriate consideration to transfer pricing policy.
5. To allow tax authorities to carry out appropriate transfer pricing risk assessment.
6. To provide sufficient documentation to aid tax authorities in conducting a transfer pricing audit in respect of entities active in their jurisdiction.

#### **Interview**

Tell me about your role:

- a. What type of clients do you advise?/What is your role within the organisation?
- b. Is transfer pricing central to your work?
- c. Have you advised clients/your organisation on the filing of CbCR reports?

**Questions grouped by theme (asked directly)**

**Impact on MNE's TP & TP documentation policies**

Can you tell me how Action 13 has impacted your client's/organisation?

Has Action 13 impacted attitudes towards TP documentation?

Are there any benefits of Action 13?

Are there any drawbacks of Action 13?

**Interaction with tax authorities**

Has Action 13 changed the way your clients/organisation interact with HMRC or other tax authorities?

Are you aware of CbCR or other Action 13 reports being requested by jurisdictions outside of the UK?

Have you observed differences in the way different jurisdictions use Action 13?

Do you think the information is useful for tax authorities?

**Tax impact**

Have you seen a cash or accounting tax impact as a result of Action 13?

Have behaviours changed as a result of Action 13?

**The role of the tax profession**

Are you aware of any lobbying your firm did when Action 13 was at the consultation stage, do you feel it was successful?

Do you feel tax advisors have played an important role in disseminating the law?

Are the Action 13 disclosure requirements clear?

Have you or has your firm participated in any industry wide forums to agree on application?

Do you feel there are differences in how the law is being applied across the profession?

**The Arm's Length Principle (ALP)**

Has Action 13/CbCR influenced your perception of the ALP?

Do you believe the ALP is still the most appropriate transfer pricing method?

Do clients ask you about alternative transfer pricing models?

**Public Perception**

How do you feel increased public focus on MNE tax practices (including TP) has influenced practice?

Do you feel public reporting of CbCR would change current practice?

**Industry Specific**

Are any industries particularly affected by Action 13?

**New UK Requirements**

Are you aware of the UK regulations set to come into force in 2023, which mandate the filing of Masterfile's?

How do you feel this change will impact your clients?

Is the profession accepting of the new rules?

Are there any other factors that you think I should take account of or questions you expected me to ask but I didn't.

Finally, is there anyone else you think I should speak to?

Thank you for your time!

## **Glossary**

**Action 13** – Action 13 of the OECD’s BEPS Action Plan as it has been implemented in the UK.

**Arms’ Length Principle ALP** – The widely accepted notion that intra-group transactions between connected parties within a multi-national group should be priced, for tax purposes, as if they had been between unconnected parties.

**BEPS** – Base Erosion and Profit Shifting, the use of legal means to transfer profits between jurisdiction in order to seek a tax arbitrage

**CbCR** – Country-by-Country Reporting as mandated by The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016

**Civil Society Organisations (CSO)** – Groups of citizens which are: “Voluntary, self-generating, (largely) self-supporting, autonomous from the state, and bound by a legal order or set of shared rules.” (Diamond, 1994, p. 7)

**MNE** – Multi-National Enterprise

**Tax Authority (TA)** – The government agency responsible for tax collection and enforcement in a jurisdiction, in the UK HMRC.

**Transfer Pricing** – the pricing of intra-group transactions between members of multi-national groups

# **13 Appendix 3 – Informed consent form**

## **Participant Information and Consent Form**

This research is being undertaken by Martyn Gordon as part of a PhD study at Aberdeen Business School (RGU).

You are invited to take part in a research study on the efficacy of the OECD's Base Erosion and Profit Shifting (BEPS) Action 13 rules (Action 13) in the UK. Before you decide to participate you are invited to review the following paragraphs to ensure you fully understand why the research is being done and what it would involve for you. Please take time to read the following information carefully, discuss it with others if you wish, and be sure to ask if there is anything that is not clear or if you would like more information.

### **Purpose of the study**

This study seeks to assess the impact of country-by-country reporting (CbCR) as mandated under Action 13 in the UK. The UK adopted a phased introduction of Action 13, with CbCR reporting for large MNEs becoming mandatory in 2016 and the disclosure of Masterfile's to become mandatory from April 2023.

At the time of its introduction the BEPS Action Plan was the largest and most comprehensive attempt in recent history to address tax avoidance by multi-national enterprises (MNE's). However, the OECD and the Action Plan faced substantial criticism from civil society advocates as well as tax payers and their advisors. In particular, the OECD faced questions as to the legitimacy of the BEPS Action Plan, with some suggesting it was an attempt to retain dominance, as the primary creator of international tax regulation rather than a true attempt to tackle tax avoidance.

By engaging with experts in the field of international tax this study hopes to supply empirical evidence as to the efficacy of Action 13 in practice and its impact on MNE's behaviours and attitudes. This evidence will inform a broader assessment of the legitimacy of Action 13, which will encompass an assessment for the OECD's organisational structure and the consultation process which the OECD undertook in creating Action 13.

### **What we would like you to do**

If you decide to take part in this study, an online interview will be arranged at a time suitable for you, and you will be asked some questions about your background and your experiences as a tax professional. You will then be asked to share your perceptions as to the impact of Action 13



in the UK. You will not be asked to identify any clients or projects and your identity and that of your firm will be kept anonymous.

You do not have to answer every question, you may ask for some answers to be redacted and you may terminate the interview at any time and ask for your data to be destroyed.

### **What are the possible benefits of taking part?**

Your contribution will enhance knowledge about the efficacy of Action 13 in the UK and enhance understanding as to how tax legislation is disseminated in practice by professional advisors.

### **Participation and Confidentiality**

Taking part in the interview study is voluntary. The interview will be conducted using Zoom or Microsoft Teams and will take approximately 30-60 minutes. If you do decide to take part, you will be asked to give consent. With your permission, the interview will be recorded and later transcribed. The transcripts will then be examined to ensure that all the important information has been captured and the recordings will be deleted. The transcripts will not contain your name or any information about you that would allow you or your firm/company to be identified. The only people who will have access to the transcripts are the researcher and his supervisory team. The transcriptions will be stored in password-protected files on the RGU R drive in compliance with GDPR requirements (printed copies in locked cabinets for personal use in the researcher's office) and will only be accessible to the researcher and supervisory team. When the project is complete the transcripts will be destroyed.

### **What will happen to the results of the research study?**

The overall findings of the study may be published in academic journals, but these will not mention you or your firm directly in any way. If you would like to receive information about the results of the study, please let us know, and we will forward a summary of the findings to you at the end of the study.

### **Study contact detail for further information**

Researcher:

Martyn Gordon (m.gordon10@rgu.ac.uk), Aberdeen Business School,  
Robert Gordon University.

PhD Supervisory Team:

Professor Elizabeth Gammie (e.gammie@rgu.ac.uk)

Dr Shonagh Douglas (s.douglas@rgu.ac.uk)

## Participant Consent Form – Interview Study

1. I confirm that I have read the Participant Information for the above study.
2. I understand that my participation will involve taking part in an interview with Martyn Gordon that takes a maximum of 60 minutes.
3. I understand that with my permission, the interview will be recorded and later transcribed for analysis.
4. I understand that my participation in this study is entirely voluntary and that I can withdraw from the interview at any time without giving a reason. This includes not answering specific questions.
5. I understand that I am free to ask any questions at any time or to discuss my participation and/or any concerns.
6. I understand that my words may be directly quoted in the study.
7. I understand that the results from the study may be published in academic journals.
8. I understand that my data will be de-identified to ensure that my company and I are not identifiable from the summarised results presented in the study. In line with GDPR requirements the interview data and this consent form will be stored separately, electronically, encrypted in a password protected secure database and retained, and kept for only as long as needed, before being destroyed.

To take part in the interview, please add your name (typed is acceptable) and date below to indicate your consent and return this form to Martyn Gordon [m.gordon10@rgu.ac.uk](mailto:m.gordon10@rgu.ac.uk) or confirm verbally once recording has started at the start of your interview.

I (the participant) agree to take part in the online interview

Name of Participant:

.....  
.....

Signature

Date

Name of Researcher:

.....  
.....

Signature

Date



## 14 Appendix 4 – Codes used in round one of interview analysis

Coding in Round 1	Description
ALP	Interviewees perceptions as to Action 13's impact on the Arm's Length Principle
Benefits of Action 13	Coding of a question designed to elicit broad perceptions as to the benefits of Action 13
Clarity of Law	Perceptions as to the ease of use of the legislation and quality of the drafting.
Compliance	Reflections on the ease/cost of compliance and the rates of compliance observed
Systems	Reflections on the ease of preparing information from existing accounting records
Confidentiality	Reflections on concerns expressed in the consultation as to threats posed to commercially sensitive data
Drawbacks of Action 13	Coding of a question designed to elicit broad perceptions as to the drawbacks of Action 13
Global tax authorities	Perceptions as to whether Action 13 documentation is treated differently by different tax authorities in different jurisdictions
Impact on attitude	Has Action 13 changed attitudes in the profession towards TP and TMTP
Impact on TP docs	Perceptions as to the impact of Action 13 on documentation policies

Coding in Round 1	Description
Impact on TP policies	Perceptions as to the impact of Action 13 on TP policies
Industries impacted	Perceptions as to whether Action 13 impacted certain industries more than others
Industry Groups	Reflections on interviewees participation in industry groups which discussed how to apply the provisions
Information Sharing	Participants views on sharing of Action 13 documentation
Lobbying	Participants experience of submitting to the consultation
Lobbying new regs	Participants experience of submitting to HMRC's consultation on mandated Masterfile's
New Masterfile Regs	Participants views on the new Masterfile requirements effective in the UK
Objective 1 - Give consideration to TP documentation	Text which gives insight into the success of Action 13 in meeting Ob 1
Objective 2 - Allow risk assessment by tax authorities	Text which gives insight into the success of Action 13 in meeting Ob 2
Objective 3 - Audit documentation	Text which gives insight into the success of Action 13 in meeting Ob 3
Public CbCR	Participants reflections on and attitudes towards public CbCR

Coding in Round 1	Description
Relationship with TA's	Participants reflections on how Action 13 has impacted relationships with tax authorities
Role of the profession	Participants views on the extent to which the tax profession helped to shape the rules in practice
Standardisation	Participants reflections on the inter-relation of Action 13 with other similar initiatives
Tax Impact	Participant's reflections on the tax impact of Action 13
Transparency	Participant's reflections on civil society requests for greater corporate tax transparency
Usefulness	Participant's reflections on the tax usefulness of Action 13
Wider BEPS	Any reflection on the wider BEPS project (as relevant to Action 13)
Wider impact of CbCR	Any reflections on wider impacts on CbCR

