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The making of problematic tax regulation: A Bourdieusian perspective

Rodrigo Ormeño-Pérez and Lynne Oats

Synopsis

Corporate taxpayers and their advisers have come under increasing scrutiny for tax planning strategies that reduce state revenues and undermine resources needed for public functions. Such behaviour frequently exploits regulations that are ambiguous, incomplete, or incoherent. While companies, guided by tax professionals, claim compliance with the letter of the law, policymakers often emphasise adherence to its spirit. Addressing these challenges requires the formulation of more robust regulations.

This article examines how problematic tax regulations come into existence, using Chile's 1997 transfer pricing rule as a case study. Employing a political sociology perspective, it investigates the drafting process and its broader implications for tax policy in developing countries.

Background and Theoretical Framework

Regulatory inadequacies often arise not from the rules themselves but from the processes by which they are created. Existing tax literature has largely focused on macro-level analyses of policy design, offering general descriptions of participants and their actions. However, such approaches often neglect the nuanced political negotiations occurring during the drafting phase, where the content of regulations is finalised for implementation. As Vanistendael (1996, p. 15) asserts, "a tax can be levied only if a statute lawfully enacted so provides". Robust drafting processes are thus essential to ensure precise regulations, reducing discretion and limiting opportunities for manipulation.

While tax law literature provides recommendations concerning the competencies of drafters, procedural steps in drafting, and linguistic precision, it often overlooks the broader political, institutional, and social dynamics that influence these processes. Drafters, as elite actors, significantly shape state capacities through their impact on revenue collection, empowering certain societal groups while disempowering others.

This study addresses two key questions:

1. Who participates in the drafting of problematic tax regulations?
2. What level of autonomy do drafters possess, and what compromises are made during the process?

To frame our analysis, we employ Pierre Bourdieu's concepts of the *field of power* and *practical sense*. The *field of power* refers to the arena where influential societal actors compete to legitimise their forms of power. These actors possess various types of capital—financial, technical, bureaucratic, political, and social—that enable them to shape decisions. Despite their power, drafters face constitutional, political, and administrative constraints, necessitating pragmatic compromises.

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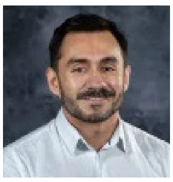

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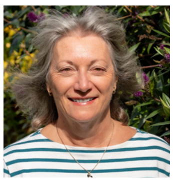

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Methodology

The study examines the drafting of Chile's first transfer pricing rule, introduced in 1997. By 2012, this rule was widely considered problematic by tax officials, advisers, and corporate representatives. The research involved a qualitative analysis of 33 interviews with policymakers, revenue agency officials, parliamentarians, tax advisers, and corporate representatives. These interviews were supplemented by parliamentary records and other political documents. Thematic analysis was conducted on the collected data, which was then interpreted using Bourdieu's theoretical framework.

Findings

The Organisation for Economic Co-operation and Development (OECD) has been at the forefront of transfer pricing regulation through its soft law approach, most notably the Transfer Pricing Guidelines (TPG). These guidelines recommend the inclusion of mandatory documentation requirements for taxpayers engaged in cross-border transactions with related entities and outline a series of valuation methods to assess the arm's-length value of such transactions.

In Chile, the formulation of the transfer pricing rule in the centre-left executive branch of government reflected a specific configuration of the field of power. This involved the participation of a tax agency drafter with considerable experience in regulatory drafting (technical capital) and a tax professional, who was also a tax lecturer, with a history of involvement in previous regulatory drafting processes. Through these experiences, the latter had cultivated professional and political relationships (social capital) with senior state personnel. However, transfer pricing was largely an unfamiliar topic in the country at the time, and neither of these drafters possessed substantial expertise in the area.

Aware of their technical limitations, the drafters adopted a series of compromises to ensure the rule would be enforceable by the revenue agency. They perceived that the agency itself lacked the specialised personnel required to implement a sophisticated transfer pricing regime of the standard envisaged in the OECD guidelines. Furthermore, the drafters recognised the political realities of a centre-right parliamentary opposition, closely aligned with neoliberal ideology, which maintained that taxation posed a threat to business activity. The opposition held significant sway, bolstered by the inclusion of institutional senators—a legacy of the authoritarian constitution from the Pinochet era (1973–1990). These senators could block progressive tax initiatives in parliament. Consequently, the drafters' practical sense led them to prioritise simplicity, including valuation methods that were less complex than those proposed in the TPG, and to dispense with documentation requirements that might increase compliance costs for taxpayers.

Following the constitutional and legal framework governing the legislative process, the transfer pricing rule was then introduced to parliament. The authoritarian constitution gave majority to the centre-right wing coalition by the nomination of institutional senators. This authoritarian majority allowed two senators, representing powerful political, bureaucratic, and business interests, to access the field of power and further constrain the rule's scope. These senators, deeply rooted in neoliberal ideology advocating for a smaller state and lower taxes, wielded significant influence. Their interventions included efforts to reduce the revenue agency's authority to challenge cross-border transactions and to restrict its ability to request information from other government departments. Although the latter proposal was ultimately rejected, their actions significantly shaped the final version of the rule.

The resulting transfer pricing rule was markedly constrained. It conferred minimal enforcement power on the revenue agency, particularly by omitting documentation requirements, and effectively empowered the private sector to conduct cross-border transactions with limited scrutiny. These outcomes underscore the interplay between political ideology, institutional constraints, and the practical limitations of tax drafters, illustrating the challenges faced by developing countries in crafting robust tax regulations.

Discussion

This case underscores the inherently political nature of tax regulation, challenging the perception of tax law as purely technical. It highlights the significant difficulties faced by developing countries, such as Chile, in formulating effective tax policies, given the constraints of limited technical expertise, fragmented political landscapes, and institutional legacies of authoritarian regimes.

The Chilean example also illustrates the challenges associated with adopting international standards, such as the OECD's TPG, in contexts with weaker institutional capacities. While the TPG provides a framework for addressing transfer pricing issues, its effective implementation relies on substantial technical expertise and institutional support—resources that were unavailable in Chile back then. As international tax systems evolve through initiatives such as the OECD's Base Erosion and Profit Shifting (BEPS) 2.0 project, similar challenges are likely to arise in other jurisdictions. Understanding these dynamics is essential for policymakers to navigate the complexities of drafting effective and equitable tax regulations.

The underlying paper was published in Critical Perspectives on Accounting Journal, and a full copy can be obtained at: https://doi.org/10.1016/j.cpa.2023.102663

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Forthcoming Research Bulletin
Title: Knowledge management in the agriculture sector: a systematic literature review

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