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Public Country-by-Country Reporting Directive adopted by the EU Council

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On 28 September 2021, more than five years after it was first tabled, the so-called "public Country-by-Country Reporting (CbCR) directive" was finally adopted by the EU Council under qualified majority voting.

Following long debates among the EU institutions and the Member States on the need for such a measure (why should multinationals publish information already exchanged between tax authorities?) and on the requirements for its adoption (unanimity vs. majority), the public disclosures of big multinational companies will be increased once again.

The public CbCR directive will amend the EU Directive 2013/34 (the "Accounting Directive") so as to require certain multinationals with revenues of more than EUR 750 million to publicly disclose the corporate income tax that they pay. Non-EU multinationals doing business in the EU through subsidiaries and branches will also have to comply with the same reporting obligations as EU multinational undertakings. The reporting will have to take place within 12 months of the date of the balance sheet for the financial year in question. Member States will have 18 months from the entry into force of the directive to transpose it into national law.

Background: why public Country-by-Country reporting?

The proposed public CbCR directive, first tabled in April 2016, is part of the European Commission action plan for a fairer corporate tax system. The idea of a public CbCR emerged shortly after "non-public" Country-by-Country Reporting (i.e., the automatic exchange of CbC reports between EU Member States) was introduced at EU level by the 4th Directive on Administrative cooperation in tax matters ("DAC4") as one of the measures of the OECD BEPS (Base Erosion and Profit Shifting) project. However, public CbCR has nothing to do with the BEPS project and the OECD has never recommended it at global level.

The purpose of the public CbCR directive is not only to introduce a new tool for corporate tax transparency, it is about enhancing public scrutiny. This objective and its supposed benefits are stated very clearly in the preambles of the CbCR directive proposal:

- *"it is necessary to enhance public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union";*
- *"it is necessary to promote a better informed public debate regarding, in particular, the level of tax compliance of certain multinational undertakings active in the Union and the impact of tax compliance on the real economy";*
- *"The public should be able to scrutinise all the activities of a group of undertakings if the group has certain types of entities established within the Union";*
- *"it will contribute to regaining the trust of citizens of the Union in the fairness of national tax systems";*
- *"the civil society will become more involved, employees will be better informed and investors less risk-averse";*
- *"undertakings will benefit from better relations with stakeholders, which will lead to greater stability, along with easier access to finance due to a clearer risk profile and an enhanced reputation".*

However, one may wonder if providing the public with this data is worth the additional administrative burden and the risk of damaging the European undertakings if the information is misinterpreted, misunderstood or commercially confidential information is exposed. Indeed, even though EU Member States may, under certain conditions, allow for some of the information to be temporarily omitted from the report, where their disclosure would be seriously prejudicial to the commercial position of the undertakings, it remains to be seen whether and, if so, how Member States will implement this option. In addition, the data has to be put into its context to be understood properly, so its true value may be circumscribed.

Why such a long legislative procedure?

For more than five years, the proposed directive evolved only very slowly due to, among others, a disagreement on its legal basis and the related requirements for its adoption: should the directive be based on article 50 of the Treaty on the Functioning of the European Union ("TFEU") and subject to the ordinary legislative procedure (which requires a qualified majority voting in the Council for its adoption) or should it be based on article 115 of the TFEU and so subject to the special legislative procedure applicable in tax matters (which requires unanimous approval in the Council for its adoption)?

Depending on whether the proposed directive was to be seen as an accounting directive (which would extend the scope of information to be reported and published) or as a tax directive (which would bring tax transparency up to the next level through a mandatory publication of some of the information already exchanged between the EU Member States under DAC4), either qualified majority voting or unanimity would apply.

The European Parliament adopted its position at first reading on 27 March 2019. Negotiations between the co-legislators started in March 2021 and resulted in a provisional agreement on 1 June 2021, with points such as the transition period and the safeguard clause being finalised. On 28 September 2021, the EU Council finally approved the proposal (under qualified majority, as an agreement was reached on moving forward under article 50 of the TFEU).

Who will be subject to public CbCR and under which conditions?

The public CbCR directive will require multinational groups with a total consolidated revenue of EUR 750 million to report if their ultimate parent company is located in the EU or if the ultimate parent company is not in the EU but has EU subsidiaries or branches.

More specifically, the following entities will have to draw up, publish and make accessible a report on income tax information:

- EU ultimate parent undertakings with consolidated revenue on their balance sheet date exceeding for each of the last two consecutive financial years a total of EUR 750 million, as reflected in their consolidated financial statements;
- EU standalone undertakings with revenue on their balance sheet date exceeding for each of the last two consecutive financial years a total of EUR 750 million, as reflected in their annual financial statements;
- EU medium-sized and large subsidiary undertakings controlled by a non-EU ultimate parent undertaking, where the consolidated revenue on its balance sheet date exceeded for each of the last two consecutive financial years a total of EUR 750 million, as reflected in its consolidated financial statements;
- EU branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking and EU branches of a non-EU standalone undertaking, the revenue of which on its balance sheet date exceeded for each of the last two consecutive financial years a total of EUR 750 million as reflected in its (consolidated) financial statements. However, these branches will be exempt from the reporting obligation if the non-EU ultimate parent Company has an EU medium-sized and large subsidiary undertaking, as defined above.

However, the following exclusions and exceptions will apply:

- Total revenue falls below EUR 750 million: The entities referred to above will no longer be subject to the reporting obligations if the total consolidated revenue falls below EUR 750 million for each of the last two consecutive financial years.
- Presence in one single Member State: The reporting rules will not apply to standalone undertakings or ultimate parent undertakings and their affiliated undertakings where such undertakings, including their branches, are established, or have their fixed places of business or permanent business activity, within the territory of a single Member State and no other tax jurisdiction.
- Banking sector: In order to avoid double reporting for the banking sector, a specific exclusion will apply under certain conditions to credit institutions already subject to reporting obligations under article 89 of the Accounting Directive.
- Non-EU ultimate parent undertakings or standalone undertakings already subject to similar reporting obligations: no reporting obligation will apply to EU subsidiaries and branches of non-EU undertakings where a similar report on income tax information is drawn up by the non-EU undertaking, provided that it meets certain criteria.

Which information will have to be included in the report on income tax information?

The CbCR directive proposal adds a new chapter to the Accounting Directive "report on income tax information". The report will have to include the following information on all members of the group:

- name of the ultimate parent undertaking or the standalone undertaking, the financial year concerned, the currency used for the presentation of the report and, where applicable, a list of all subsidiary undertakings consolidated in the financial statements of the ultimate parent undertaking, in respect of the relevant financial year, established in the EU or in tax jurisdictions included in Annexes I and II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes;
- a brief description of the nature of the activities;
- the number of employees on a full-time equivalent basis;
- revenues, which are to be calculated either as: (i) the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income; or (ii) the income as defined by the financial reporting framework on the basis of which the financial statements are prepared, excluding value adjustments and dividends received from affiliated undertakings;
- the amount of profit or loss before income tax;

- the amount of income tax accrued during the relevant financial year, which is to be calculated as the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches in the relevant tax jurisdiction;
- the amount of income tax paid on a cash basis, which is to be calculated as the amount of income tax paid during the relevant financial year by undertakings and branches in the relevant tax jurisdiction; and
- the amount of accumulated earnings at the end of the relevant financial year.

The information will have to be broken down for each EU Member State which the group is active in and also for each jurisdiction qualified as non-cooperative based on the EU list of non-cooperative jurisdictions for tax purposes for which the report is to be drawn up.

Publication and other requirements

The report on income tax information will have to be made accessible to the public in at least one of the official languages of the Union, free of charge, no later than 12 months after the balance sheet date of the financial year for which the report is drawn up. It will have to be published on the website of either (as the case may be):

- the EU ultimate parent undertaking or the EU standalone undertaking;
- the EU subsidiary undertaking or an affiliated undertaking of the non-EU ultimate parent undertaking; or
- the branch or the undertaking which opened the branch, or an affiliated undertaking.

The members of the administrative, management and supervisory bodies will be collectively responsible for ensuring that the report on income tax information is drawn up, published and made accessible in accordance with the public CbCR Directive.

Where the financial statements of an undertaking governed by the law of a Member State are required to be audited by one or more statutory auditors or audit firms, the audit report will have to state whether, for the financial year preceding the financial year for which the financial statements under audit were prepared, the undertaking was required to publish a report on income tax information and, if so, whether the report was published in accordance with the publication and accessibility requirements of the public CbCR Directive.

Next steps and implications

Now that the EU Council has approved the proposal (under qualified majority), the only remaining step before the directive can enter into force is the formal approval of the provisional agreement by the European Parliament. The public CbCR directive will enter into force on the twentieth day following its publication in the Official Journal of the European Union. Member States will have 18 months from the entry into force of the directive to transpose the new rules into national law.

It remains to be seen whether countries which disagreed with the legal basis of the directive and voted against its adoption in EU Council will try to challenge its compatibility with EU law.

For the present, multinationals will have to add yet another project to their growing list of tax compliance projects. The new reporting requirements will not provide any additional information to the tax authorities, so it seems hard to see how they will have revenue-raising benefits for governments. However, the reporting creates a serious risk that businesses may now be subject to arbitrary trial in a court of public opinion where there is no judge, jury or right of defence. Consequently, multinationals should carefully consider their strategy for communicating around taxes.

Do you have further questions?

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