EU Directive proposals would widen public country-by-country reporting

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In brief

The EU Member States' negotiating mandate on public country-by-country reporting (public CbCR) was established under the Portuguese Presidency of the Council on the basis of its compromise draft following the informal Council video conference on 25 February 2021. The mandate also was approved by Member State permanent representatives in the 'Coreper' meeting on 3 March 2021.The EU institutions will now start trilogue negotiations with a view to agreeing on the legislative text within the next few months. The Member States likely will reach agreement before the end of June 2021. Although the transposition into Member States' domestic law could take another two years, companies would need to start preparing and testing their tax data and their narratives sooner rather than later.

The draft Directive refers to in-scope groups, subsidiaries and branches as large or medium-sized, broadly by reference to an EUR750m threshold.

This Bulletin covers:

- key differences between this text and the amended version proposed by Parliament
- differences between the Council version and the private CbCR to tax authorities (as in BEPS Action 13 and as embodied in the Directive on Administrative Cooperation on Tax (DAC)) or other comparable public CbCR regimes or proposals, and
- the extent to which non-EU headquartered groups would be required to report information under this initiative.

In detail

Background

The Council's compromise draft Directive discussed in an informal Council meeting on 25 February (see our Tax Policy Alert, and now also reflected in the Council Presidency's mandate for negotiations) - hereafter referred to as the 'draft Directive' - would have effect by amending the requirements for publishing financial statements (the Accounting Directive 2013/34/EU) to incorporate also the disclosure of various information by certain undertakings and branches, described as 'income tax information.' The EU Accounting Directive already requires mining and forestry companies to report on the taxes, royalties and bonuses that they pay worldwide, while the EU's Capital Requirements Directive IV (CRD IV) requires credit institutions and investment firms to publish certain tax and financial data for each country in which they operate.

The proposed new Directive broadly suggests that it will:

- provide an essential element to further foster corporate transparency and responsibility, thereby contributing to the welfare of EU societies
- promote a better-informed public debate regarding in particular the level of tax compliance of certain MNEs active in the EU and the impact of this on the real economy, and
- serve the general economic interest by providing for equivalent safeguards throughout the EU for the protection of investors, creditors and other third parties generally, and thus contributing to regaining the trust of EU citizens in the fairness of national tax systems.

The European Parliament's legislative resolution of 27 March 2019 set out many proposed amendments to the proposal at that time. Some of the more substantive differences are discussed below. While the analysis below focuses on the Council's current compromise text, these amendments will be raised in trilogue negotiations involving the Council, Commission and Parliament.

There are numerous other regimes that provide for, or propose, elements of public reporting on tax-related information, some of the more noteworthy of which are described below.

- The Global Reporting Initiative's (GRI's) sustainability reporting standards are widely accepted global standards for sustainability reporting. Many companies voluntarily comply with these standards (allowing them to be labeled 'GRI compliant'). The GRI issued a standard on Tax (GRI 207) in 2019, which contains a requirement for public CbCR (Tax 207-4) and is effective from January 2021.
- In February 2020, US member of Congress Cindy Axne (IA-03) proposed new legislation (H.R 5933, The Disclosure of Tax Havens and Offshoring Act) that would direct the US Securities and Exchange Commission (SEC) to mandate public disclosure of country-by-country financial reports by corporations with annual revenues over $850 million.
- The World Economic Forum's International Business Council (IBC) considered a public CbCR proposal in 2020, but adopted a revised core metric that instead broadly incorporates the taxes borne element of our Total Tax Contribution (TTC) methodology plus an expanded metric including the options of including the taxes collected element of TTC and/or geographic analysis of that data.

BEPS Action 13 included private CbCR to tax authorities for the purposes of high-level tax risk assessment. It has been widely adopted by countries (and by the EU). An initial 58 jurisdictions required or permitted the filing of CbC reports beginning in 2016; that has grown to 90 jurisdictions with reporting obligations in place. The first exchanges of CbC reports between tax authorities took place in June 2018.

Undertakings operating in the EU

Under the draft Directive, a group parent governed by the national laws of an EU Member State with at least EUR750m consolidated revenues would generally be within the scope if there is at least one large or medium-sized entity in the EU. There would be an exclusion if its subsidiaries and branches were also all within that State (except that a Member State might optionally bring all such undertakings within scope).

Where the ultimate parent is outside the EU, a subsidiary undertaking in the EU would have to publish that parent's report if it could obtain the information and the report were not suitably published elsewhere (including identifying any EU presence). Otherwise, it should explain the reasons for the omission and publish its own CbCR information if its revenues are over EUR750m. If, for a particular MNE group, there is no EU subsidiary, any applicable EU branch would have to 'comply or explain' in a similar manner but only if group revenues exceed EUR750m.

Council draft	Parliament proposal
A Member State may opt (for every group) to bring subsidiaries and branches in their territory into scope if together their revenues exceed EUR750m in that state.	The European Parliament would like it to be mandatory for groups with such subsidiaries and branches to be in scope.

Revenue threshold(s)

The revenue threshold would be that applicable to the group, undertaking or branch, as noted above. The requirement would apply to two consecutive periods to limit the situation where a group moves in and out of scope due to revenue fluctuations. The threshold would be tested over both the reporting financial year and the previous financial year. This differs from the BEPS Action 13 private CbCR to tax authorities, which also uses a different definition of 'revenue'; the EU's approach was considered but apparently rejected in the 2020 review of Action 13.

Included countries

The information would cover all EU Member States in which there are affiliated undertakings consolidated in the financial statement for the relevant financial year (or in-scope branches), broken down for each EU Member State.

Moreover, information concerning the operations of multinational enterprises should also be shown on a disaggregated basis as regards certain third-country tax jurisdictions which pose particular challenges. These third-country jurisdictions are those which, at the end of the previous financial year, are listed in the EU list of non-cooperative jurisdictions for tax purposes (unless it is confirmed that group entities in the relevant jurisdiction have no dealings with intra-group EU entities).

For all other third-country operations, the information should be given in an aggregate number, unless the undertaking wishes to present more detailed information. The Council and Parliament currently disagree on this:

Council draft	Parliament proposal
The Council argues that only aggregated information would be required for third-country operations, with the exception of countries on the 'blacklist' (save on exception).	The Parliament wants companies to publicly disclose information separately for each jurisdiction outside the EU ('disaggregated reporting').

Where and how to make the report available

The report would usually have to be on the parent's website.

If an EU subsidiary is making the report because it is not on the parent's website, it would have to be on the website of that subsidiary or that of an affiliate. If an EU branch is making the report it would have to be the website of the branch, its home office or an affiliate. A Member State may ignore this requirement if the report is filed on the State's corporate register and is accessible free of charge within the EU (provided the relevant website references that location).

The report should be made accessible within 12 months after the balance sheet date, and should be available for at least five years.

Likely first reporting period

In-scope companies would need to make a first report no later than the start of the first financial year starting on or one year after the transposition deadline (although a Member State could potentially apply the rule before the end of the transposition period). The transposition deadline for Member States is two years after the Directive's entry into force. This entry-into-force date is the twentieth day following publication in the EU Official Journal (OJ).

ISo, if the Directive were published in the OJ on, say, 31 July 2021, it would enter into force on 20 August 2021. The Directive would have to be transposed by 20 August 2023, but could be sooner depending on a Member State's decision. Member States would in this scenario have to make it effective for reports for a calendar year accounting group by the financial year beginning 1 January 2025, but could potentially do so earlier; some commentators have suggested this could feasibly be required for companies from 1 January 2023).

Reconciliation or narrative

The report might also include an overall narrative providing explanations in case of material discrepancies at the group level between the amounts of taxes accrued and the amounts of taxes paid, taking into account corresponding amounts concerning previous financial years. This is somewhat similar to the opportunity that groups have with respect to BEPS Action 13 private CbCR to tax authorities under Table 3.

Commercially sensitive material/ 'safeguard' clause

It is recognised that publicly disclosing data to be included in the report on income tax information could, in certain cases, be seriously prejudicial to an undertaking's commercial position, as competitors could draw significant conclusions about its current activities. Therefore, undertakings should have a possibility to defer disclosing certain information for a limited number of years, provided they clearly disclose the deferral and give a reasoned explanation for it in the report. The Council's current draft suggests any information thus omitted shall be made public in a later report no more than six years from the date of its original omission.

The Council and the Parliament have different positions on this (and some Member States openly disagree with the Council draft in this area, e.g., France).

Council draft	Parliament proposal
The Council proposes that a report may postpone publication of certain information for a maximum of six years if it provides an explanation regarding its omission.	The Parliament states that any omission is dependent upon annual approval by Member States' tax authorities. The tax authorities would then share the omitted information with the European Commission.

Currency

The currency used in the report on income tax information shall be the currency of the consolidated financial statements of the ultimate parent undertaking (or that for the financial statement of the subsidiary if it is publishing only its own public CbCR).

Responsibility

The members of the administrative, management and supervisory bodies of the ultimate parent undertaking, or for non-EU groups an EU subsidiary undertaking, would have collective responsibility for the content and appropriate publication of the report.

For an EU branch making a report, those members made responsible by the Member State for the branch's registration would be similarly collectively responsible for making the report available.

Audit of obligation (not content)

To ensure public awareness on the scope of (and to ensure compliance with) the reporting obligations, Member States might require that statutory auditor(s) or audit firm(s) state whether an undertaking is required to draw up a report on income tax information.

Information

A broad comparison of the information requirements of different CbCR (or comparable) regimes is set out below.

Item	GRI 207-4: Tax 2019	OECD BEPS (Action 13)	EU (prop. Portugal text)	US (H.R. 5933 – Axne)
Total Revenue	X	✔	✔ - modified reporting basis	X
Revenue from third parties	✔	✔	X	✔
Revenue from related parties	Between jurisdictions only	✔	X	✔
Profit/loss before tax	✔	✔	✔	✔
Tax paid (on cash basis)	✔ - flexibility to report withholding tax separately	✔	✔	✔
Tax accrued - current year	✔	✔	✔	✔
Tangible assets or other than cash and cash equivalents	✔	✔	X	✔
Number of employees	✔	✔ - FTE Basis	✔ - average #	✔ - FTE Basis
Reasons for the difference between corporate tax accrued on profit/loss and the tax due if the statutory tax rate is applied to profit/loss	✔	X	X	X
Total accumulated earnings	X	✔	✔	✔
Stated capital	X	✔	X	✔

It would be permissible for the data to correspond to the reporting specifications for the CbCR to tax authorities covered by DAC (Annex III, Section III, Parts B and C of Directive 2011/16/EU - and thereby effectively BEPS Action 13). So if the BEPS Action 13 report is published that will satisfy the Directive's requirement.

The Council and the Parliament also take different positions in relation to the specific data points required:

Council draft	Parliament proposal
List of disclosures as above.	The list should include fixed assets other than cash, subsidies received and whether companies had benefited from preferential tax treatments, such as patent boxes

Penalties

Article 51 of the Accounting Directive, into which the public CbCR provisions would be inserted, sets out a penalty regime. It requires that Member States provide for penalties applicable to infringements of national provisions adopted in accordance with that Directive and take all measures necessary to ensure that those penalties are enforced. The penalties provided are to be effective, proportionate and dissuasive. That would apply to the detailed components of the report, timing, and other requirements. It appears that the requirement for non-EU groups would be to comply or explain, so that an explanation that it does not have the information to provide a report in respect of the consolidated group would not fall within these penalty provisions. Rather than a uniform penalty scheme, it would be established at the Member State level.

The takeaway

The Member States are likely to agree on public reporting of certain tax-related information on a country-specific basis before the end of June. Negotiations are ongoing on various issues that some Member States wish to consider further, while some disagreements between the Parliament and the Council will have to be resolved.

Interested groups will be keen to see whether the proposal will leave information on business outside the EU to be aggregated except in relation to blacklist countries. Enterprises that are headquartered outside the EU will also want to follow developments on whether their EU operations will be able simply to explain if they don't have the group information available. Many companies will be in scope for the other regimes requiring the publication of similar information, and other countries may be encouraged by the EU developments to adopt their own rules (e.g., current draft US legislation (H.R. 5933 – Axne) and the power previously granted under UK law for future regulation in this area).

Some companies may wish to reconsider their approach to tax transparency and whether in the light of public CbC in the EU they wish to make greater voluntary disclosures and to put the data into the context of their business operations.

Let's talk

For a deeper discussion of how this issue might affect you, please get in touch with your usual PwC contact or one of the following:

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