An Roinn Fiontar,
Trádála agus Fostaíochta
Department of Enterprise,
Trade and Employment

Public Consultation on the transposition of Directive (EU) 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches

Response Template

Department of Enterprise, Trade and Employment
December 2021

As set out in the consultation, the Department of Enterprise, Trade and Employment is specifically seeking views on the Member State options provided in Articles 48c(6) and 48d(3) of Directive 2021/2101.

Respondents have the opportunity to comment generally on the Directive at the end of the template and express any views on other specific articles of the Directive should they wish.

Please include your response in the space underneath the relevant option, to set out/ explain your views. Completing the template will assist with achieving a consistent approach in responses returned and facilitate collation of responses.

When responding please indicate whether you are providing views as an individual or representing the views of an organisation.

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Field Code Changed

Respondents are requested to return their completed templates by email to companylawconsultation@enterprise.gov.ie by the closing date of **Friday 18 February 2022**

Hardcopy submissions are not being received at this time due to remote working.

Please mark your submission as 'response to Public Consultation on the Transposition of Directive (EU) 2021/2101'.

1. Article 48c (6) – **Content of the Report on tax information**

Member States may allow for one or more specific items of information otherwise required to be disclosed in accordance with paragraph 2 or 3 to be temporarily omitted from the report where their disclosure would be seriously prejudicial to the commercial position of the undertakings to which the report relates. Any omission shall be clearly indicated in the report together with a duly reasoned explanation regarding the reasons therefor. Member States shall ensure that all information omitted pursuant to the first subparagraph is made public in a later report on income tax information, within no more than five years of the date of its original omission.

Question – Do you consider that Ireland should take the option to allow for one or more specific items of information, otherwise required to be disclosed to be temporarily omitted from the report, when their disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates? Please give reasons for your preference.

No.

Public country-by-country reporting (CBCR) can be an important transparency measure and tool to tackle tax avoidance. However, its effectiveness depends on the strength of the obligation placed on corporations to disclose meaningful, ***complete*** and accurate information on a country-by-country basis for ***all*** countries of operation. Ireland should resist attempts to open up loopholes that would further undermine the Directive.

The option provided for in Article 48c (6) is highly concerning, and has been criticised as an effective corporate-get-out clause by civil society organisations, trade unions and investors.[1] There is no clear definition or parameters for what would be sufficiently 'commercially sensitive' to justify omission, ultimately leaving companies with very wide discretion to choose what ought to be published. The Directive does not mandate any competent authority to approve or even supervise this process, leaving it open to abuse. In addition, the significant time delay of five years would badly undermine the value of the measure as the information provided may no longer represent an accurate and up-to-date picture of the company's activities and structures.

Concerns were raised about the potential for public disclosure of potentially commercially sensitive information after the legislative proposal for public CBCR in 2016. However, they have been allayed significantly by the positive experience of mandatory public CBCR for the banking sector, introduced under the Irish Presidency of the EU[2], and the emergence of voluntary public CBCR practices among large multinational enterprises.[3] However, despite these positive trends, recent research on the disclosure practices of a cross-section of companies operating in Ireland suggests that where there is significant discretion (as in the Directive) companies will likely choose not to publish.[4]

Ireland should not include this option during transposition and require large companies to publish complete information in the relevant financial year.

If some form of delay or equivalent is included, it is essential that strict limits are placed on its use and a competent authority is empowered to monitor it. At a minimum:

- Any delayed publication should require advance approval from a competent authority. Such approval should be on the basis of a written application, subject to an assessment based on objective, universal and publicly available criteria, and require written confirmation by the authority. Ireland should publish data on the number of requests received and granted.

- Any delayed publication should be set to the minimum time necessary, as specified by the competent authority. A blanket timeframe (of five years or otherwise) is unacceptable. Companies should be obliged to indicate that information has been omitted with approval and state the length of delay approved in the relevant financial year.

2. Article 48d (3) – **Publication and accessibility**

Member States may exempt undertakings from applying the rules set out in paragraph 2 of this Article where the report on income tax information published in accordance with paragraph 1 of this Article is simultaneously made accessible to the public in an electronic reporting format which is machine-readable, on the website of the register referred to in Article 16 of Directive (EU) 2017/1132, and free of charge to any third party located within the Union. The website of the undertakings and branches, as referred to in paragraph 2 of this Article, shall contain information on that exemption and a reference to the website of the relevant register.

Question – Do you consider that Ireland should take the option to exempt undertakings from the publishing requirement, where the report is simultaneously made accessible to the public on the website of the CRO and free of charge to any third party located in the European Union?

Please give reasons for your preference.

We are concerned about this exemption on the basis of comprehensive access. It is critical that access to CBCR data is not limited to parties located in the European Union, as this data is of interest to stakeholders both inside and outside the EU, including policy makers, citizens, workers, journalists, shareholders, investors and tax authorities. It is particularly important for civil society and tax authorities in developing countries, which tend to have reduced access to current (private) CBCR data generated through the system of Automatic Exchange of CBC Information introduced by BEPS Action 13.[5] However, the introduction of public registers of beneficial ownership in Europe has demonstrated that limiting access to natural persons in the EU has severely limited the effectiveness of the transparency measure, including for EU citizens and residents.[6]

> **To ensure broad and meaningful access, Ireland should oblige large companies to publish CBCR report on their website, and submit them to a central public register, such as the website of the CRO. Registers must be accessible to <u>anyone</u> and provide machine-readable reports free of charge, regardless of their geographic location or residency status.**

3. Please indicate any general comments you may have.

Over the past decade, a growing number of civil society organisations, trade unions, business representatives and campaigners have advocated for greater transparency as a means of addressing harmful corporate tax avoidance. For good reason: billions of euro are lost from public budgets every year, with recent research from the European Parliament Research Service conservatively estimating €50-70 billion of losses annually within the EU alone.[7] Profit-shifting and other forms of avoidance are particularly harmful for poorer developing countries, which tend to be more dependent on corporate income tax.[8] This lost revenue is badly needed to fund public services such as healthcare and education, as well as climate action and sustainable development.

One of the key problems with today's corporate tax system is the secrecy surrounding information about where corporations do business and what tax they pay in those countries. Meaningful, comprehensive and public CBCR data can go some way to addressing this. It can be a strong tool against corporate tax avoidance, but only if all large corporations are obliged to disclose ***complete*** and accurate information on a country-by-country basis for ***all*** countries of operation.

However, the EU directive adopted in December 2021 will not deliver real and effective public CBCR due to the significant limitations and loopholes contained in the new rules.[9] It is crucial that Member States do not accept this minimum baseline as an acceptable standard for transparency.

Further to the recommendations provided above regarding accessibility and delayed reporting, below are three further crucial areas that must be addressed during transposition: scope, threshold and content.

(1) Geographic scope: which countries are covered?

It is simply not accurate to refer to the disclosure requirements in the Directive as public CBCR, as large countries will not have to report on a country-by-country basis. The limited geographic scope and lack of comprehensive disaggregated data fundamentally undermine the objective and effectiveness of the Directive.

The Directive will not provide citizens with an accurate overview of large companies' tax arrangements, as they will only be required to report on activities in EU Member States and some of the jurisdictions contained in the EU list of non-cooperative jurisdictions.

On this basis, the transparency measures introduced are so incomplete that if the rules were in effect today, they would allow companies to continue to hide how much tax they're paying and where they pay it in 75% of countries worldwide.[10]

In addition, where a country is comprised of more than one tax jurisdiction, reporting is set at the country level. For example, EU Member State Netherlands is comprised of Netherlands and the three Dutch Antilles, Aruba, Curaçao, and Sint Maarten, so aggregated country level reporting would not provide an accurate overview of where undertakings' operations take place and where taxes are paid.

Ireland should expand the scope of disclosure obligations to require large companies to report disaggregated information on their activities in *every* country they operate in. Reporting should be disaggregated to the tax jurisdiction level.

(2) Threshold: which companies are covered?

The Directive contains a threshold of €750 million turnover for two consecutive years in order for companies to be required to report. This is an extremely high threshold that will exclude the majority of large undertakings operating in the EU. According to the Impact Assessment accompanying the Commission Proposal in 2016, only 6,500 companies worldwide met a €750million per year threshold, out of which 1,900 are headquartered in the EU.[11]

This threshold is higher than the current (private) CBCR rules introduced by BEPS Action 13. Crucially, it is significantly higher and out of step with existing public CBCR rules, agreed during the Irish Presidency of the EU for the banking sector. These rules were introduced in response to the financial crisis and contain a much lower threshold based upon the existing EU definition of a large undertaking, using a '2 of 3' test of balance sheet total, turnover and number of employees.[12]

> **Ireland should align the reporting threshold for public CBCR with the existing EU definition of a large undertaking, which has already been used in the public CBCR requirements for the banking sector and similar transparency requirements for the extractive and forestry sectors in the EU.**

(3) Content: what data is provided?

The limited content of the report excludes information which is important for stakeholders to have an accurate understanding of companies' tax practices.

In 2019, the world's largest voluntary sustainability reporting body, the Global Reporting Initiative (GRI), adopted a new standard introducing public CBCR for all reporting companies. This standard was developed by an expert body of representatives from multinational corporations, the financial sector, trade unions, civil society and academia and has since been endorsed by many large multinationals who have published voluntary public CBCR, such as Vodafone, BP, Orsted, NN Group, Anglo American, Allianz and Newmont.

Ireland's *National Plan on Business and Human Rights* includes a commitment to 'encourage engagement with human rights reporting standards, such as the UN guiding Principles Reporting Framework, the Global Reporting Initiative or the Business Working Responsibly Mark' (p. 18), and the GRI is also included in the *Business and Human Rights Guidance* 'toolkit'.[13] Ireland has committed to endorsing these principles and shout ensure they are reflected in domestic legislation.

> **Ireland should expand the items on which companies must report to align with the GRI template, ensuring the content of the report also includes, as a minimum:**
> - **Transactions with related parties**
> - **Stated capital**
> - **Details of public subsidies and relevant donations**
> - **Whether entities benefit from tax incentives**
> - **A narrative explanation of the difference between corporate income tax accrued and statutory tax rate applied to profit/loss before tax.**

[1] For example, "Public Country-By-Country Reporting (CBCR) requirements in the EU", a letter signed by investors representing US$5.6 trillion in assets under management, published in May 2021.
[2] Official Journal of the European Union (2013), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, published 27 June 2013, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:176:0338:0436:En:PDF, Article 89
[3] A number of voluntary reporting initiatives include public country by country reporting as part of company disclosures, such as the world's largest ESG reporting standard, the Global Reporting Initiative (GRI) and the Fair Tax Foundation. In addition, a number of large multinational corporations are already publishing public CBCR data voluntarily, including Vodafone, BP, Orsted, NN Group, Anglo American, Allianz, Shell, Philips and Newmont.57
[4] 'National Integrity Index – Private Sector 2020', Transparency International Ireland: https://transparency.ie/national-integrity-index/private-sector-index-2020
[5] See OECD, 'Activated exchange relationships for Country-by-Country reporting', updated October 2021 & Eurodad et. al., 'Joint response to OECD public consultation document on the review of Country-by-Country Reporting (BEPS Action 13)' March 2020.
[6] Transparency International, *Access Denied? Availability and accessibility of beneficial ownership data in the European Union*, May 2021, p7.
[7] For example, see: Cobham, Alex, and Janský, Petr (2017), 'Global Distribution of Revenue Loss From Tax Avoidance: Re-Estimation And Country Results', WIDER Working Paper 2017/55 Helsinki: UNU-WIDER, 2017; European Parliament Research Service (2015), 'Bringing transparency, coordination and convergence to corporate tax policies in the European Union. I – Assessment of the magnitude of aggressive corporate tax planning', September 2015.
[8] Corporate income tax (CIT) constitutes an average of 15.3% of all tax revenues in Africa, and 15.4% in Latin America and the Caribbean, while wealthy OECD states generate around 9% of their tax revenues from CIT. See OECD Corporate Tax Statistics database: https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm (last accessed 22 June 2020). Figures are for 2000-2018: see International Monetary Fund, '*IMF Policy Paper: Spillovers in International Corporate Taxation'* (9 May 2014) p. 7 https://www.imf.org/external/np/pp/eng/2014/050914.pdf (last accessed 22 June 2020).
[9] The Irish Times, 'EU tax loopholes keep citizens in the dark' 4 June 2021, and Eurodad, 'EU fails to introduce real public country by country reporting', 1 June 2021.
[10] The directive requires that multinational corporations publish data on their activities in EU Member States and jurisdictions included in Annex. I of the EU list of non-cooperative jurisdictions for tax purposes on 1 of March of the financial reporting year, and jurisdictions contained on Annex. II of the EU list of non-cooperative jurisdictions as of the 1 March 2021 and 2020. This would oblige large multinational companies to report on activities in 42 countries (of 193 United Nations Member States). This would exclude 79% of countries worldwide if the rules were in force today.
Jurisdictions contained on Annex. I of the EU list of non-cooperative jurisdictions as of the 1 March 2021 are American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands, Vanuatu, and Seychelles. See Council of the European Union, *Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes,* (2021/C 66/10), 26 February 2021, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv:OJ.C_.2021.066.01.0040.01.ENG
Jurisdictions contained on Annex. II of the EU list of non-cooperative jurisdictions as of the 1 March 2021 and 2020 are Australia, Botswana, Eswatini, Jordan, Maldives, Thailand, Turkey. See Council of the European Union, *Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes,* 26 February 2021, https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv:OJ.C_.2021.066.01.0040.01.ENG (Contains: Australia, Barbados, Botswana, Eswatini, Jamaica, Jordan, Maldives, Thailand, Turkey) and Council of the European Union, *The EU list of non-cooperative jurisdictions for tax purposes,* 18 February 2020, https://www.consilium.europa.eu/media/42596/st06129-en20.pdf (Contains: Anguilla, Australia, Botswana, Bosnia and Herzegovina, Eswatini, Jordan, Maldives, Mongolia, Morocco, Namibia, Saint Lucia, Thailand and Turkey)
[11] According to the Impact Assessment accompanying the Commission Proposal only 6,500 MNEs with a global turnover of more than €750m exist worldwide, out of which 1,900 are headquartered in the EU. See European Commission, *IMPACT ASSESSMENT assessing the potential for further transparency on income tax information Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches*, SWD(2016) 117 final, April 2016.
[12] The reporting threshold for public CBCR requirements for the banking sector is based upon the EU definition of a 'large undertaking', obliging reporting for undertakings that meet at least two of the three following criteria: (a) balance sheet total: EUR 20 000 000; (b) net turnover: EUR 40 000 000; (c) average number of employees during the financial year: 250.).
[13] 'National Plan on Business and Human Rights', see: https://www.dfa.ie/media/dfa/alldfawebsitemedia/National-Plan-on-Business-and-Human-Rights-2017-2020.pdf; 'Business & Human Rights Guidance for Business Enterprises', see: https://www.dfa.ie/media/dfa/ourrolepolicies/humanrights/Guidance_on_Business_and_Human_Rights.pdf