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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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'.

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.

The temporary omission of specific items of information from the report is something that would be sought by many businesses given the competitive commercial environments in which these entities are operating.

The public disclosure of information such as that required under this Directive may have particularly severe implications for some entities from a competition perspective. For example, an entity may be operating in an environment where they, along with one or two other businesses are the main industry players, and the release of some or all information required under this Directive may undermine or damage their position from a competition standpoint. The disclosure, particularly on a disaggregated basis, of key metrics such as revenues, employees, accumulated earnings and tax, on a per entity basis, would mean offering up vital information on how the business organises its affairs. This information could be used by a competitor to undermine the entity or group's competitive edge in the market.

With this in mind, we suggest that an option be available to businesses to allow for one or more specific, sensitive items of information to be temporarily omitted from the report. In light of our above point, we would suggest that when interpreting the meaning of *"seriously prejudicial"* (noting the lack of definition in the Directive), the test be interpreted as being *commercially prejudicial*. We feel that such a framing is warranted and appropriate given the lack of direction on the meaning of "seriously prejudicial" at an EU level. Given the importance of this term to the operation of the exemption, consideration needs to be had around what this term should mean in practice. A *commercially prejudicial* reading would be easier to objectively demonstrate by a business and would be more straightforward to police from an administrative perspective. We believe that this reading would meet the minimum standard called for under the Directive and does not represent a derogation from Article 48c(6).

Furthermore, the relationship between the length of the deferral and the extent to which the disclosure of information is seriously prejudicial should be taken into account. Depending on how the seriously prejudicial test is applied, i.e. whether it is a dichotomous test or one with a range of outcomes varying in degrees of seriousness, it may be appropriate to account for a link between

the degree of seriousness (or the extent to which the commercial position is threatened) and the length of the deferral allowed, particularly in light of the use of the term “limited number of years” in the Directive.

We note from the Directive that it would also be necessary to provide a reasoned explanation of how the disclosure of information would be seriously prejudicial. This reasoned explanation point will also have to be explored in the event that the option around the deferral of information is taken. There are a number of points around this issue that would need to be ironed out. These would include the amount of information that would have to be included in the explanation, the process around the review and approval of the explanation, the existence of an appeal facility in the event that a submission is rejected, and also the parties who would be responsible for reviewing and making a decision based on these submissions.

In the event that deferrals are granted, consideration would need to be given to the particular items that would be the subject of these deferrals. It would have to be decided whether a deferral would be granted with respect to all items requested, or a more focused approach would be taken, allowing deferrals for only specific pieces of information. In the event that the latter approach is taken, the decision-making process around this course of action would have to be worked out, particularly in terms of how the items for which deferrals are granted are decided upon. We propose that the business be supported in this way by leaving a wide degree of optionality in terms of what is and is not seriously (read: commercially) prejudicial for that business vis-a-vis its competitors and the extent to which reporting multiple pieces of information increases the level of threat to the commercial interests of the business.

In terms of the requirement for information to be provided on a disaggregated basis for black-listed and grey-listed countries, there would have to be guidance issued by Irish Revenue in relation to how the deferral operates given the deferral may last for a number of years and the black-list and grey-list of countries tends to change every 6 months. This guidance should consider what happens if a country moves on or off the blacklist after a deferral has been granted, particularly focusing on whether the deferred information that is then subsequently disclosed can be disclosed on an aggregated basis or a disaggregated basis (i.e. would it have to be disclosed in line with the circumstances in existence at the time of the deferral or when the business is required to report?).

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.

Businesses are facing a significant increase in the amount of reporting required as a result of recent transparency initiatives such as CbCR, GRI, etc. Adopting this option would lessen the administrative burden on reporting entities, as they will have one less reporting requirement to manage. Given the level of detail required under this particular reporting obligation, we believe that this lessening warrants the option for exemption being left open to businesses.

We believe that a point to consider in taking this option is around the accessibility of this information to those located outside of the EU. Interested third parties located outside of the EU that want to access this information may have to pay to access the information in the event that this option is taken. This impediment, we believe, does not align to what should be the fundamental aim of the Directive, which is fostering an environment of transparency.

An alternative course of action would be for Ireland to impose a requirement whereby the report is made available free of charge to all third parties, regardless of their geographical location. This measure may also have the impact of reducing the administrative burden on the CRO, as it will not be required to monitor whether a request for information has come from outside the EU or not, as both will be treated the same. This should meet the minimum standard as set out in the Directive, whilst not putting Ireland in a competitively disadvantaged position compared to other EU countries.

Please indicate any general comments you may have.

Finally, we would hope that any policy decisions arising from the above points would be communicated early to Irish Revenue. It is imperative that a joined-up approach is taken by the various public sector bodies in the implementation of these rules. The pCBCR Directive is the latest in a number of initiatives specifically aimed at fostering a culture of corporate tax transparency at an EU and OECD level, and more broadly, it is one of a number of new tax initiatives that large MNEs and standalone entities have to contend with. As a result, this Directive should ideally be implemented and enacted in a way that is straightforward to navigate, both from the perspectives of those who will enforce it, and those whom it will apply.