



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

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.

Name(s):	Gerard Gibbons
Organisation:	Irish Congress of Trade Unions
Email address:	Ger.gibbons@ictu.ie
Telephone number:	087-6846799

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.

ICTU does not think that Ireland should avail of this option. Our principal reasons are as follows.

First, the directive sets a relatively low bar as regards the disclosure of income tax information by a small minority of undertakings, and has been criticised as such by a broad range of civil society organisations including trade unions. It does not have to be transposed until June 2023, its provisions become applicable from June 2024, and for calendar year taxpayers the first reportable year will be 2025, with their reports due by December 2026. Therefore, enabling undertakings and branches within its scope to avail of up to a five-year deferral from its obligations could mean that some required information, in theory, may not come into the public domain until January 2032, i.e. almost ten years from the current date.

Second, it is not clear what is meant by ‘seriously prejudicial to the commercial position of the undertakings’. It appears that it is the undertakings themselves that would determine this (albeit with the proviso that an omission would be ‘clearly indicated’ and have a ‘duly reasoned explanation’). Nor is it clear whether the right to omit ‘specific items of information’ applies to all information required or ‘specific items’ of that information. Whether and how to avail of this option is to be decided by member states, so it is possible that if Ireland did so but other member states did not, information withheld in Ireland could be obtained elsewhere.

Third, recital 4 states that public country-by-country reporting is ‘likely to have a positive impact’ on employees’ rights to information and consultation as provided for in Directive 2002/14/EC and, by increasing knowledge of undertakings’ activities, on the quality of the dialogue that takes place within undertakings. However, Ireland’s 2006 transposition of the information and consultation directive declined to avail of the options to go beyond its minimum requirements, so employees’ rights to information and consultation in Ireland is weak compared to many other member states. Any decision to avail of the option under Article 48c (6) would only run counter to the view that the directive would ensure that employees are ‘better informed’ (i.e. recital 8).

Fourth, Article 48c (6) also states that member states shall ensure that information pertaining to the ‘tax jurisdictions’ on the EU blacklist and greylist of non-cooperative tax jurisdictions ‘may never be omitted’. Given that the Council conclusions on these lists are updated regularly, the possibility exists that undertakings may have to revise their disclosure reports on a regular basis, thus undermining credibility in the implementation of the directive in Ireland.

Fifth, a decision to enable undertakings covered to withhold required information would run counter to the purpose of Article 48c (7). This encourages undertakings within its scope to provide an 'overall narrative about any material discrepancies'. How credible would such narratives be if certain required information were withheld for up to five years (and potentially up to the end of 2031)?

Sixth, it should be noted that despite the fact that the two business representative groups (i.e. IBEC and the Irish Tax Institute) that were invited by the Oireachtas *Standing Order 112 Select Committee* in May 2016 to set out their views on the draft directive raised concerns about commercially sensitive information, this issue was not addressed in the Reasoned Opinion against this initiative adopted by the Oireachtas in June 2016. This Reasoned Opinion, one of only two adopted by member states' national parliaments, did go beyond the immediate issue at hand as to whether the proposal complied with the subsidiarity principle and raised points about its substance (e.g. whether the reporting threshold would be changed).

Seventh, Article 48h requires the Commission to review and report by June 2027 on implementation of this directive, including its possible extension to other undertakings and broadening the range of items that must be reported. This review process, which we presume would be preceded by engagements with member states, undertakings covered and all stakeholders, would represent an opportunity to raise any genuine issues that may arise in the implementation of the directive.

Lastly, we note that the government was critical of this initiative from the outset and, according to the Minister for Finance in March 2021, 'opposed this proposal as the legal base is not in keeping with the Treaties and that as it relates to tax, it should be the responsibility of Finance Ministers to negotiate at the ECOFIN Council rather than at COMPET Council.' Ireland did abstain in the final vote in Council in September 2021, rather than vote against.

Some of the commentary from business representatives may however be more sanguine about this initiative. PWC's brief on the directive (July 2021) concluded that, 'with advances in data analytics, interested stakeholders, including investors and NGOs, can analyse the data and compare it with other publicly available data. In order to build an explanation of any potential issues associated with increased public disclosure regarding their tax position, groups should start to develop their tax (transparency) strategy now.' Similarly, KMPG's *CBCR Overview* (December 2021) acknowledges that 'tax transparency is here to stay'; that, 'a combination of public pressure and political willpower at the G20/OECD and EU levels has resulted in a paradigm shift in the global tax landscape; and that 'Understanding and progressing tax transparency within the business, helps to inspire both confidence and support from investors, customers and regulators.'

It may be the case therefore that some undertakings covered are already ahead of Ireland when it comes to this legislation, and are in fact looking towards the 2027 review including of the 'temporary omission of information' and the mandate to the Commission to consider broadening its scope; this review may result in a proposal to amend the directive to abolish Article 48c (6).

For all these reasons ICTU would recommend that Ireland not avail of the option under Article 48c (6).

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.

ICTU does not think that Ireland should avail of the option to exempt undertakings from this publishing requirement where the report is also made available to the CRO.

Again, this directive only applies to a small minority of undertakings, which will be required to produce these reports. If they have to provide them to the CRO, it does not seem to be a disproportionate burden to also make them available and accessible on their own website(s).

This particular issue should be considered in the context of the directive's emphasis on promoting and ensuring greater corporate transparency and accessibility about income tax information. Recital 10 states that the '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'. Would this be possible if the required information is only available on the CRO website, which not all members of the public may be familiar with?

Again, if any genuine issues arise with these particular provisions, they could be considered in the context of the planned review in 2027.

Please indicate any general comments you may have .

We would just make one additional point at this stage.

Among the information that must be provided under Article 48c 2 is 'the number of employees on a *full-time equivalent basis*'. We note however that the consultation document refers instead to the number of *full-time* employees. While this may just be an oversight, we would like to flag it as this stage of the transposition process, as the number of full-time employees may be different to the number of full-time equivalents.

ICTU would also like to reserve the right to come back on other provisions of the directive prior to transposition.

We would be willing to engage further with Government in relation to the two options being considered in this consultation and on the wider transposition of this legislation.