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EUROPEANISSUERS POSITION ON CBCR

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Introduction

On 12 April 2016, the Commission published a proposal on public country-by-country reporting as an amendment to the Accounting Directive of 2013, together with an impact assessment. The proposal contains a requirement for multinational companies with turnover exceeding €750 million annually and operating in the European Union, to disclose certain accounting and tax information on their world-wide operations. This tax information will include income tax paid and accrued as well as "contextual" information (description of activities, number of employees, annual revenue). This information is to be broken down by country for the EU Member States and tax heavens, but aggregated for other non-EU tax jurisdictions.

Summary

While EuropeanIssuers supports the introduction of measures to combat corruption and tax evasion at the international level, we consider that the recent directive 2016/881/EU, requiring country-by-country reporting towards national tax administrations, as well as the exchange of the reports between them, is sufficient to that effect.

Disclosure to the public of turnover, profit and taxes on a country-by-country basis would place European companies at a competitive disadvantage towards companies in third-countries. Competitive disadvantage means less markets, less investments and less employment. This is particularly important for Europe, since it is an important location for corporate headquarters of large companies with extensive international networks.

The European economy would lose from the imbalance between information received from companies headquartered outside the EU and public CBCR information disclosed by companies within the scope of the proposal. The overall effect of the public CBCR would negatively impact EU companies since their industrial and commercial strategy would be unveiled. We believe this would far outweigh any benefits expected for public finances in the EU.

Key Messages

1. The Commission proposal falls in the area of tax policy rather than accounting

Article 50 TFEU[1] is not the appropriate legal basis for the proposal on public CBCR. We share the Council Legal Service's analysis, which in its Opinion points out that *"while the proposal uses the means of transparency obligations imposed on companies, this requirement pursues the precise aim of deterring tax avoidance"*.[2] Furthermore, the Opinion states that *"neither the aim nor the content of the proposal correspond to the scope of Article 50(2)(g) TFEU"* and that "*the proposal has been based on a flawed reasoning that mixes aims and means"* concluding that the proposal falls within the tax provisions of the Treaty (Art. 115 TFEU).

This has been also seconded by the reasoned opinion on subsidiarity by the Irish Parliament: *"the objectives of the proposal fall generally within the area of tax policy rather than accounting and thus impinges on a national competency. This proposal cedes responsibility for an element of tax policy from Members States to the Commission without clearly establishing benefits which do not already arise from the Directive on Administrative Cooperation"*[3].

Moreover, as indicated by the Swedish Parliament in its opinion: "*in its impact assessment, the Commission likewise takes the view that the proposal is part of the Commission's work to ensure that the country where an undertaking's profits are generated is also the country where they are taxed".* Therefore, the Swedish Parliament considers that *"the proposal harmonises taxation rules"* and observes that *"responsibility for taxation policy is primarily located at national level"* and it recalls that, at the same time, *"a transfer of responsibility from Member States to the EU entails a limitation of Member States' scope for action in this field."*

2. The Commission proposal undermines the competitiveness of European industry and its attractiveness as an investment destination

Despite limitation of the scope of the CBCR to companies with activities in EU member states and tax havens, disclosure to the public of commercially sensitive information could allow competitors to work out profit margins and other important business information. Sensitive commercial information may be exposed even in instances where information is aggregated.[4] This would help competitors engage in unfair competition with EU companies. Consequently, European multinationals risk losing control over their business strategy by exposing sales revenues and profits for each country from which their pricing

[1] Article 50(1) TFEU (pertaining to the Chapter "Right of Establishment") allows the EU legislature to adopt directives in order to attain freedom of establishment through action on company law.

[2] Opinion of the Legal Service of the Council of the European Union on the Proposal for a Directive (…) as regards disclosure of income tax information by certain undertakings and branches, 14384/16, 11 November 2016

[3] European Parliament, Committee of legal affairs, Reasoned opinion of the Irish Houses of the Oireachtas on the 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 (COM(2016)0198 – C8 - 0146/20 16 – 2016/0107(COD) (COD)), pp.6-7.

[4] The risk of competitive disadvantage linked to the disclosure of certain information is recognised in several parts of the Impact Assessment (i.e. see page 22 table I, pages 119-120). Moreover, also the Accounting directive recognised this risk and in article 18§2 provides a "safeguard clause": "*Members States may allow the information referred to in point (a) §1 (i.e. net turnover) to be omitted where the disclosure of that information would be seriously prejudicial to the undertaking*". Finally, the EU Competition policy requires companies not to exchange the strategic data including: turnover, prices and productions costs (see Communication 2011/C11/01).

policy can be deduced[5]. This was recognised by the French Constitutional Court that on 8 December 2016 ruled that the provision of the Sapin II law, implementing the public CBCR principle, was unconstitutional as it disproportionately restricts the freedom to do business.[6]

3. Erroneous interpretation and reputational damage

Public CBCR will be of little usefulness to assess the transfer pricing strategy of an undertaking or in judging whether the correct amount of tax has been paid. A discrepancy between high income earned and low taxes paid can be due to the carry forward of losses from the early years of an investment in a new market or other specific factors and would not necessarily indicate an aggressive tax-structure. A proper assessment of companies' tax positions requires deep expertise and knowledge not only of domestic and international tax laws and accounting standards, but also of the legal structure of the group, of the nature and structure of the transactions between the group's different entities and the history of its tax assets and liabilities. Public CBCR will inevitably lead to wrongful accusations against companies' tax behaviour, based on erroneous interpretations.

4. The Commission proposal would be extremely difficult to enforce towards third country multinationals, which would lead to an unlevel playing field

The proposed directive requires that EU subsidiaries of third country multinationals also disclose a CBCR report. However, this provision would be extremely difficult to enforce. Subsidiaries and branches in the EU of third country multinationals may not be able to require the relevant information on the worldwide activities of their parent companies abroad (e.g. tax information covered by local tax secrecy laws) without putting their parent at risk of breaching such laws.

5. The Commission proposal undermines the implementation of tax CBCR and international tax co-operation

Public CBCR would call into question the implementation of CBCR towards the tax authorities. Certain third countries may refuse to exchange tax information if country-by-country reporting information were to be made public, casting doubts on the ability to maintain tax secrecy, which is a fundamental cornerstone of international tax law. The US have already made clear that they will not exchange CBCR reports with tax administrations of countries that have implemented public CBCR. Exchange of tax information can only take place if the confidentiality of information exchanged is safeguarded.

In any event, introducing a public CBCR would indirectly put pressure on tax authorities and adversely affect the implementation of the CBCR towards the tax authorities. While already the new tax requirements will result in significant new burdens on tax departments of multinational corporations because of practical difficulties involved in preparing their CBCR report. In addition, tax secrecy laws sometimes prohibit a subsidiary from providing information to its parent company that is covered by such laws.

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[5] Pricing strategy may vary from one country to another.

[6] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-741-dc/decision-n-2016-741-dc-du-8-decembre-2016.148310.html

6. The Commission proposal runs counter to the Better Regulation objective

In line with the Commission's commitment to Better Regulation, new rules should not be introduced in an area before other relevant proposed rules have been implemented and have had time to be evaluated. Therefore, the Commission should have waited until the above mentioned proposed rules on CBCR towards the tax authorities were implemented and sufficient time elapsed to evaluate its impact. Moreover, the European Parliament pointed out in its report of 16 June 2015 on better regulation that "a competitiveness assessment should form a significant part of the impact assessment process". In that respect, we question whether the impact assessment accompanying the proposal can provide valid basis for the proposal on a public CBCR. The consultation took place in the absence of rules requiring CBCR toward the tax authorities amongst EU countries. Replies to the consultation in favour of a public CBCR were therefore based on assumptions not facts. Furthermore, items to be disclosed under the CRD IV are not quite the same as those in the Commission proposal on public CBCR. Also, given the very different business model of financial institutions, they would not have the same effect. In our view, a valid impact study should be conducted after the OECD BEPS action plan is implemented amongst OECD countries. Only then can its effects be properly assessed.

RECOMMENDATIONS

- CBCR information should only be disclosed to the EU tax authorities and provided that they are subject to binding tax secrecy.
- Article 50 TFUE is not the appropriate legal basis for the proposal. Instead it should be based on the tax provisions of the Treaty.
- The competitiveness of EU companies should not be undermined by legislation that would not bring additional benefits in terms of combatting tax fraud and tax evasion, given that the recent Directive on CBCR towards the tax authorities (2016/881/EU) already meets this objective.
- Additional costs incurred by businesses resulting from the implementation of CBCR (e.g. need to adapt information systems, gather information from group entities all over the world, etc.), should be kept to a minimum. CBCR should therefore, as far as possible, be based on information included in the consolidated accounts.
- Any proposals should provide for an efficient mechanism to avoid double taxation.

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EuropeanIssuers is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. There are approximately 13,225 such companies on both the main regulated markets and the alternative exchange-regulated markets. Our members include both national associations and companies from all sectors in 14 European countries, covering markets worth €7.6 trillion market capitalisation with approximately 8,000 companies.

We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer term. We seek capital markets that serve the interests of their end users, including issuers.

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