Deutsches Aktieninstitut

Public Country-by-Country Reporting: Strong Safeguard Clause Needed!

Position of Deutsches Aktieninstitut on trilogue negotiations on the introduction of a Public Country-by-Country Reporting, 12 April 2021.

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.

On 25 February 2021, a qualified majority was reached at the meeting of EU Competitiveness Ministers on the Portuguese Presidency's compromise. This enabled the COREPER to approve on 3 March 2021 the Council's negotiating mandate to begin negotiations with the European Parliament on the text. The Council introduced a safeguard clause delaying by 6 years the public disclosure of sensitive corporate information.

Summary

While supportive of tax transparency and measures to combat corruption and tax evasion at the international level, Deutsches Aktieninstitut is concerned that 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.

The European economy is bound to 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. Generating this unlevel playing field materialises at a time when multinationals have emerged weakened from the Covid-19 crisis and need to focus on restarting the economy and safeguarding their markets.

To mitigate these impacts, we therefore urge EU co-legislators first to retain key aspects of the Commission's initial proposal (scope of application, geographical aggregation and granularity of the disclosed information) and second to make sufficient provision for a robust safeguard clause that ensures adequate protection of commercially sensitive data. Due consideration should also be given to postponing the implementation schedule foreseen in the Presidency's text at a time when the need for economic recovery is the greatest.

Key Messages

1. Public CBCR without safeguards would negatively impact 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 would 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. 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 policy can be deduced1.

The following examples are particularly meaningful.

- In the manufacturing industry (e.g. motors and vehicles), Public CBCR would exhibit EU companies' manufacturing strategy by disclosing their margin in every country in which they operate, Third country competitors would be informed of the location of the different spare parts and equipment manufacturing units, or, in other words of their whole manufacturing process, which is the companies' core strategy.
- Companies whose activity depends on public procurement and rely on answering calls for proposals (e.g. engineering, environment or energy

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

sector) would, as a result of Public CBCR, expose the market conditions under which the contracts have been awarded.

- In the case of mono-product industries commercial strategies may be inferred by comparing profit generated within and outside the EU.

Public CBCR would also negatively impact the attractiveness of the EU as an investment destination, which runs directly counter to the CMU's objectives. Non-EU headquartered companies as well as the global mutual funds industry would be hesitant to enter or expand their operations in the EU if doing so required them to publicly disclose sensitive commercial information which their home jurisdiction does not require them to do. The adverse competitive consequences of these disclosures, particularly those regarding non-EU activities, could be substantial. Without an EU presence, these firms would be less likely to acquire securities of EU issuers – to the detriment of the EU capital markets; infrastructure investment would slow, economic growth would be less robust, and EU residents would lose.

2. The directive should retain some key aspects of the Commission's initial proposal

Three fundamental aspects of the Commission proposal taken up by the Presidency compromise should be embedded in the directive's final text.

- Data concerning third countries should remain aggregated, while country by country reporting only applies to the EU and non-cooperative jurisdictions. Requiring companies to publish information for each tax jurisdiction where they operate, both within and outside the EU, would further aggravate the competitive disadvantage for EU companies.
- The list of disclosed information should be limited to what is absolutely necessary for public scrutiny and preference may be given to the Commission and Presidency's list (which are both shorter and, albeit not fully satisfactory for the reasons indicated in connection with the safeguard clause, better aligned with tax reporting requirements).
- In order to minimize costs and administrative burdens for companies, the data definitions and subsidiaries perimeter under the public CBCR should be aligned with the tax CBCR.

3. Sufficient provision should be made for an effective safeguard clause

Issuers need a safeguard clause which effectively ensures ownership of commercially sensitive information. The option retained by the Portuguese

Presidency to delay for 6 years only the public disclosure of this information under the Portuguese Presidency's compromise text would not resolve this, as the information would remain sensitive particularly for companies with stable business models and margins.

The risk of competitive disadvantage linked to the disclosure of certain information is recognised in several parts of the Impact Assessment2. 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 costs3.

We propose extending the 6 years duration whenever necessary and ensuring that Member States first allow multinationals to omit information required to be disclosed where the disclosure would be prejudicial to the commercial position of the undertakings to which it relates and second provide that any dispute over the right to omit disclosure be settled by the relevant national jurisdictions.

4. The directive's implementation schedule should be postponed

To help multinationals to overcome the current crisis, we believe that the commencement date for the public reporting on tax information should be postponed by at least one year and set not less than two years (instead of one year under the Portuguese Presidency's compromise) after the transposition deadline of two years. If enacted in 2021, the new reporting requirement will apply to the first financial year starting on or after the two years transposition deadline, i.e. effective for financial periods beginning on or after 1st January 2026.

Besides, in the first two years of application of the reporting requirement, information concerning EU-based operations should also be aggregated.

The current proposal of the EU Commission on a Public CBCR risks to undermine the agreement reached at the international level (OECD BEPS Action 13) on the automatic exchange of CBCR information among tax authorities. By January 2021, 89 countries have followed suit and agreed to exchange data between tax administrations (multilateral competent authority agreement on the exchange of country-by-country reports). Certain third countries however refuse to

[2] see page 22 table I, pages 119-120.
[3] see Communication 2011/C11/01)

exchange tax information if CBCR information were to be made public, as the OECD BEPS action 13 agreement was reached under the condition that the confidentiality of information exchanged is safeguarded. For instance, the US have not signed the multilateral competent authority agreement on the exchange of country-by-country reports. They made it clear from the very beginning that they would not exchange CBCR reports with tax administrations of countries that have implemented public CBCR (As affirmed by Robert Stack, former US Treasury Deputy Assistant Secretary for international tax affairs, "the United States will not share CBCR with foreign authorities who choose to make the reports public" (International Tax Review, 15 March 2016)).

We call on the trialogue negotiators not to jeopardize the important fight to combat tax evasion on global level, the latter being the only way to efficiently address the issue of aggressive tax planning. Negotiators should thus work on a strong safeguard clause for companies to omit business sensitive information that could contribute to easy worries of third countries to adhere to the multilateral competent authority agreement on the exchange of country-by-country reports.

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