Executive summary

On 4 July 2017, the European Parliament approved, in first reading, the joint report submitted by the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs on the proposal for a directive of the European Parliament and the Council amending the Accounting Directive as regards disclosure of income tax information by certain undertakings and branches (better known as public Country-by-Country (CbC) reporting). The matter has now been referred back to the committees responsible for interinstitutional negotiations (the so called “trilogue”) who will report to the Parliament within four months.

The joint report proposes to amend the European Commission proposal to broaden the scope of the reporting obligation to any multinational enterprise (MNE) group, having an annual consolidated turnover of or exceeding €750 million, with undertakings or branches within the European Union (EU) and provides for exemptions in the case of commercially-sensitive information (which are closely monitored). Furthermore, the public CbC reporting requirements are more aligned to the non-public CbC reporting requirements under the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Action 13 on CbC reporting. A new revision clause stipulates that every four years, the European Commission has to carry out an impact assessment of the new reporting obligation.
In terms of the further procedure after the interinstitutional negotiations, the proposed directive will ultimately need to be adopted by the Council. At this time it is difficult to predict whether and to which extent this proposal will be acceptable to the Council, given the negative comments made by some Member States. If adopted, all EU Member States will have to transpose the text into national legislation.

Detailed discussion

Background

On 12 April 2016, the European Commission proposed to amend the Accounting Directive (Directive 2013/34/EU) which would require large multinational companies operating in the EU to draw up and publically (on the website of the undertaking) disclose income tax information, including a breakdown of profits, revenues, taxes and employees. The proposal builds on the OECD BEPS work, in particular Action 13 on CbC reporting. However, it went a step ahead by requiring large MNEs to make certain items of the CbC report publicly available. The European Commission’s proposal was presented under Article 50(1) of the Treaty on the Functioning of the European Union (TFEU).

During the legislative process, the proposal is considered by the European Parliament and the Council. In the Council, the working party on company law is preparing the Council’s positions on the proposal for public CBC reporting. In the Parliament, the joint committee procedure is being applied and the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs are responsible for the preparations of the Parliament’s position on the proposal for public CBC reporting.

On 13 July 2016, the Working Party on Company Law requested the Legal Service of the Council of the EU to give a written opinion on the legal basis of the mentioned proposal. It was specifically asked whether the proposal should be adopted on the legal basis of Article 115 TFEU (which requires unanimous consent), instead of on the basis of Article 50(1) TFEU (which only requires a qualified majority). The Legal Service of the Council of the EU concluded on 11 November 2016, that the proposal must be based on Article 115 TFEU. For the legal basis to be changed by the Council, nevertheless, unanimity is required.

On 12 June 2017, the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs jointly adopted their own report on the proposal for public CBC reporting, and submitted it to Parliament for approval. The joint committee made some changes to the proposal issued by the European Commission in April 2016, broadening the scope and including additional requirements. The joint committee recommended that the European Parliament should amend the Commission’s proposal.

On 22 June 2017, the EU Presidency released a state of play document containing the Presidency compromise text on public CBC reporting to take stock of the work undertaken with the help of delegations at working party level and considering the December 2016 compromise proposal.

Proposal approved by the European Parliament

On 4 July 2017, the European Parliament approved, in first reading, the proposed Directive on public CBC reporting contained in the joint report submitted by the Committee on Economic and Monetary Affairs and the Committee on Legal Affairs on 12 June 2017 (the parliament legislative resolution). The report was approved by 534 votes to 98 votes, with 62 abstentions.

The European Parliament adopted a number of amendments on the April 2016 Commission’s proposal, which broadens the scope of the Directive so that public CbC reporting applies to non-EU MNE groups, having an annual consolidated turnover of or exceeding €750 million, with undertakings or branches within the EU, irrespective of whether the undertaking or
branch is of medium or large size as defined in the Accounting Directive. Furthermore, the amendments, to a certain extent, align the public CbC requirements with the non-public CbC reporting requirements under Directive 2016/881/EU and the CbC reporting model legislation in BEPS Action 13. For example, it is now envisaged to present the information in a common template comprising a number of items broken down by tax jurisdiction. Thus, this version does not allow aggregating data from countries outside of the EU.

Under the parliament legislative resolution, the public CbC report would contain the following items:

- Name of the ultimate undertaking and, where applicable, the list of all its subsidiaries, a brief description of the nature of their activities and their respective geographical location
- Number of employees on a full-time equivalent basis
- Fixed assets other than cash or cash equivalents
- Amount of the net turnover, including a distinction between the turnover made with related parties and the turnover made with unrelated parties
- Amount of profit or loss before income tax
- Amount of income tax accrued (current year) which is the current tax expense recognized on taxable profits or losses of the financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction
- Amount of income tax paid which is the amount of income tax paid during the relevant financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction
- Amount of accumulated earnings
- Stated capital
- Details of public subsidies received and any donations made to politicians, political organizations or political foundations
- Whether undertakings, subsidiaries or branches benefit from preferential tax treatment, from a patent box or equivalent regimes

Furthermore, Member States would be permitted to allow one or more specific items of information listed to be temporarily omitted from the public CbC report as regards activities in one or more specific tax jurisdictions when they are of a nature such that their disclosure would be seriously prejudicial to the commercial position of the MNE group. The omission is subject to a yearly requested authorization by the undertaking and shall be indicated in the report together with a motivation for each tax jurisdiction with the underlying reasons. As from the end of the non-disclosure period, the undertaking or branch shall also retroactively disclose, in the form of an arithmetic average, information of preceding years covered by the non-disclosure period. The use of the temporary derogation possibility will be closely monitored by the European Commission.

Finally, a revision clause now stipulates that every four years, the European Commission has to carry out an impact assessment in order to evaluate whether the €750 million threshold should be reduced. Also, sanctions in the case of non-compliance are introduced. Accordingly, Member States shall at least provide for administrative measures and penalties for the infringement by undertakings of national provisions adopted in accordance with this Directive.

Next steps

In the European Parliament, the matter is now referred back for interinstitutional negotiations to the committees responsible (i.e., Committee on Economic and Monetary Affairs and the Committee on Legal Affairs). The interinstitutional negotiations (being the so-called “trilogue”) will be held between the Council, the European Parliament and the European Commission. During these negotiations, the question whether public CBC reporting is a tax issue (which requires Council unanimity) or an internal market issue (which allows Council voting by means of a qualified majority) may arise again. Moreover, given that there are now two compromise texts (i.e., the EU Presidency’s compromise released on 22 June 2017 and the text approved by Parliament on 4 July 2017), it is possible that both texts will be discussed during the trilogue phase. As this matter will likely be subject to intense discussions, the outcome of the interinstitutional negotiations is unknown. It is uncertain whether a political compromise will be achieved and, if so, to which extent the presidency compromise text and the parliament legislative resolution will remain in place, particularly since some Member States have already expressed their concerns of going beyond the OECD recommendations. The timing of the next steps in the legislative procedure is also difficult to predict at this stage, the committees to which the matter was referred back shall report to Parliament within four months, but this period may be extended. Ultimately the Directive should be adopted by the Council after which the Directive would have to be transposed into national legislation by all EU Member States.
Implications

If public CbC reporting is adopted, it could lead to implications for both EU-headquartered and non-EU-headquartered undertakings with a consolidated turnover of or exceeding €750 million. The Commission was already successful in introducing public CbC reporting for banks under the Capital Requirements Directive IV, and also there is public pressure and political will to implement these new measures. Although the proposal may be subject to further amendments in the further legislative procedure, and the timing of the adoption and implementation of the Directive is currently very difficult to predict, it seems advisable to proactively monitor these developments.

Endnotes


4. Article 3(3) of the Accounting Directive defines Medium-sized undertakings as “undertakings which are not micro-undertakings or small undertakings and which on their balance sheet dates do not exceed the limits of 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.” Article 3(4) of the Accounting Directive defines large undertaking as “undertakings which on their balance sheet dates exceed 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.”
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