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.

We 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.

Introductory comments

The Directive requiring the publication of country-by-country reporting (CbyCR) seeks to enhance corporate transparency and public scrutiny of corporate taxes paid by Multinational Enterprises (MNEs) carrying out activities in the EU. In adopting Directive (EU) 2021/2101 (the Directive) into Irish law, Ireland must balance achieving the Directive's objective with preventing in-scope businesses from being placed at a commercial disadvantage.

It is imperative that Ireland provides maximum flexibility in relation to all features of the regime, specifically for privately owned companies, including the timing of implementation, allowing for a maximum deferral of disclosure of five years of all information which would be seriously prejudicial to the commercial position of the undertakings, and including the option to satisfy the obligations by making the report accessible through the Companies Registration Office (CRO).

Companies have invested significant time and resources in understanding and responding to changes made in the standards of corporate transparency in recent years. This includes the preparation and filing of country-by-country reports with the relevant tax authorities. Going beyond these initiatives by requiring the publication of this information, which contains a significant volume of non-tax and commercially sensitive information as well as tax information creates genuine commercial concerns for MNEs.

The reasons for this preference are outlined below together with a general background and context at the end of this section.

- ✓ **Importance of safeguarding commercially sensitive information**

At an EU meeting of internal market and industry ministers considering the adoption of the Directive on the 25 February 2021, Robert Troy TD stated that Ireland considers that the new measures should be consistent with the international cooperation and exchange of information arrangements which are based on confidentiality.[i]

As the information must be published in a later report, within no more than five years of the date of its original omission, this option will not diminish the value of the information for the purposes of increasing corporate transparency and enhancing public scrutiny. The deferral of disclosure will protect against the risk of sensitive commercial information being available to an MNE's competitors in “real-time”. That risk will be amplified where competitor MNEs are operating outside of the European Union (EU) (which now includes the United Kingdom), or are large groups operating in only one jurisdiction, and are not subject themselves to public reporting requirements, affording them the twin benefits of non-disclosure of their own information and the ability to leverage off the public disclosures of competitors operating in the EU. Indeed, even in cases where a non-EU headquartered group is required to report, it is likely that the level of information available to it and therefore disclosed may be restricted, resulting in a significantly reduced level of disclosure.[ii] This concern is equally relevant with regard to information that will be accessible to an MNE’s suppliers and customers. Such parties continue to have the protection of other existing mechanisms in law, e.g., the requirement for limited liability companies to file financial statements with the CRO.

The Directive states that public scrutiny should be conducted without harming the investment climate in the Union or the competitiveness of Union undertakings.[iii] It is also stated that the information should be limited to what is necessary to make effective public scrutiny possible, in order to ensure that disclosure does not give rise to disproportionate risks or disadvantages for undertakings in terms of competitiveness or of misinterpretations regarding the undertakings concerned.[iv]

We consider that it is appropriate to safeguard commercially sensitive information as permitted within the framework of the Directive.

- ✓ **Seriously prejudicial to the commercial position of the undertakings**

The Directive does not provide a definition of the term “seriously prejudicial to the commercial position of the undertakings”, and the European Commission has not released guidance material. Hence, it is up to the relevant Member State to determine the meaning of the term. The commercial sensitivity of data will vary widely based on the profit margins and market share of the MNE, the business model, location of operations, products/services provided, the range of activities carried on by the MNE, etc. Competitors, suppliers and customers would have access to information concerning their turnover, growth margins, employment patterns, productivity, accumulated earnings and a host of other commercially sensitive information. This is a particular concern for MNEs involved in specialised activities in a niche market space, where negotiating positions could be exposed in these reports.

In cases involving private / family-owned Irish businesses, in addition to the above, there may also be other adverse implications of public disclosure, which could pose serious issues in relation to safeguarding the privacy and, in more extreme cases, the personal safety of individuals.

Ireland, as one of the smaller Member States, will naturally have a lower number of impacted groups, resulting in a perhaps disproportionate level of focus and publicity on the CbyC data in Ireland.

We consider that the inclusion of requirements that go beyond the minimum standard set out in the Directive would damage Ireland’s reputation for being a fair and reasonable environment in which to do business, impairing our competitiveness at a time when Ireland has moved with its international partners in reforming its corporation tax regime.

- ✓ **Enhanced public scrutiny**

Public CbyC reporting is primarily a tool for increasing corporate transparency and enhancing public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union[v]. The Directive provides that the reporting requirement does not apply to standalone undertakings or ultimate parent undertakings and their affiliated undertakings where such undertakings, including their branches, are established, or have their fixed places of business, within the territory of a single Member State.[vi] Hence, the Directive is not aimed at large companies that are mainly operating in one jurisdiction.

For Irish companies in the early stages of international expansion, or that have a very narrow international footprint (e.g. importation of goods into an EU port in the Netherlands), but which have a consolidated turnover of over €750 million, the preparation of these disclosures will result in a significant compliance burden which may discourage outbound investment.

For example, an Irish privately owned business that may have €760 million of Irish turnover, and only €3 million of turnover abroad, would appear to nonetheless be fully within the scope of the Directive. A company at this stage should not be hindered by the application of international rules which apply to more established MNEs. This is recognised in other internationally agreed initiatives, including the recent OECD Model Global Anti-Base Erosion Rules under Pillar 2 of BEPS (Base Erosion and Profit Shifting) 2.0.[vii] In seeking to achieve a balance between the objectives of the global tax reform and the administrative burden for tax administrations and taxpayers, it was considered that an amount of top-up tax need not be calculated in these low-risk situations. The proposed EU implementing Directive also includes this provision.[viii]

We consider that the option to defer publication for up to five years in the Public CbyCR Directive will protect these largely domestic companies from public disclosures, as envisaged in the Directive.

The Public CbyCR Directive further states that the setting of common rules on corporate income tax transparency would also serve the general economic interest by providing for equivalent safeguards throughout the Union for the protection of investors, creditors and other third parties generally, and thus contribute to regaining the trust of citizens of the Union in the fairness of national tax systems.[ix] We consider that an in-depth knowledge of complex tax law is required to instigate meaningful assessments on MNEs in ensuring the correct amount of tax is paid.

- ✓ **Responsibility of directors**

We consider that the directors of the company are best placed to determine whether information is commercially sensitive. Directors should determine whether the criteria has been met to defer the disclosure of information for five years. The Directive provides for auditors to perform a review role.

The directors of the company are equipped with the requisite knowledge of the business to ascertain the information that, if available to competitor companies, would be seriously prejudicial to the undertaking. What is considered “seriously prejudicial to the commercial position of the undertakings” is subjective and its interpretation should be open to the directors of the reporting entity. This is consistent with the approach currently adopted under the Companies Act 2014 where similar wording is used.[x]

There may indeed be circumstances where disclosure of any of the specific items of information would be seriously prejudicial to the commercial position of the undertaking in the relevant year. We consider that domestic legislation should provide for the maximum deferral of a rolling five year period for any and all of the specific items of information where, in the opinion of the directors, disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates.

The Directive does not require input from an independent arbiter where a company avails of the deferral option. Auditors will be required to check and state whether a company falls within scope of the Directive and if so, whether the report was published.[xi]

- ✓ **Existing standards which recognise the need to protect commercially sensitive information**

The OECD/G20's BEPS Action 13 Report on Transfer Pricing Documentation and Country-by-Country Reporting[xii], regarding MNEs reporting to tax authorities data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates, states that *"Tax administrations should take all reasonable steps to ensure that there is no public disclosure of confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information contained in the documentation package . . .".* We consider that the importance of protecting confidential information is equally relevant in the context of public reporting.

The need to protect commercially sensitive information from disclosure is also recognised in the context of exchange of information requirements. The commentary in the OECD Model Tax Convention on Income and Capital notes that a State may decline to supply information to the extent that the provision of the information would disclose a trade secret.[xiii] Revenue guidance on the arrangements for implementing EU[xiv] and OECD exchange of information requirements in respect of tax rulings states that Revenue will not provide information regarding a taxpayer to another Member State that would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process or of information the disclosure of which would be contrary to public policy.

We consider that EU Public CbyC reporting standards should be in line with the standards that are recognised at a global level.

The adoption of the deferral is also in line with the approach taken in other areas of Irish law relating to the legal rights of persons in accessing certain records. For example, the Freedom of Information Act 2014[xv] provides for the refusal of disclosure of information which *"could prejudice the competitive position of that person in the conduct of his or her profession or business*" and "*information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates."*

We consider that the Directive should be in line with internationally agreed global standards, and those that exist in Irish law.

- ✓ **Equivalent safeguards in Member States**

As noted above, the Directive seeks to "serve the general economic interest by providing for equivalent safeguards throughout the Union"[xvi]. As Ireland has initiated the consultation process for implementing the Directive before other Member States, it will be important to monitor the implementation process across the EU to ensure that Ireland is not placed at a commercial disadvantage. Ireland can safeguard this by implementing the minimum standards required.

Ireland should incorporate this option to ensure we remain an attractive country to do business.

Further background and context

The Irish government is committed to implementing the highest standards in transparency in the taxation of corporates. In recent years, Ireland has introduced several initiatives, arising from both EU and OECD proposals, that place tax transparency as a core pillar of our corporate tax regime. In addition to tax transparency, implementation of corporate transparency initiatives, including adoption of EU Accounting Directives and anti-money laundering Directives, ensures Ireland has achieved best-in-class corporate transparency.

In adopting the Directive into Irish law, Ireland must balance achieving the Directive's objective with preventing in-scope businesses from being placed at a commercial disadvantage. For multinationals, the extent to which the scales tip either way in this balance can have a detrimental impact on their business. Going beyond the objectives of the Directive will lead to a loss of competitiveness through disclosure of confidential business information, particularly if Ireland goes

further than other international norms, or it will lead to reputational damage through misinterpretation of 'one-size-fits-all' disclosure formats contained in the public country-by-country reports. This applies to non-EU groups that have chosen Ireland as their international hub, and Irish-owned private companies that have built and grown their businesses from Ireland with significant benefits for the local and national economies. As noted above, at the 25 February 2021 EU meeting considering the adoption of the Directive, the concerns regarding the classification of the Directive as a non-tax Directive were raised. Robert Troy, Minister of State at the Department of Enterprise, Trade and Employment, stated that Ireland considers that this measure should have the benefit of tax expertise to ensure it is consistent with existing requirements, and importantly with the international cooperation and exchange of information arrangements which are based on confidentiality. It was also stated that tax experts are best placed to ensure that international efforts to collect income tax from multinational corporations will not be undermined by new measures. Any measures which negatively impact the competitiveness of Irish-based businesses will in turn negatively impact Ireland's competitiveness as against other jurisdictions. Ireland needs to be particularly mindful of this in the context of the United Kingdom's exit from the EU. The Directive is a tool for increasing corporate transparency and enhancing public scrutiny. The Directive notes that common rules on corporate income tax transparency would also serve the general economic interest by providing for equivalent safeguards throughout the Union for the protection of investors, creditors and other third parties generally. Importantly, the Directive also acknowledges that immediate disclosure of the data to be included in the report on income tax information could, in certain cases, be seriously prejudicial to the commercial position of an undertaking. **In transposing the Directive, we consider that it is important to reflect Ireland's position regarding confidential information and adopt the option under the Directive to defer for five years information contained in the report that could be seriously prejudicial to the commercial position of an undertaking.**
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. **We 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.**

We do not consider that incorporating this option will impact on the effectiveness of the Directive. The report will either be accessible to the public free of charge and in an electronic reporting format which is machine-readable on the website of the relevant undertaking, or the website will refer to the CRO website which contains the electronic machine-readable report.

Companies operating in Ireland have existing frameworks and infrastructure in place to ensure they are compliant with current CRO requirements. Including a facility to meet the obligations of the Directive through the CRO should facilitate a high level of compliance.

MNEs are already required to publish a significant volume of information. In implementing additional disclosure requirements, Ireland should seek to minimise the administrative burden on these companies. Providing an option to MNEs to submit the report to the CRO, which is made available to the public, is a practical approach.

Ireland should seek to minimise the administrative burden on companies by allowing for optionality in publication of the report.

Please indicate any general comments you may have.

- ✓ **Timing of implementation**

In transposing the Directive, the domestic measures should not apply earlier than the required deadline set out in the Directive, i.e. from the commencement date of the first financial year starting on or after 22 June 2024.

It will be important to ensure that companies have adequate time to plan and prepare for the additional resources that will be required to comply with the Directive.

- ✓ **Implementing the minimum standard required**

Going beyond the objectives of the Directive will lead to a loss of competitiveness for companies operating in Ireland, or could lead to reputational damage through misinterpretation of 'one-size-fits-all' disclosure formats contained in the public country-by-country reports.

Ireland is a small open economy competing in the international marketplace for investment and talent. Ireland should ensure that the measures introduced do not go beyond what is required as this would put companies investing here at a competitive disadvantage.

Ireland's twin industrial policies of successfully attracting international business to the country and supporting domestic entrepreneurship have led to great prosperity for the country at large. For Ireland to improve and indeed maintain our competitiveness, it will have to continue to be an attractive location for businesses who are successful in both the domestic and international marketplace. The relative attractiveness of Ireland's corporation tax rate is likely to be reduced as the world converges on a minimum tax rate for large multinational corporations. In these circumstances, the other factors that are taken into account in location decision making will assume greater relative importance than they have in the past. These factors include issues such as access to skills, market access and regulatory risk and reputational risk.

Ireland competes not just within the EU but also on a global level. Although all Member States will be required to adopt the Directive, the implementation of varying options may lead to significant differences in how the Directive will impact the economic environment for companies operating in different jurisdictions. We consider that Ireland should not go beyond the minimum standards set out in the Directive.

- ✓ **Significant existing publication requirements for MNEs**

Under existing rules, MNEs are required to report information to tax authorities and to publish financial statements which are available to the public. It will be important to ensure that the additional publication requirements do not go beyond the requirements of the Directive and impose an excessive burden on MNEs, as these measures will be layered on top of numerous existing disclosure requirements:

- **MNEs with a total consolidated revenue of €750 million are already required since 2016 to report information to taxing authorities on the revenue, profits, taxes and other indicators of economic activities for each tax jurisdiction in which the group operates.**

Tax authorities can use this information to perform transfer pricing risk assessments and to evaluate other BEPS related risks, which can lead to additional tax assessments. We consider that tax authorities having an in-depth knowledge of tax law are best placed to understand this complex information and to determine whether further action should be taken to ensure that MNEs pay the correct amount of tax. Additional public disclosures may act as a catalyst for competitor jurisdictions to initiate unilateral action against Irish companies in a way which would go beyond newly agreed and established standards of international taxation. At a minimum, this will cause a strain on companies' resources in complying with the audit. The increased likelihood of disputes between tax authorities should be recognised and resources expanded to deal with this.

More generally, significant progress has been made to date through international initiatives at OECD and EU level, including the initial BEPS process and further measures implemented through various elements of the Anti-Tax Avoidance Directive (ATAD), updates to the Directive on Administrative Cooperation and Anti-Money Laundering Directives, and the BEPS 2.0 measures which are expected to be implemented in due course. These initiatives are based on a fundamental underlying principle that international consensus is the most effective tool to reform the taxation of MNEs.

- **Every company in Ireland, whether trading or not, is required by law to file an annual return accompanied by annual financial statements with the CRO once a year.**

The financial statements are prepared by the directors of the company and laid before the shareholders at the Annual General Meeting (AGM). The Companies Act 2014 sets down the detailed disclosure requirements for Irish registered companies such as accounting policies, departure from generally accepted accounting principles, fixed assets, capital commitments, contingent liabilities, transactions with directors and their connected persons and particulars of subsidiary and related companies.[xvii] In addition to preparing their own financial statements, holding undertakings are required to prepare consolidated group financial statements and to lay them before the AGM at the same time as their own annual financial statements. The information filed with the CRO is available for public inspection (usually for a small fee).[xviii]

The financial statements of large companies will include an auditor's report which states whether, in their opinion the financial statements give a true and fair view of the assets, liabilities and financial position of the company as at the end of the financial year, and of the profit or loss of the company for the financial year. The auditor will also state whether the statutory financial statements have been properly prepared in accordance with the relevant financial reporting framework and, in particular, with the requirements of the Companies Act 2014.[xix]

- **Large companies[xx] are also required to disclose non-financial information under Regulations introduced in 2017.[xxi]**

Matters to be reported on include environmental issues, social and employee matters, respect for human rights and corruption and bribery risks and policies. The non-financial statement can be included as a specific section of the directors' report, which forms part of the company's annual audited financial statements. Alternatively, the non-financial information can be set out in a separate statement, a copy of which must either be published on the website of the company or be annexed to the annual return. In addition, the Regulations require large listed companies to include in their corporate governance statement a report on their diversity policy with regard to their board of directors.

As Ireland and the international community experience significant changes to the global tax landscape, it will be important to ensure that Ireland does not go beyond the measures in the Directive and aims to minimise the cost of compliance for MNEs. Acknowledging that Member States are obliged to transpose the Directive into national law, it is nonetheless imperative that Ireland does not go beyond the minimum standard required by the Directive. Further, the measures should not be implemented earlier than the required deadline set out in the Directive.

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[i] Informal video conference of internal market and industry ministers - Consilium - https://www.consilium.europa.eu/
[ii] Article 48b(4), Directive (EU) 2021/2101
[iii] Recital 2, Directive (EU) 2021/2101
[iv] Recital 13, Directive (EU) 2021/2101
[v] Recital 2, Directive (EU) 2021/2101
[vi] Article 48b(2), Directive (EU) 2021/2101
[vii] Article 5.5, OECD (2021), Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD, Paris
[viii] Article 29, 'De minimis exclusion', Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union
[ix] Recital 2, Directive (EU) 2021/2101
[x] Paragraph 65(6) 'Particulars of turnover', Part IV, Schedule 3, Companies Act 2014
[xi] Article 48f of Directive (EU) 2021/2101
[xii] OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.
[xiii] Commentary on Article 26, OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing.
[xiv] Article 17(4) of Council Directive 2011/16/EU
[xv] Section 36
[xvi] Recital 2, Directive (EU) 2021/2101
[xvii] https://www.cro.ie/Annual-Return/Accounts-Requirements
[xviii] CRO - Re-Use of CRO Data - https://www.cro.ie/

[xix] CRO - Annual Return - Auditor's Report - https://www.cro.ie/
[xx] Companies which satisfy two of the following conditions: turnover exceeds €40 million, balance sheet total exceeds €20 million, average number of employees is 250.
[xxi] European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017