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NOTE

From: Presidency
To: Delegations

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Subject: 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.
- Information from the Presidency

Delegations will find attached a follow-up note from the Presidency on CBCR.

Follow-up note from the Presidency on CBCR**I. Introduction**

On 12 April 2016, the European Commission submitted the proposal on the public country-by-country reporting (CBCR) to the Council and the European Parliament. The proposal was part of the broader strategy for a Fair and Efficient Corporate Tax System in the EU. The public scrutiny of tax payments aims at reinforcing public trust and strengthening companies' corporate transparency and social responsibility.

The proposal requires that Multinational Enterprises (MNEs) disclose publicly in a specific report the income tax they pay together. MNEs, whether headquartered in the EU or outside, with turnover of more than EUR 750m would need to comply with these transparency requirements. For the first time, not only European businesses but also non-European multinational companies doing business in Europe will through their branches have the same reporting obligations.

The proposal complements undertakings' current financial reporting obligations under Accounting Directive No 2013/34/EU. However, it does not interfere with the existing requirements in relation to undertakings' financial statements, for example as regards publishing of their annual accounts.

The proposal does not modify the rules already in place on non-financial reporting and sectoral CBCR for both the banking sector and the extractive and logging industries. It is in line with OECD BEPS reporting and Council Directive (EU) 2016/881.

II. State of play

The Working Party on Company Law examined the proposal at eighteen (18) occasions during the Netherlands, Slovak, Maltese, Estonian, Romanian and Finnish Presidencies. Significant progress has been made since the detailed examination of the proposal began. The latest meeting of the Working Party on Company Law (Attachés) examined the proposal (doc 5134/19) under the Finnish Presidency on 12 November 2019.

On the basis of the technical preparations, the Finnish Presidency presented a compromise proposal, in the Annex to the document 14038/19, in order to reach an agreement on a general approach at **Competitiveness Council on 28 November 2019**. The ministers discussed the compromise proposal in a public debate but sufficient support for general approach was not gained despite broad support. The main outstanding issue proved to be the aim of the proposal determining the proper legal basis. The issue of the legal basis was also raised at **Economic and Financial Affairs Council on 5 December 2019** as information point under “Any Other Business” item.

Based on the views expressed at Council meetings the Finnish Presidency concluded that it would continue working on the proposal to find a way forward.

III. Follow-up and way forward

As a follow-up to the debates at Competitiveness Council and at Economic and Financial Affairs Council, the Finnish Presidency puts forward the following amendments to the recitals 2, 6b, 10 and 12.

It is the Presidency’s view that amending these recitals by clarifying the aim and content of the proposal could alleviate concerns regarding the legal base of the proposal, and pave the way for further negotiations at the Council. Several delegations as well as the Council Legal Service also highlighted this approach at the Competitiveness Council as well as at Economic and Financial Affairs Council.

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(2) In parallel with the work undertaken by the Council to fight corporate income tax avoidance, it is necessary to enhance public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union, as this is an essential element to further foster corporate **transparency and** responsibility, ~~to~~ **thereby** contributing to the welfare of our societies. **Providing for such scrutiny is also necessary** to promote a better informed public debate **regarding in particular the level of tax compliance of certain multinational undertakings active in the Union and the impact of this on the real economy. The setting of common rules on corporate income tax transparency will 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 contributing** to regaining the trust of citizens of the Union in the fairness of the national tax systems. Such public scrutiny can be achieved by means of a report on income tax information, irrespective of where the ultimate parent undertaking of the multinational group is established.

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(6b) ~~At the same time it is stressed that, as concluded by the G20 and the OECD, country by-country reports will be helpful for high-level transfer pricing risk assessment purposes only. The information in the Country-by-Country Report on its own does not constitute conclusive evidence that transfer prices are or are not appropriate and that information should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and comparability analysis.~~

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(10) In order to strengthen **corporate transparency and** responsibility vis-à-vis **investors, creditors, other** -third parties **and the general public** -and to ensure appropriate governance, the members of the administrative, management and supervisory bodies of the ultimate parent undertaking or standalone undertakings which are established within the Union and which have the obligation to draw up, publish and make accessible the report on income tax information, should be collectively responsible for ensuring the compliance with these reporting obligations. Given that members of the administrative, management and supervisory bodies of the subsidiaries which are established within the Union and which are controlled by an ultimate parent undertaking established outside the Union or the person(s) in charge of carrying out the disclosures formalities for the branch may have limited knowledge of the content of the report on income tax information prepared by the ultimate parent undertaking or may have limited ability to obtain such information or report from their ultimate parent undertaking, their responsibility to publish and make accessible the report on income tax information should be limited. In case this information or report is not provided, the subsidiary undertakings should publish and make accessible a statement as to why the report on income tax information could not be published and made accessible.

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(12) This Directive aims to enhance **corporate** transparency **and transparency** and public scrutiny on corporate income tax **information** by adapting the existing legal framework concerning the obligations imposed on companies and firms in respect of the publication of reports, for the protection of the interests of members and others, within the meaning of Article 50(2)(g) TFEU. As the Court of Justice held, in particular, in Case C-97/96 *Verband deutscher Daihatsu-Händler*¹, Article 50(2)(g) TFEU refers to the need to protect the interests of "others" generally, without distinguishing or excluding any categories falling within the ambit of that term. **Thus, the term "others" is broader than investors and creditors, and extends to other interested third parties, including competitors and the general public.** Moreover, the objective of attaining freedom of establishment, which is assigned in very broad terms to the institutions by Article 50(1) TFEU, cannot be circumscribed by the provisions of Article 50(2) TFEU. Given that this Directive does not concern the harmonisation of taxes but only obligations to publish reports on income tax information, Article 50(1) TFEU constitutes the appropriate legal basis.

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Otherwise, the text would remain as it is in the document 14038/19.

¹ Judgement of the Court of Justice of 4 December 1997, C-97/96 *Verband deutscher Daihatsu-Händler* ECLI:EU:C:1997:581