



Council of the European Union
General Secretariat

Brussels, 27 October 2017

WK 12197/2017 INIT

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NOTE

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| From: | General Secretariat of the Council |
| To: | Working Party on Company Law (CBCR) |
| N° Cion doc.: | COM (2016) 198 final |
| Subject: | 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 - Consolidated table with Delegations' contributions |

Delegations will find attached the consolidated table with contributions from delegations following up the Working party on 11 September 2017

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

Consolidated table with delegates contributions

AT, CY CZ, DE, DK, FR, IE, LV, MT, PL, RO, SE, UK

General comments

AT:

regarding ultimate parents that are not obliged to prepare consolidated financial statements, f. ex. if they are investment entities under IFRS 10.

It should be no problem: since the proposal defines the ultimate parent undertaking as the one that draws up the consolidated financial statements, the investment entity does not qualify as ultimate parent undertaking.

This seems to be also the case in DAC4: an UPE is "required to prepare" consolidated financial statements (Annex III Section I Pt. 7 a). According to Annex III Section I Pt. 7 b), there cannot be a "constituent entity" above this UPE owning interest in that UPE. But I think an investment entity does not qualify as "constituent entity", since it is not included in the consolidated financial statement of the group (Annex III Section I Pt. 5).

IE:

We remain of the view, based on the Council Legal Services Opinion dated 11 November 2016, that the Proposal should be based on Article 115 of the TFEU, not Article 50(1).

Notwithstanding this view, we make the following observations on the Proposal as reflected in the working paper (WK 10862/2017 INIT) dated 9 October 2017, discussed at the working party on 11 October 2017

PL:

Poland would also like to reaffirm its support for the EP proposal to disclose tax information for all jurisdictions separately and independently from the EU list of non-cooperative jurisdictions for tax purposes, as it is already in the case of banks.

RO:

Regarding *the safe-harbour clause* among the pending issues within the proposal of the Directive we consider that is more appropriate to provide for a two-years period to publish and make accessible the information omitted in the report on income tax information.

SE:

It is our opinion that the proposal relates to taxes and that the correct legal basis therefore is Article 115 TFEU, which requires unanimity. This view is supported by the Council Legal Service. In its written opinion the Council Legal Service states that since both the aim and the content of the proposal relate to "fiscal provisions" and since the proposal directly affects the establishment and the functioning of the internal market, the proposal must be decided with unanimity (based on Article 115 TFEU).

Impact assessment

According to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Lawmaking, the Commission may, on its own initiative or at the request of the European Parliament or the Council, supplement its own impact assessment or carry out other analyzes which it considers necessary.

Sweden considers that the Commission's impact assessment should be supplemented and that the analyzes and additions should be made by the Commission.

In our view it is essential that what is achieved within the OECD is not jeopardized, and instead, more countries should join the global standard for automatic exchange of Country-by-country Reports (BEPS Action 13). The impact of the proposed public country-by-country

reporting could have to Action 13 has to be analyzed.

It is also our opinion that the proposals impact of the competitiveness of EU-companies must be analysed. Can it be ensured that European companies are not unfairly disadvantaged when reporting requirements are imposed only on companies operating within the EU?

The risk that the proposal redistributes the tax base improperly must also be analysed by the Commission.

This analysis needs to highlight if the requirements can result in:

- that companies choose to no longer be active in the EU or that non-EU MNEs choose to establish themselves in a non-EU country instead for within the EU,
- that MNEs choose to deviate from internationally agreed transfer pricing guidelines to avoid negative publicity, or
- Countries using the information in the CBCR to adjust the transfer prices within a MNE.

In the impact assessment the Commission mentions that the proposal may lead to the reallocation of tax base between MS but there is no analysis of which MS that could gain tax revenue and which MS that could lose tax revenue by the proposal. The impact assessment should be supplemented by the Commission even in this respect.

The impact of the proposed reporting on developing countries should be analyzed. In what way have the specific conditions of developing countries been taken into account and what are the disadvantages a public country-by-country reporting may have for these countries? In this context, the choice of countries for which country-by-country reporting should take place and the choice of turnover level that defines which businesses are covered should be further highlighted. It should also be highlighted how consideration has been taken to the lower capacity these countries may have in preventing tax evasion.

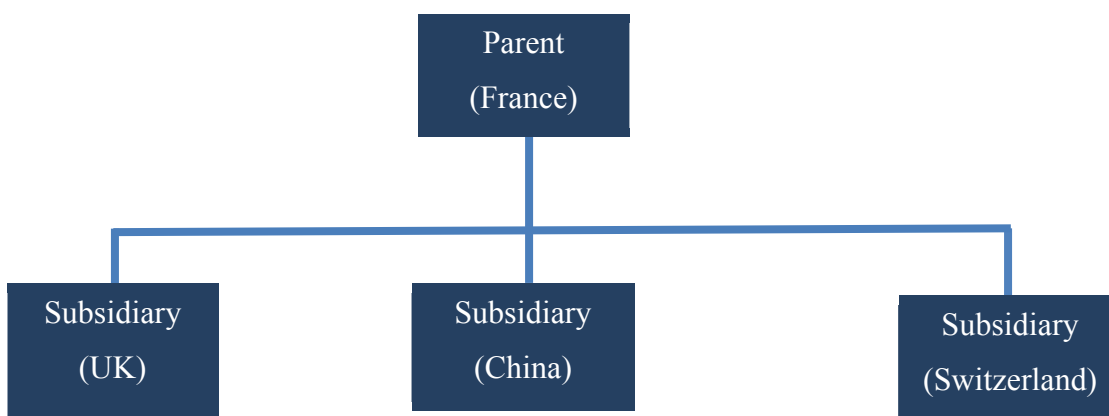
Addition of a Point

During the meeting on 11 October a room document concerning accumulated earnings was discussed suggesting the possibility to add point (h) as "*dividend paid during the financial year*". We do not think a point (h) should be added since companies no longer would be able to use DAC 4 in preparing this report/information. The ability for entities to publish their DAC 4 report is vital in reducing the administrative burden on business.

UK:

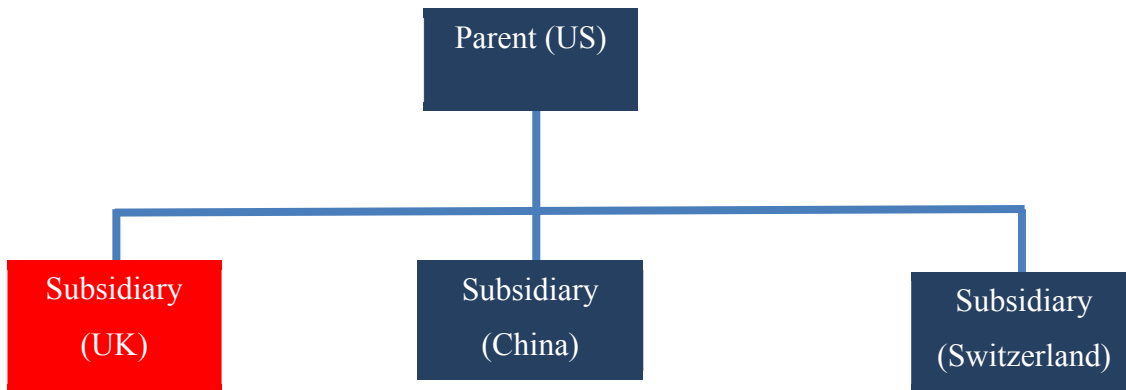
- In general, our comments are designed to maintain a balance between the information that we require, and imposing unnecessary administrative burdens.
- One point we would like to draw your attention to is the prevention of dual reporting for affiliated undertakings. Our understanding is that the proposal intends to exempt those entities that already disclose a report under CRD IV (Art 48b (2)). However, we believe the current compromise does not cover affiliated undertakings that are subject to CRD IV but have non-EU headquarters. We have provided a drafting suggestion in the attached document and I have also attached some simple diagrams to hopefully illustrate our point.
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1. EU HQ banking group



Based on the current compromise, the EU subsidiary of an EU Headquartered entity which is required to provide a CRD IV report is exempt from PCBCR requirements to prevent dual reporting.

2. Non-EU HQ banking group



However, the current compromise requires an EU subsidiary, which provides a CRD IV report, of a non-EU Headquartered entity to **also** report under PCBCR. For consistency and to prevent dual reporting such a subsidiary should also be exempt from PCBCR requirements.

Recitals

~~(1) In recent years, the challenge posed by corporate income tax avoidance has increased considerably and has become a major focus of concern within the Union and globally. The European Council in its conclusions of 18 December 2014 acknowledged the urgent need to advance efforts in the fight against tax avoidance both at global and Union level. The Commission in its communications entitled 'Commission Work Programme 2016 - No time for business as usual' and 'Commission Work Programme 2015 - A New Start' identified as a priority the need to move to a system whereby the country in which profits are generated is also the country of taxation. The Commission also identified as a priority the need to respond to our societies' call for fairness and tax transparency~~

~~(2) The European Parliament in its resolution of 16 December 2015 on bringing transparency, coordination and convergence to corporate tax policies in the Union acknowledged that increased transparency in the area of corporate taxation can improve tax collection, make the work of tax authorities more efficient and ensure increased public trust and confidence in tax systems and governments.~~

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 responsibility to contribute

DE:

The previous text of the COM proposal should not be deleted. The new text should not be inserted

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| <p><u>to the welfare of our societies, to promote a better informed public debate and to regain 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.</u></p> | |
| <p>(3) Following the European Council conclusions of 22 May 2013, a review clause was introduced in Directive 2013/34/EU of the European Parliament and of the Council requiring the Commission to consider the possibility of introducing an obligation on large undertakings of additional industry sectors to produce, on an annual basis, a country-by-country reporting taking into account the developments in the Organisation for Economic Cooperation and Development (OECD) and the results of related European initiatives.</p> | |
| <p>(4) Calling for a globally fair and modern international tax system in November 2015, the G20 endorsed the OECD 'Action Plan on Base Erosion and Profit Shifting' (BEPS) which aimed at providing governments with clear international solutions to address the gaps and mismatches in existing rules which allow corporate profits to shift to locations of no or low taxation, where no real value creation may take place. In particular, BEPS Action 13 introduces a country-by-country reporting by certain multinational undertakings to national tax authorities on a confidential basis. On 27 January 2016, the Commission adopted the 'Anti-Tax Avoidance Package'. One of the objectives of that package is to transpose into Union law, the BEPS Action 13 by amending Council Directive 2011/16/EU</p> | |
| <p>(5) Enhanced public scrutiny of corporate income taxes borne by multinational undertakings carrying out activities in the Union is an essential element to further foster corporate responsibility, to contribute to the welfare through taxes, to promote fairer tax competition within the Union through a better informed public debate and to restore public trust 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</p> | |

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| <p>(6) The public should be able to scrutinise all the activities of a group when the group has certain establishments within the Union. For groups which carry out activities within the Union only through subsidiary undertakings or branches, <u>operating subsidiaries and branches should publish and make accessible the report of the ultimate parent undertaking <u>to the extent that the requested information is available to the subsidiary or branch. If the requested information is not available the subsidiary or branch should explain in the report the reasons of this omission.</u></u> However for reasons of proportionality and effectiveness, the obligation to publish and make accessible the report should be limited to medium-sized or large subsidiaries established in the Union, or branches of a comparable size opened in a Member State. The scope of Directive 2013/34/EU should therefore be extended accordingly to branches opened, <u>and still operating,</u> in a Member State by an undertaking which is established outside the Union <u>and which has a legal form which is comparable to the types of undertakings listed in Annex I of Directive 2013/34/EU.</u></p> | |
| <p>(6a) <u>Multinational groups, and where relevant, certain non-affiliated solo undertakings, should provide the public with a report on income tax information when they exceed a certain size over a period of the last two consecutive financial years, depending on the consolidated revenue of the group or the revenue of the non-affiliated solo undertaking. Having regard to Article 2(12) of Directive 2013/34/EU, non-affiliated undertakings are intended to be standalone entities which are not part of a group. Given the wide array of accounting financial reporting frameworks with which financial statements may comply, in order to determine the scope of application, such revenue should be defined as net turnover for undertakings governed by the law of a Member State and following national financial reporting framework of a Member State or „revenue“ as defined in paragraph 2 of Article 48a for other undertakings. Article 43(2)(c) of Directive 86/635/EEC and Article 66(2) of Directive 91/674/EEC provide</u></p> | <p><i>UK:</i> We greatly appreciate the work already done to define a non-affiliated undertaking. We suggest a small change to replace “solo” with “standalone”.</p> <p>The Accounting Directive already presupposes that any operation through a branch, regardless of its location, would be consolidated into the undertaking’s audited financial statements. We believe that referring to such entities as “standalone” undertakings is the most appropriate way forward. This will ensure that the terminology is consistently interpreted by finance professionals tasked with ensuring compliance with the requirements and this would also address the concerns about inclusion of revenue from branches</p> |

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| <p><u>definitions as to the determination of the net turnover of a credit institution or of an insurance undertaking, respectively. For other undertakings, the revenue should be assessed in accordance with the financial reporting framework on the basis of which these financial statements are prepared. It should be noted that „revenue“ has different definition for purposes of content of the report.</u></p> | |
| <p>(6b) <u>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.</u></p> | |
| <p>(7) In order to avoid double reporting for the banking sector, ultimate parent undertakings <u>and non-affiliated solo undertakings</u> which are subject to Directive 2013/36/EU of the European Parliament and of the Council and which include in their report prepared in accordance with Article 89 of Directive 2013/36/EU all its activities and, <u>where appropriate,</u> all the activities of its affiliated undertakings included in the consolidated financial statements, including activities not subject to the provisions of Chapter 2 of Title 1 of Part Three of Regulation (EU) No 575/2013 of the European Parliament and of the Council, should be exempted from the reporting requirements set out in this Directive.</p> | |
| <p>(8) The report on income tax information should provide information concerning all the activities of an undertaking or of all the affiliated undertakings of a group controlled <u>consolidated</u> by an ultimate parent undertaking <u>or, depending on the circumstances, concerning all the activities of a non-affiliated solo undertaking.</u> The information should be based on the reporting specifications of BEPS' Action 13 and limited to what is necessary to enable effective public scrutiny, in order to ensure that disclosure does not give rise to disproportionate risks or disadvantages <u>for undertakings. For</u></p> | <p><u>CY:</u> Our stance has been from the beginning that this proposal should be in line with the requirements set by DAC4/BEPS 13 or even with less. The deletion of the sentence that the reporting information should be based on the reporting specifications of BEPS Action 13 is not agreeable to us. The paragraph has been altered in order to provide on the one hand the flexibility to undertakings to disclose information that are necessary to enable effective public scrutiny in order to ensure that disclosure does not give rise to disproportionate risks or disadvantages, but on the other hand, as these information are</p> |

this reason, the list of required information is exhaustive. The report should be made accessible within 12 months after the balance sheet date. Any shorter periods for the publication of financial statements should not apply with regard to the report on income tax information. The provisions of Chapter 10a of this Directive do not affect the provisions regarding annual financial statements and consolidated financial statements. The report should also include a brief description of the nature of the activities. Such description might be based on the categorisation provided for in table 2 of the Annex III of Chapter V of the OECD "Transfer Pricing Guidelines on Documentation".

not even indicatively defined, it does not give comfort that these information are at least on an equal footing with DAC4/BEPS 13.

DE:

The provisions of Chapter 10a of this Directive do not affect the provisions regarding annual financial statements and consolidated financial statements. SENTENCE SHOULD NOT BE DELETED.

It should be made clear that the new income tax report would be a new instrument and that all requirements from the existing accounting directive have to be read without reference to this new chapter. The existing sentence made this clear.

MT:

The Recital "The provisions of Chapter 10a of this Directive do not affect the provisions regarding annual financial statements and consolidated financial statements" is meant to ensure that such provisions are in no way affected and remain in force. The disclosure of taxation details being required in Chapter 10a is to be retained as separate and over and above such provisions. There should be no doubt whatsoever that this is the case and this is the reason why the Maltese Presidency had introduced this Recital.

SE:

The recital should be clear that the requirements in this proposal do not affect the requirements of annual reports or consolidated accounts. Therefore it is our view that the following deleted sentence should be reintroduced in recital 8.

"The definitions and requirements in Chapter 10a do not affect the requirements of annual reports or consolidated accounts."

(8a) **In order to avoid administrative burden, when preparing a report on income tax information in compliance with this Directive, undertakings should be entitled to prepare the information on the basis of the reporting specifications laid down in Annex III, Section III, parts B and C of Council Directive 2011/16/EU as amended. For this reason, the report should specify the reporting framework used.** The report should **might in addition** include an overall narrative providing explanations in case of material discrepancies at group level between the amounts of taxes accrued and the amounts of taxes paid, taking into account corresponding amounts concerning

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| <p>previous financial years.</p> <p>(9) In order to ensure a level of detail that enables citizens to better assess the contribution of multinational undertakings to welfare in each Member State, the information should be broken down by Member State. Moreover, information concerning the operations of multinational enterprises should also be shown with a high level of detail as regards certain third country tax jurisdictions which pose particular challenges. For all other third country operations, the information should be given in an aggregate number. Undertakings may voluntarily present more detailed information.</p> | <p>SE: We suggest that the last sentence of the recital is deleted since it is unnecessary. Companies can always publish more information than the law requires them to.</p> |
| <p>(9a) It is recognised that publicly disclosing data to be included in report on income tax information could in certain cases be seriously prejudicial to commercial position of an undertaking, since it would make it possible for competitors not subjected to similar transparency to draw significant conclusions about its current activities. Therefore, undertakings should have a possibility to defer disclosing certain information for a limited number of years, provided they clearly disclose the deferral and give a reasoned explanation for it in the report.</p> <p><i>To be read in conjunction with Article 48c (3a).</i></p> | <p>DE: for a limited number of years See below (comment on recital (12a))</p> <p>FR: For the sake of clarity of the law, there is no point in drafting propositions that permits any action that is not anyway forbidden. For this reason, we would not recommend to add this sentence: « Undertakings may voluntarily present more detailed information »</p> <p>LV: LV holds scrutiny reservation on Recital (9a).</p> |
| <p>(10) In order to strengthen responsibility vis-à-vis third parties and to ensure appropriate governance, the members of the administrative, management and supervisory bodies of the ultimate parent undertaking or non-affiliated solo undertakings which is are established within the Union and which has 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</p> | |

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| <p><u>limited ability to obtain such information or report from their ultimate parent undertaking,</u> their responsibility to publish and make accessible the report on income tax information should be limited. <u>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.</u></p> | |
| <p><u>[(11) To ensure public awareness on the compliance of the reporting obligations by the relevant undertakings,</u> that cases of non-compliance are disclosed to the public, statutory auditor(s) or audit firm(s) should check <u>state</u> whether a the report on income tax information has been submitted and presented <u>published, or not,</u> in accordance with the requirements of this Directive and made accessible on the relevant undertaking's website or on the website of an affiliated undertaking, <u>or on the website of the register, within the time limits established by this Directive. A statutory auditor or audit firm should fulfil the requirements set out in Article 48f of this Directive to the extent of the information provided by the undertaking governed by the law of a Member State and to the extent of the information being readily available to the statutory auditor or audit firm.]</u></p> <p><i>Proposed to omit; See Article 48f</i></p> | <p>LV: As LV does not see the added value of the auditors' verification that the report is published, and it seems that an entity would be more informed on the groups' structure than an auditor, we would be in favour of deleting Recital (11)</p> |
| <p>(12) This Directive aims to enhance transparency and public scrutiny on corporate income tax 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, 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. 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</p> | |

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| <p>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.</p> | |
| <p>(12a) <u>To ensure the full functioning of the internal market and a level playing field between the European Union and third-country multinational enterprises, the Commission should consider issuing recommendations on how to ensure that global dis-aggregation may be achieved particularly in international fora.</u></p> | <p>CY: We agree with the position of DE to delete this recital "To ensure the full functioning of the internal market and a level playing field between the European Union and third-country multinational enterprises, the Commission should consider issuing recommendations on how to ensure that global dis-aggregation may be achieved particularly in international fora".</p> <p>DE: Remark: This sentence would mean that the EU should go for a global CBCR. Such an approach may not reflect the current positions of most MS in the Working Group. Therefore, the sentence should be deleted</p> <p>SE: We do not see necessity for this recital and suggest that it is deleted.</p> |
| <p>(13) In order to determine certain tax jurisdictions for which a high level of detail should be shown, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of drawing up a common Union list of these tax jurisdictions. This list should be drawn up on the basis of certain criteria, identified on the basis of Annex 1 of the Communication from the Commission to the European Parliament and Council on an External Strategy for Effective Taxation (COM(2016) 24 final). It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making as approved by the European Parliament, the Council and the Commission and pending formal signature. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.</p> | |
| <p>(14) Since the objective of this Directive cannot be sufficiently achieved by the Member States but can rather, by reason of</p> | |

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| <p>its effect, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.</p> | |
| <p>(15) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.</p> | |
| <p>(16) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.</p> | |
| <p>(17) Directive 2013/34/EU should therefore be amended accordingly,</p> | |
| <p>HAVE ADOPTED THIS DIRECTIVE:</p> <p style="text-align: center;"><i>Article 1</i> Amendments to Directive 2013/34/EU</p> <p>Directive 2013/34/EU is amended as follows:</p> | |
| <p>(1) in Article 1, the following paragraph 1a is inserted:</p> <p>'1a. The coordination measures prescribed by Articles 2, 48a to 48ee and 51 shall also apply to the laws, regulations and administrative provisions of the Member States relating to branches opened and still operated in in a Member State by an undertaking which is not governed by the law of a Member State but which is of a legal form comparable with the types of undertakings listed in Annex I.' Article 2 shall apply to these branches to the extent that Articles 48a to 48e and 51 are applicable to such branches'</p> | <p>UK: We would like to be certain about what is meant by the phrase 'and still operating' and suggest that the Presidency or EU Commission might please clarify this at the next working party</p> |
| <p>(2) the following Chapter 10a is inserted:</p> <p style="text-align: center;">'Chapter 10a Report on Income tax information</p> | |
| <p style="text-align: center;"><i>Article 48a</i> Definitions relating to reporting on income tax information</p> | |
| <p>1. For the purposes of this Chapter, the following definitions shall apply:</p> | |

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| (1) 'ultimate parent undertaking' means an undertaking which draws up the consolidated financial statements of the largest body of undertakings; | |
| (2) 'consolidated financial statements' means the financial statements prepared by a parent undertaking of a group in which the assets, liabilities, equity, income and expenses are presented as those of a single economic entity; | |
| (3) 'tax jurisdiction' means a State as well as a non-State jurisdiction which has fiscal autonomy in respect of corporate income tax. | |
| <u>(4) 'solo undertaking' means an undertaking which is not part of any group WITHIN THE MEANING OF ARTICLE 2 PARA. 11.</u> | <p><i>CZ:</i> It is proposed to try and to solve difficulties around understanding of the term "non-affiliated undertakings" introducing a proper definition of "solo undertaking" in Article 48a (1).</p> <p>Comment: We do not agree with the new (proposed) definition. We recommend using the terminology of the Accounting Directive.</p> <p><i>DE:</i> For clarification a reference to the existing definitions of the Accounting Directive should be introduced.</p> |
| <u>2. For the purposes of Article 48b, the following definition shall apply: 'revenue' has the same meaning as:</u> | |
| <u>(1) the 'net turnover', for undertakings governed by the law of a Member State, and ARE NOR REQUIRED TO APPLY not applying international accounting standards adopted on the basis of Regulation (EC) No 1606/2002, or</u> | <p><i>DE:</i> ARE NOR REQUIRED TO APPLY not applying A REFERENCE TO A NATIONAL LEGAL REQUIREMENT TO APPLY IFRS IS NECESSARY. The newly added reference to IFRS-applying undertakings may be useful for non-PIE-undertakings which are required by national law to apply IFRS. In Germany, all companies which are non-PIEs, have to prepare consolidated financial statements based on national GAAP (based on the Accounting Directive).. However they may choose to fulfil their publication requirements by publishing consolidated financial statements based on IFRS. For companies using this option it would be unclear whether they fall under (1) or (2) of this para.</p> |
| <u>(2) the 'revenue' as defined by or within the meaning of the financial reporting framework on the basis of which financial statements are prepared, for other undertakings.</u> | |
| <p><i>Article 48b</i> Undertakings and branches required to report on income tax information</p> | |

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| <p>1. Member States shall require ultimate parent undertakings governed by their national laws <u>which on their balance sheet date exceeded for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in their consolidated financial statements</u> and having a consolidated net turnover exceeding EUR 750 000 000 as well as undertakings governed by their national laws that are not affiliated undertakings and having a net turnover exceeding EUR 750 000 000 to draw up, and publish <u>and make accessible</u> a report on income tax information <u>as regards the later of the last two consecutive financial years.</u> on an annual basis.</p> <p><u>Member States shall require undertakings governed by their national laws that are not affiliated solo undertakings and which on their balance sheet date exceeded for each of the last two consecutive financial years a total revenue of EUR 750 000 000 as reflected in their annual financial statements to draw up, publish and make accessible a report on income tax information as regards the later of the last two consecutive financial years.</u></p> <p>The report on income tax information shall be made accessible to the public on the website of the undertaking on the date of its publication.</p> | |
| <p><u>1a. Member States shall not apply the rules set out in paragraph 1 to non-affiliated solo undertakings, ultimate parent undertakings and their affiliated undertakings where such undertakings, including their branches, are established have a legal presence or a fixed place of business or a permanent business activity only within the territory of one single Member State and in no other tax jurisdiction.</u></p> | <p>DE: <u>have a legal presence or a fixed place of business or a permanent business activity</u></p> <p>We still wonder whether the current wording is identical with the DAK-IV-concept and whether we should not also refer to "establishment"</p> <p>FR: France can accept the amendment replacing « <i>are established</i> » by « <i>have a legal presence or a fixed place of business or a permanent business activity</i> » but there are difficulties in interpreting precisely what is the scope of a « <i>legal presence</i> ». Specification is needed.</p> <p>SE: The meaning of several terms used in this paragraph such as "legal presence", "fixed</p> |

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| <p>2. Member States shall not apply the rules set out in paragraph 1 of this Article to <u>non-affiliated solo undertakings and</u> ultimate parent undertakings where such undertakings or their affiliated undertakings <u>disclose a report in accordance with</u> are subject to Article 89 of Directive 2013/36/EU of the European Parliament and of the Council and encompass, in a country-by-country <u>that</u> report, information on <u>all their activities and</u> all the activities of all the affiliated undertakings included in the consolidated financial statement of those ultimate parent undertakings.</p> | <p><i>place of business” and “permanent business activity” are unclear to us.</i></p> <p>UK: Our understanding is that the intention is to exempt those entities that already disclose a report under CRD IV. However, we believe the current compromise does not cover affiliated undertakings of non-EU Headquartered entities that are subject to CRD IV.</p> <p>For example, consider a UK subsidiary of a US banking group that is reporting under CRD IV. Based on the drafting of the existing proposal, the subsidiary would be required to publish a report under CRD IV and a report under Article 48b (3). i.e. a dual reporting requirement that the Directive seeks to avoid in other instances. We suggest the following addition to Article 48b (2) to address this.</p> <p>Where an affiliated undertaking is required to publish a report under Article 48b (3), Member States shall not apply the rules set out in paragraph 1 of this article if the affiliated undertaking discloses a report in accordance with Article 89 of Directive 2013/36/EU.</p> |
| <p>3. Member States shall require the medium-sized and large subsidiary undertakings referred to in Article 3(3) and (4) <u>that</u> which are governed by their national laws and controlled by an ultimate parent undertaking which <u>on its balance sheet date exceeded for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements</u> has a consolidated net turnover exceeding EUR 750 000 000 and which is not governed by the law of a Member State, to publish <u>and make accessible</u> the a report on income tax information of that ultimate parent undertaking on an annual basis <u>as regards the later of the last two consecutive financial years, to the extent that the this information or report is available to the subsidiary undertaking. When this information or report is not available, the subsidiary undertaking shall request its ultimate parent undertaking not governed by the law of a Member State to provide it with all information required to enable it to meet its obligation.</u></p> | |

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| <p><u>In case this information or report is not provided, the subsidiary undertakings shall publish and make accessible a statement as to why the report on income tax information could not be published and made accessible.</u></p> | |
| <p><u>3a. If such a subsidiary undertaking that was required to publish a statement as referred to in paragraph 3 SUBPARAGRAPH 2 exceeds the threshold set out in paragraph 1 for each of the last two consecutive financial years, it shall also publish its own report on income tax information as provided for under paragraph 1 and 1a.</u></p> <p>The report on income tax information shall be made accessible to the public on the date of its publication on the website of the subsidiary undertaking or on the website of an affiliated undertaking.</p> | <p><i>DE:</i> Introduce precise reference: to <u>SUBPARAGRAPH 2</u></p> <p><i>PL:</i> – as indicated at the meeting the wording of the requirement should be aligned with the same requirement in other part of the directive by adding the following words: „(...) it shall also <u>draw up, publish and make accessible</u>“. Moreover during the meeting PREZ clarified that the new par. 3a aims only to cover the situation in which the ultimate parent entity fails to provide its tax CBCR report and in this case the subsidiary exceeding itself the 750 million EUR threshold should be obliged to prepare its own report, and that PREZ does not aim to duplicate the reporting obligations. However, we would like to draw the PREZ attention to the fact, that this aim is not reflected in the current wording – in our opinion the paragraph reads as it would be an additional obligation for the subsidiary also when the subsidiary will be able to provide the tax CBCR report prepared by its ultimate parent: <i>Current wording:</i> <i>3a. If subsidiary undertaking that was required to publish a statement as referred to in par. 3 exceeds the threshold set out in paragraph 1 for each of the last two consecutive financial years, it shall also publish its own report on income tax information as provided for under paragraph 1 and 1a.</i></p> <p>In our view this paragraph needs further clarification as regards the scope of subsidiaries covered.</p> |
| <p>4. Member States shall require branches which are opened in their territories <u>and still operated</u> by an undertaking which is not governed by the law of a Member State to publish <u>and make accessible</u> on an annual basis the <u>a</u> report on income tax information of the ultimate parent undertaking <u>or the non-affiliated solo undertaking</u> referred to in point (a) of <u>this</u> paragraph 5 of this Article <u>as regards the later of the last two consecutive financial years, to</u></p> | |

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| <p><u>the extent that the this information or report is available to the person(s) designated to carry out the disclosure formalities referred to in Article 48e(2). When the this information or report is not available, such person(s) shall request the ultimate parent undertaking not governed by the law of a Member State or the non-affiliated solo undertaking referred to in point (a) of this paragraph to provide all information required to meet their obligations. In case the this information or report is not provided, the branches shall publish and make accessible a statement as to why the report on income tax information could not be published and made accessible report shall contain an explanation as to why this is the case.</u></p> <p>The report on income tax information shall be made accessible to the public on the date of its publication on the website of the branch or on the website of an affiliated undertaking.</p> <p>Member States shall not apply the first subparagraph of this paragraph only to branches which have net turnover did not exceeding at least for each of the last two consecutive financial years the net turnover threshold defined by the law of each Member State pursuant to Article 3(2).</p> | |
| <p>5= Member States shall apply the rules set out in this paragraph 4 only to a branch only where the following criteria are met:</p> | |
| <p>(a) the undertaking that which opened and still operates the branch is either an affiliated undertaking of a group which is controlled by an whose ultimate parent undertaking is not governed by the law of a Member State and which on its balance sheet date exceeded for each of the last two consecutive financial years a total consolidated revenue of EUR 750 000 000 as reflected in its consolidated financial statements has a consolidated net turnover exceeding or an undertaking that is not an affiliated undertaking and which has a net turnover exceeding on its balance sheet date exceeded for each of the last two consecutive financial years a total revenue of EUR 750 000 000 as reflected in its financial</p> | |

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| <p>statements; and</p> <p>(b) the ultimate parent undertaking referred to in point (a) does not have a medium-sized or large subsidiary undertaking as referred to in paragraph 3.</p> | |
| <p>6. Member States shall not apply the rules set out in paragraphs 3 and 4 of this Article where a report on income tax information drawn up in accordance with consistently with Article 48c and:</p> | |
| <p>(a) is made accessible;</p> <p>(i) to the public on the website of the ultimate parent undertaking not governed by the law of a Member State or of the non-affiliated solo undertaking not governed by the law of a Member State;</p> <p>(ii) in at least one of the official languages of the Union;</p> <p>(iii) within a reasonable period of time, which shall not exceed 12 months after the balance sheet date of the financial year for which the report is drawn up; and</p> <p>(b) where the report identifies the name and the registered office of the a single subsidiary undertaking or the name and the address of the a single branch governed by the law of a Member State which has published the a report in accordance with Article 48d(1).</p> | |
| <p>7. Without prejudice to paragraph 1a of this Article, Member States shall may require subsidiaries and or branches not subject to the provisions of paragraphs 3 and 4 but being controlled by one ultimate parent undertaking to publish and make accessible the a report on income tax information where the sum of their revenues as reflected on their financial statements exceeds EUR 750 000 000 for two consecutive financial years. such subsidiaries or branches have been established for the purpose of avoiding the reporting requirements set out in this Chapter.</p> | <p>DE: WE ARE AGAINST THE NEW WORDING. The new text introduces a totally new element into the text which has not been discussed before. In addition, there is no need to introduce such a member state option. All member states may introduce new requirements which go way beyond the Directive and e.g. below the thresholds and scope set in the new Directive. It would be very strange if just one case is mentioned. The intention of the Commission's proposal was very different from what is not introduced now.</p> <p>DK: Before the re-draft performed by the Presidency this para was drafted as a circumvention clause which should secure that subsidiaries and branches which did not exceed the thresholds would be required to publish a CBC report anyway if the subsidiaries or branches were intentionally divided into legal entities of a size not exceeding the set thresholds. The Presidency has explained that the reason</p> |

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| | <p>for the proposed re-draft is that the provision was vague and very difficult to enforce. Denmark agrees that it is clearly difficult for a competent authority to prove that a subsidiary or a branch is established with the purpose to avoid a reporting obligation. We are not absolutely sure that we understand the range of the Presidency proposal, though and we tend to disagree. It seems the proposal implies that in a group the revenue of each subsidiary and each branch should be merged for the purpose of deciding whether the subsidiary respectively the branch is covered by the CBC reporting obligation. In our view this implies an extension of the scope of the Directive proposal to an unknown extent which we do not support. Furthermore the proposed re-draft means that subsidiaries and branches which for perfectly legitimate reasons happen to have a revenue not exceeding the set thresholds might be included only because the merged revenues of the subsidiaries and branches coincidentally exceeds the thresholds.</p> <p>PL: in our view the wording is not clear – during the meeting PREZ clarified that it will be a Member State option and the subsidiaries and branches (not subject to the provisions of paragraph 3 and 4 but being controlled by one ultimate parent undertaking) covered are only those from one Member State. However it is still not clear to us who should be responsible for the preparation and publication of such a tax CBCR report? Furthermore, even in case those subsidiaries and branches (covered by this paragraph) are located in one Member State and have one ultimate parent – they may be still at different levels of a multiple structured group with a few parent undertakings and one ultimate parent undertaking. When using this option would it be up to Member State to decide which of those subsidiaries and/or branches would have to draw up, publish and make accessible the tax CBCR report?</p> |
| <p><i>Article 48c</i> Content of the report on income tax information</p> | |
| <p>The report on income tax information shall include information relating to all the activities of the non-affiliated solo undertaking and or the ultimate parent undertaking, including activities those of all affiliated undertakings consolidated in the financial statement in respect of the relevant financial year.</p> | |
| <p>2. The information referred to in paragraph 1 shall be as follows comprise the following:</p> | |

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| <u>(-a) the name of the ultimate parent undertaking or the non-affiliated solo undertaking, financial year concerned and the currency used;</u> | |
| (a) a brief description of the nature of the activities; | |
| (b) the number of employees <u>which is the average number of employees during the financial year;</u> | |
| (c) the <u>revenues which are:</u> amount of the net turnover, which includes the turnover made with related parties; | |
| <u>(i) the sum of the net turnover, other operating income, income from participating interests, excluding dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income as listed in Annexes V and VI of this Directive, or</u> | |
| <u>(ii) the income as defined by or within the meaning of the financial reporting framework on the basis of which financial statements are prepared excluding value adjustments and dividends received from affiliated undertakings;</u> | |
| (d) the amount of profit or loss before income tax; | |
| (e) the amount of income tax accrued <u>in the</u> (current year); <u>during the relevant financial year</u> which is the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction; | |
| (f) the amount of income tax paid <u>on cash basis</u> 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; and | |
| (g) the amount of accumulated earnings <u>at the end of the relevant financial year.</u> | <p>CZ: Two options are proposed:</p> <ul style="list-style-type: none"> • First option: "accumulated earnings at the end of the relevant financial year"; • Second option: "accumulated earnings during the relevant financial year". <p>Comment: We support the first option, i.e. „ the amount of accumulated earnings at the end of the relevant financial year“.</p> <p>FR: France supports the first option: « accumulated earnings at the end of the relevant financial year »</p> |

IE:

The term "accumulated earnings at the end of the relevant financial year" may not be sufficiently clear. The text tells us the time up to which the earnings were accumulated but tells us nothing about the time over which they were accumulated. In the context of the divergent views expressed on this subject and as a matter of semantics, the "accumulated earnings at the end of the financial year" could be taken to mean earnings accumulated in the course of the relevant financial year or earnings accumulated over a longer period (over the life of the entity). We suggest referring to "accumulated *retained* earnings" for greater clarity, though this would not resolve the matter. This is an area where any ambiguity or lack of clarity may have significant unintended consequences.

Our understanding of the concept of accumulated earnings, as used in BEPS 13, DAC IV and more generally, is that it relates to earnings accumulated (and not distributed by way of dividend or otherwise) over the life of the reporting entity since its inception, up to the most recent balance sheet date. In this regard, the interaction of Article 48c(2)(g) and 2a may be of importance.

Although the OECD does not define "accumulated earnings", its inclusion in the denominator of the calculations of pre-tax and post-tax return on equity in paragraph 48 of the OECD's *Handbook on Effective Tax Risk Assessment* makes it clear beyond doubt that the OECD considers that the amount comes from the balance sheet.

With respect to Article 48c(2)(g), our preference is to align the provision with the intention of BEPS 13. That said, for comparability purposes we need to choose one or the other of the approaches set out in the Presidency's room document of 11 November 2017 and we will accept whichever gains support in Council provided that the nature of the chosen approach is clear in the text.

MT:

the Chairman of the Maltese Accountancy Board takes the following view:

*the issue is how to define "accumulated earnings" (AR) . This being so, on behalf of the Accountancy Board, I maintain that the definition of AR as "The sum of the profit brought forward which was not decided for the distribution to members as of **the end** of the relative financial year and the profit for*

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| | <p><i>that financial year which was not distributed [at the end of the financial year here being understood], is an accurate unmistakable definition unlike that proposed. Defining AR "the amount of accumulated earnings at the end of the relevant financial year" is not really a definition at all, but practically an unexplained restatement or, may I claim, circular reasoning.</i></p> <p><i>Furthermore, I do not subscribe to the argument that the current definition (with its underlining of "at the end" and "profits") is in itself ambiguous. In my view, the definition is only clearly referring to the Estonia-claimed first option of "accumulated earnings <u>at the end</u> of the financial year", specifying that the amount brought forward from that of previous years is also to be included with that at the end of the current year as long as it has not been decided for distribution during the current year. It therefore has the advantage that it is directly available also from the balance sheet. I cannot subscribe to the present definition being attributed the alternative interpretation of "accumulated earnings <u>during</u> the financial Year" and, since it clearly refers to undistributed <u>profits</u> neither to the extension of the argument that this could be interpreted as "total comprehensive income minus dividend paid".</i></p> <p><i>I do agree with the recommended addition of point (h) on "dividends paid during the year" as this is an important disclosed component in all financial statements already required in most legislatures.</i></p> |
| <p><u>For the purposes of point (c) of the first subparagraph the revenues shall include transactions with related parties.</u></p> | |
| <p>For the purposes of point (e) of the first subparagraph the current tax expense shall relate only to the activities of an undertaking in the current financial year and shall not include deferred taxes or provisions for uncertain tax liabilities.</p> | |
| <p><u>For the purposes of point (f) of the first subparagraph taxes paid shall include withholding taxes paid by other undertakings with respect to payments to undertakings and branches within a group.</u></p> | |
| <p><u>For the purposes of point (g) of the first subparagraph the accumulated earnings shall mean the sum of the profit brought forward which was not decided for distribution to members as of the end of the relevant financial year and the profit</u></p> | <p><i>DE:</i> For a better understanding the paragraph should not be deleted.</p> |

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| <p>for that financial year which was not distributed. With regard to branches, accumulated earnings shall be reported by the undertaking which opened a branch.</p> | |
| <p>2a. Member States shall permit the information listed in paragraph 2 to correspond to the reporting specifications referred to in Annex III, Section III, Parts B and C of Directive 2011/16/EU.</p> | |
| <p>3. The report shall specify whether it was prepared in accordance with paragraph 2 or 2a. (moved to paragraph 8)</p> <p>The report shall present the information referred to in paragraph 2 or 2a separately for each Member State. Where a Member State comprises several tax jurisdictions, the information shall be combined at Member State level.</p> <p>The report shall also present the information referred to in paragraph 2 or 2a of this Article separately for each tax jurisdiction which, at the end of the previous financial year, is listed in the common EU non list of non-cooperative jurisdictions for tax purposes certain tax jurisdictions drawn up pursuant to Article 48g, unless the report explicitly confirms, subject to the responsibility referred to in Article 48e below, that the affiliated undertakings of a group governed by the laws of such tax jurisdiction do not engage directly in transactions with any affiliated undertaking of the same group governed by the laws of any Member State.</p> <p>The report shall present the information referred to in paragraph 2 or 2a on an aggregated basis for other tax jurisdictions.</p> <p>The information shall be attributed to each relevant tax jurisdiction on the basis of the a legal presence, the existence of a fixed place of business or of a permanent business activity which, arising from the activities of the group or non-affiliated solo undertaking, can give rise to income tax liability in that tax jurisdiction.</p> <p>Where the activities of several affiliated undertakings can give rise to a tax liability within a single tax jurisdiction, the information attributed to that tax jurisdiction shall represent the sum of the information relating to such activities of each affiliated undertaking and their branches in that tax jurisdiction. Information on any particular activity shall not be attributed simultaneously to more than one tax jurisdiction.</p> | <p>CY: : "The report shall also present the information referred to in paragraph 2 or 2a of this Article separately for each tax jurisdiction which, at the end of the previous financial year, is listed in the common EU Union list of non-cooperative jurisdictions for tax purposes" We are in full agreement with the positions expressed by UK, namely that the provision under this paragraph constitutes a defensive measure. It should be reminded that discussions are currently taking place in the CoCWG which have not yet resulted in a common approach.</p> <p>IE: Third subparagraph: The introduction of "a legal presence" is welcome, useful and important as it recognises that a tax liability may well arise from factors other than the existence of a fixed place of business or of a permanent business activity (notably, on being "resident" within the meaning of Article 4 of the OECD Model Tax Convention). In our view the subparagraph as a whole may be open to varying interpretations.</p> <p>SE: As mentioned regarding Article 48b.1a the meaning of the terms "<i>legal presence</i>", "<i>fixed place of business</i>" and "<i>permanent business activity</i>" are unclear. It is also unclear what is meant by "<i>can give rise to income tax liability</i>". As we have pointed out in previous written comments, the wording suggests that it refers to something different than a factual tax liability. In which situations is this applicable?</p> <p>UK: We are concerned that these provisions constitute a defensive measure. Discussions are taking place in the EU Code of Conduct Group to consider the use of defensive measures, and how those measures could be tailored towards the different reasons for a country being listed. That discussion has not</p> |

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| | <p>yet resulted in any agreed approach. Therefore, it is inappropriate to include a defensive measure prior to agreement or even comprehensive discussion in the forum with primary responsibility for this issue. <u>We suggest deleting.</u></p> |
| <p><u>3a. Member States may allow certain information required to be disclosed by paragraphs 2 and 3 of this Article to be omitted when its nature is such that its disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates, including when only a single affiliated undertaking operates in a tax jurisdiction which is not listed in the EU list of non-cooperative jurisdictions for tax purposes. Any such omission shall be subject to prior administrative or judicial authorisation for a period of one year, which may be renewed, and disclosed in the report together with reasoned explanation regarding its causes. Any information thus omitted shall be made public in a later report on income tax information within no more than four years from the date of its original omission. Information pertaining to tax jurisdictions listed in the EU list of non-cooperative jurisdictions for tax purposes may never be omitted. The report shall include a detailed account of the basis for any exemption granted under this paragraph.</u></p> | <p><u>CZ:</u> It is proposed system of disclosure of sensitive information and to revert back to a "comply or explain" system.</p> <p><u>Comment:</u> We support EE PRES proposal, i.e.: "Member States may allow information required to be disclosed by paragraphs 2 and 3 of this Article to be omitted when its disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates. Any such omission shall be disclosed in the report together with reasoned explanation regarding its causes. Any information thus omitted shall be made public in a later report on income tax information within no more than four years from the date of its original omission. Information pertaining to tax jurisdictions listed in the EU list of non-cooperative jurisdictions for tax purposes may never be omitted".</p> <p><u>DE:</u> <u>within no more than four years from the date of its original omission</u> Such a reference to a strict period may not cover all situations possible (cf. the concept of the CSR-Directive which introduced Art. 19a para. 1 subpara. 4 of the Accounting Directive)</p> <p><u>DK:</u> We support the proposed re-draft of the safe-harbor clause as we believe it should be the decision of the undertaking whether or not the disclosure of certain information would be seriously prejudicial to the undertaking. We support that the undertaking must disclose the fact that they have omitted information and the reasons for the omission. Finally, we support that omitted information must be disclosed no later than 4 years after the information has been omitted as we believe that sensible information would – in the vast majority of cases – no longer not be sensible after 4 years.</p> <p><u>FR:</u> Even though we appreciate the efforts made to reach a compromise that do not expose</p> |

companies to unnecessary burden, we cannot accept a limitation in the duration of the exemption because the notion of duration has no links with the cause of the exemption (that could last longer than four years). For example, private-public partnerships (PPP) on water distribution can last more than 10 years. Under the proposed amendment, a company only running a unique PPP in a MS would have to disclose retroactively all the omitted information required by the directive after four years. As a consequence, such company would be forced to reveal information that can be sorted out in order to reconstruct the commercial margins and then give an undeserved competitive edge to its competitors (that can be from third countries as well as from MS) and to commercial counterparts seeking commercial advantage. The flaw in the amendment is not acceptable. It would have the unwanted effect of hindering EU companies in crucial sectors such as utilities and infrastructure. Also, it might be in conflict with the protection for legitimate business interests provided for in Article 16 of the EU Charter of Fundamental Rights that guarantees a company's "Freedom to conduct a business in accordance with Community law and national laws".

France is supportive of any clause that is proportionate and balanced, which appears to be the case:

- proportionate: the exemption is not applicable to non-cooperative jurisdiction.
- balanced: if a company seeking the protection of the safe harbor clause provides questionable explanations for not publishing the required information, stakeholders are properly empowered to engage in a dialogue with the company as, pursuant to Article 48e, members of the administrative, management and supervisory bodies have collective responsibility for ensuring that the report on income tax information is drawn up, published and made accessible in accordance with Articles 48b, 48c and 48d.

As a consequence, the following amendment is suggested:

Member States may allow information required to be disclosed by paragraphs 2 and 3 of this Article to be omitted when its disclosure would be seriously prejudicial to the commercial position of

the undertakings to which it relates. Any such omission shall be disclosed in the report together with reasoned explanation regarding its causes. Information pertaining to tax jurisdictions listed in the EU list of non-cooperative jurisdictions for tax purposes may never be omitted.

LV:

LV holds scrutiny reservation on Article 48c(3a).

PL:

we do not support such a clause as the intention of the directive is to cut the aggressive tax planning and in our view such an option for undertakings will weaken this legislative proposal. Moreover disclosing omitted information after few years will have almost no informative value for the users of tax CBCR reports and for the public at large. In our view as it is an option for Member States it might create practical problems in its application because the ultimate parent will be allowed to omit information in one Member State whereas in another Member State not – what if the ultimate parent undertaking would like to omit information in both cases – two subsidiaries from different Member States and only one of those Member States would allow the omission? The wording of the option is not clear whether it allows for omission in a particular Member State only in case of undertakings located in that Member State or in the case of any undertaking being in the group (even multi-level group)?

SE:

According to WK 10862/2107 the Presidents opinion is that no ex ante or ex post permission or authorization from MS or COM should be required.

In the first sentence is worded as “Member States may allow...”. We suggest that the sentence is rephrased to reflect that no permission or authorization should be needed. Our drafting suggestion is: *“Information otherwise required to be disclosed by paragraphs 2 and 3 of this Article may be omitted when its disclosure would be seriously prejudicial to the commercial position of the undertakings to which it relates.”*

Furthermore, in our view the requirement to publish omitted information in a later report could force companies to reveal information that could be prejudicial to their commercial position. It could lead to the disclosure of

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| | information about intellectual property and business secrets and could also force companies to disclose information concerning transfer pricing arrangements. Therefore the second last sentence should be deleted. We are still analysing the last sentence in this paragraph since the work on a common EU-list is not finalised. |
| 4. The report shall may include, where applicable at group level, an overall narrative providing explanations on material discrepancies between the amounts disclosed pursuant to points (e) and (f) of paragraph 2, if any, taking into account if appropriate corresponding amounts concerning previous financial years. | |
| 5. The report on income tax information shall be published and made accessible on the website in at least one of the official languages of the Union. | |
| 6. The currency used in the report on income tax information shall be the currency in which the consolidated financial statements of the ultimate parent undertaking or the annual financial statements of the non-affiliated solo undertaking are presented. Member States shall not require this report to be published in a different currency than the currency used in the financial statements. However, in the case mentioned in the second subparagraph of Article 48b(3), the subsidiary undertaking shall publish the report in the currency in which it publishes its annual financial statements. | |
| 7. Where Member States have not adopted the euro, the threshold referred to in Article 48b(1) shall may be converted into the national currency, by Such conversion must applying the exchange rate as at <i>[Publications Office- set the date = the date of the entry in force of this Directive]</i> published in the Official Journal of the European Union and by may increase increasing or decrease the thresholds decreasing it by not more than 5 % in order to produce a round sum in the national currencies. The thresholds referred to in Article 48b(3) and (4) shall be converted to an equivalent amount in the national currency of any relevant third countries by applying the exchange rate as at <i>[Publications Office - set the date = the date of the entry in force of this Directive]</i> , rounded off to the nearest thousand. | |
| 8. The report shall specify whether it was prepared in accordance with paragraph 2 or 2a of this Article. <i>(moved from paragraph 3)</i> | |
| Article 48d | |

| Publication and Accessibility | |
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| <p>1. The report on income tax information or the statement mentioned in Article 48b shall be published within 12 months after the balance sheet date of the financial year for which the report is drawn up as laid down by the laws of each Member State in accordance with Chapter 2 of Directive 2009/101/EC, together with documents referred to in Article 30(1) of this Directive and where relevant, with the accounting documents referred to in in accordance with Article 7 9 of Council Directive 89/666/EEC.</p> | |
| <p>1a. The report or the statement published in accordance with paragraph 1 shall be made accessible to the public within 12 months after the balance sheet date of the financial year for which the report is drawn up: (a) on the website of the undertaking when Article 48b(1) applies, or (b) on the website of the subsidiary undertaking or on the website of an affiliated undertaking when Article 48b(3) applies, or (c) on the website of the branch or on the website of the undertaking which opened the branch or on the website of an affiliated undertaking when Article 48b(4) applies.</p> | |
| <p>1b. Member States may exempt undertakings to apply from applying the rules set out in paragraph 1a of this Article where the report published in accordance with paragraph 1 is simultaneously made accessible to the public on the website of the register referred to in Article 3(1) of Directive 2009/101/EC, free of charge to any third party located within the Union. The website of the undertakings and branches as referred to in paragraph 1a shall contain information on the exemption and the reference to the website of the relevant register.</p> | |
| <p>2. The report referred to in Article 48b(1), (3), (4) and (6) shall remain accessible on the website for a minimum of five consecutive years.</p> | <p>DK: (1) The report referred to in Article 48b(1), (3), (4) and (6) shall remain accessible on the website, cf. paragraph 1a or on the website of the register mentioned cf. paragraph 1b for a minimum of five consecutive years.</p> |
| <p><i>Article 48e</i> Responsibility for drawing up, publishing and making accessible the report on income tax information</p> | |
| <p>1. Member States shall ensure that the members of the administrative, management and supervisory bodies of the ultimate parent undertaking or the non-affiliated solo</p> | <p>DK: the responsibility of the management of subsidiary undertakings <i>exceeding the net turnover threshold of EUR 750 000 000</i> is</p> |

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| <p>undertakings referred to in Article 48b(1), or the subsidiary undertaking exceeding for each of the last two consecutive financial years EUR 750 000 000 of total consolidated revenue as referred to in Article 48b(3a), acting within the competences assigned to them under national law, have collective responsibility for ensuring that the report on income tax information is drawn up, published and made accessible in accordance with Articles 48b, 48c and 48d.</p> | <p>regulated. In our understanding Article 48e(2), should therefor only regulate the responsibility of the management of subsidiary undertakings <i>not exceeding the net turnover threshold of EUR 750 000 000</i> (and branches). We believe this needs to be clarified in Article 48e(2), which refers only to 'subsidiary undertakings referred to in Article 48b(3). Article 48b(3) regulates both subsidiary undertakings below and above the net turnover threshold.</p> |
| <p>2. Member States shall ensure that the members of the administrative, management and supervisory bodies of the subsidiary undertakings referred to in Article 48b(3) of this Directive and the person(s) designated to carry out the disclosure formalities provided for in Article 13 of Directive 89/666/EEC for the branch referred to in Article 48b(4) of this Directive, acting within the competences assigned to them by national law, have collective responsibility for ensuring that, to the best of their knowledge and ability, the report on income tax information is drawn up consistently with Article 48c, is published and made accessible in accordance with Articles 48b, 48c and 48d.</p> | |
| <p>[Article 48f Independent check <u>Statement by statutory auditor</u></p> | |
| <p>Member States shall ensure that, where the financial statements of an affiliated undertaking governed by the law of a Member State referred to in Article 48b(1), (3) and (6)(b) are required to be audited by one or more statutory auditor(s) or audit firm(s) pursuant to Article 34(1), the statutory auditor(s) or audit firm(s) also check state(s) in the next audit report after publication or, if applicable after the expiration of the time limit for publication whether, as of the date of the audit report, the a report on income tax information has been provided and made accessible in accordance with referred to in Articles 48b, 48c and 48d has been published. The statutory auditor(s) or audit firm(s) shall indicate in the audit report if the report on income tax information has not been provided or and made accessible or not, in accordance with these Articles 48b and 48d. <i>Proposed to omit.</i></p> | <p>CZ: It is proposed to delete Article 48f or to submit it as an option for a Member State and to modify corresponding Recital (11). Comment: We support deleting Article 48f. We can agree with the amendment to Article 48f to option for Member State, too.</p> <p>DK: The Presidency has proposed to delete Article 48f which stipulated that a statutory auditor should state in the auditor's report <i>whether</i> a CBC report has been published or not. The Presidency has explained that the Article is deleted as it seemed to bring about more confusion than benefits and that most MSs believe that the auditor's statement as to <i>the existence of a CBC report</i> adds no value to the public. We do not support this drafting proposal but we propose a change to the Article as we agree there is not much value in a statement only establishing whether or not a report has been published. We believe the Directive should require an auditor to state whether or not a CBC report <i>should have been</i> published and if that is the case whether the report <i>has been published</i>. By drafting the Article in this way we do not impose on the auditor an obligation to check</p> |

the correctness or the completeness of the information. The auditor only needs to assess whether the undertaking is under the obligation to publish a CBC report, e.g. if the undertaking is within the scope of the Directive, and if this is the case, to state whether a report has been published. We believe that a statement from the auditor containing the above mentioned information will be valuable to the public in the sense that the public will have knowledge about violations of the CBCR obligations. More important, though, the auditor's statement will enable the national competent authorities to identify subsidiaries and branches established in their MS, which are covered by the provisions of the Directive. MS's will hence be able to enforce the provisions of the Directive to these entities. Otherwise national competent authorities will not have the necessary knowledge to identify these subsidiaries and branches as we do not have access to information about the group they are part of and about financial data, including the net turnover for the ultimate parent established in a third country. In Sweden's former written comment to Article 48f they propose the deletion of the Article. Sweden refers to Chapter 10 of the Accounting Directive (2013/34/EU) (reports on payments to governments) and mentions that in Chapter 10 there is no requirement to have an auditor statement. We believe that the difference between provisions in Chapter 10 and the CBCR proposal is the fact that the CBCR proposal covers not only multinational groups where the ultimate parent undertaking is established *in the EU* but also subsidiaries and branches in the EU having an ultimate parent *outside the EU*. The fact that deciding whether or not an EU subsidiary or branch is covered by the Directive requires knowledge of the net turnover of an undertaking established outside the EU means that the involvement of an auditor is appropriate.

LV:

As LV does not see the added value of the auditors' verification that the report is published, and it seems that an entity would be more informed on the groups' structure than an auditor, we would be in favour of deleting the Article 48f.

PL:

we maintain our opinion expressed at the meeting - in our view the auditor should be obliged to state whether the tax CBCR report

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| | <p>was presented as it is in the case of non-financial information because by doing so he/she would have to check whether the thresholds were exceeded in two last consecutive financial years. This will be important information for the users and for institutions responsible for the enforcement of those reporting requirements.</p> <p>SE: Since we do not see added value in a requirement for the statutory auditor or audit firm to check if a report has been published, we welcome that the Article is deleted. Since Article 48f is deleted, recital 11 should be deleted as well.</p> <p>UK: The UK agrees with the proposal to delete this paragraph as we do not see any reason for an independent statement by an auditor or any value added by imposing additional compliance burdens on businesses.</p> <p>We believe it would be obvious whether publication (or not) has taken place and so we are not clear what additional value there is in imposing a requirement for an independent statement by an auditor.</p> |
| <p><i>Article 48g</i> Common Union list of certain tax jurisdictions</p> | |
| <p>The Commission shall be empowered to adopt delegated acts in accordance with Article 49 in relation to drawing up a common Union list of certain tax jurisdictions. That list shall be based on the assessment of the tax jurisdictions, which do not comply with the following criteria:</p> <p>(1) Transparency and exchange of information, including information exchange on request and Automatic Exchange of Information of financial account information (2) Fair tax competition; (3) Standards set up by the G20 and/or the OECD; (4) Other relevant standards, including international standards set up by the Financial Action Task Force.</p> <p>The Commission shall regularly review the list and, where appropriate, amend it to take account of new circumstances.</p> | |
| <p><i>Article 48h</i> Commencement date for reporting on income tax information</p> | |
| <p>Member States shall ensure that laws, regulations and administrative provisions transposing Articles 48a to 48f apply, at the latest, from</p> | |

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| <p>the commencement date of the first financial year starting on or after [<i>Publications Office- set the date = one year after the transposition deadline</i>].</p> | |
| <p>Article 48i Report</p> | |
| <p>The Commission shall report on the compliance with and the impact of the reporting obligations set out in Articles 48a to 48f. The report shall include an evaluation of whether the report on income tax information delivers appropriate and proportionate results, taking into account the need to ensure a sufficient level of transparency and the need for a competitive environment for undertakings.</p> <p>The report shall be submitted to the European Parliament and to the Council by [<i>Publications Office- set the date = five years after the transposition date of this Directive</i>].'</p> | <p>FR: For the sake of compromise, Article 48i about the evaluation report by the Commission could be amended this way: <i>The Commission shall report on the compliance with and the impact of the reporting obligations set out in Articles 48a to 48f. The report shall include an evaluation of whether the report on income tax information delivers appropriate and proportionate results, particularly the application of Article 48c (3a), taking into account the need to ensure a sufficient level of transparency and the need for a competitive environment for undertakings.</i></p> |
| <p>(3) Article 49 is amended as follows:</p> | |
| <p>(a) Paragraphs 2 and 3 are replaced by the following '2. The power to adopt delegated acts referred to in Article 1(2), Article 3(13), and Article 46(2) and Article 48g shall be conferred on the Commission for an indeterminate period of time from the date referred to in Article 54.</p> | |
| <p>3. The delegation of power referred to in Article 1(2), Article 3(13), and Article 46(2) and Article 48g may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.'</p> | |
| <p>(b) The following paragraph 3a is inserted: '3a. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016 [<i>date</i>].'</p> | |
| <p>(c) Paragraph 5 is replaced by the following: '5. A delegated act adopted pursuant to Article 1(2), Article 3(13), and Article 46(2) and Article 48g shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period,</p> | |

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| <p>the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.'</p> | |
| <p>Article 2 Transposition</p> | |
| <p>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [<i>Publications Office - set the date = one two years after entry into force</i>] at the latest. They shall forthwith communicate to the Commission the text of those provisions. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.</p> | |
| <p>2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.</p> | |
| <p>Article 3 Entry into force</p> | |
| <p>This Directive shall enter into force on the twentieth day following that of its publication in the <i>Official Journal of the European Union</i>.</p> | |