POSITION PAPER

BUSINESSEUROPE

6 July 2016

PUBLIC COUNTRY-BY COUNTRY-REPORTING

KEY MESSAGES

1 BusinessEurope supports the European Commission's objective to fight tax fraud and evasion. We support the OECD recommendations regarding the reporting of financial information to tax authorities by companies on a country-by- country basis and the sharing of that information between tax authorities.

2 The Commission's proposal for the EU to unilaterally require public country-by-country reporting would not help to address tax evasion as it would undermine the role of the tax authorities who have the expertise, and, supported by the OECD agreement, the information to properly enforce tax rules.

By requiring public disclosure of country by-country reporting (CBCR) information, the EU may jeopardise the willingness of other countries who have signed up to the OECD proposal to share taxpayers' country-by-country reporting information.

3 Public CBCR could put companies with an EU presence at a competitive disadvantage and damage the attractiveness of the EU as an investment destination. In particular, the Commission's proposal for public CBCR raises the risk that EU parented or listed MNEs would be required to make more information available than their competitors. Also, companies would be burdened with heavy explanatory efforts in order to prevent reputational damage.

WHAT DOES BUSINESSEUROPE AIM FOR?

- *Fair tax competition is best achieved through ensuring that tax authorities are able to enforce tax rules on the basis of information being shared between them as proposed by the OECD.*
- *We urge the Council and the European Parliament to reject the Commission's April 2016 proposal for public country-by-country reporting of tax information.*

KEY FACTS AND FIGURES

Only around 5% of corporate tax revenues are currently misallocated between countries (OECD), compared with a gap in VAT revenue of over 15% across the EU (Commission).
In 2012 businesses paid nearly €2 trillion of taxes in total in the EU.

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SUPPORTING THE FIGHT AGAINST TAX FRAUD AND EVASION

BusinessEurope supports the European Commission's objective to fight tax fraud and tax evasion as these create competitive distortions at the expense of the vast majority of businesses who pay their taxes in full.

BusinessEurope and its members have actively engaged with the OECD Base Erosion and Profit Shifting (BEPS) project. We have viewed BEPS as an opportunity to improve the architecture of international taxation in the age of globalisation and therefore promote open markets and investment across borders. We support the principle that businesses should pay taxes in line with where actual profits are generated, and support the OECD recommendation that companies should report financial information on a country-by-country basis to tax authorities and that this information can be shared between the tax authorities.

EU Commission proposal for public country-by country reporting risks distorting competition, damaging EU competitiveness and being disproportionate

We are concerned by the proposal made by the Commission on 12th April 2016[1] for the EU unilaterally to implement public country-by-country reporting. We believe that requiring country-by-country information to be made public is a cure that is worse than the disease. It could distort competition as the requirement would only apply to EU companies (or companies with an EU presence). Companies required to report publicly may be forced to provide insight into their business strategies that competitors may not otherwise be able to discern.

Implementation of the Commission's proposals as they are could therefore damage the attractiveness of the EU as an investment destination for FDI, ultimately reducing overall levels of corporate tax receipts and growth in the EU.

In particular, businesses should pay tax on the basis of clear rules set down by government and applied and enforced consistently by tax authorities. Introducing public pressure based on country-by-country information regarding levels of income and taxes companies´ pay creates potential uncertainty for businesses operating in the EU. Companies without an EU presence are not subject to similar rules.

[1] European Commission, proposal for a directive amending directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

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The Commission's proposal is disproportionate in relation to the observed size of the problem. The OECD calculates that only around 5% of corporate tax revenues are currently misallocated between countries. This compares with a gap in VAT revenue for example of over 15% across the EU, according to the European Commission. Moreover, we estimate that businesses paid nearly €2 trillion of taxes in total the EU in 2012.

This is particularly the case considering that there are already a number of burdens placed on companies to make non-financial information public, such as the Directive on non-financial information (2013/34/EU), with new proposals adding to the administrative burden for companies operating in the EU.

Public reporting would not lead to an informed discussion on corporate taxationand would not enhance tax authorities' ability to asses tax risk

Public reporting risks undermining the role of tax authorities in enforcing tax rules, given the implication of the Commission's proposal that tax authorities alone are not capable of playing this role. We also believe that public country-by-country reporting would not support an informed discussion of companies' tax liabilities. A proper assessment of companies' tax positions requires full access to accounts and business information, which is clearly not appropriate for public disclosure given commercial confidentiality concerns. Companies whose tax-related information is subject to potential misinterpretation and manipulation face potential reputational harm and/or may be required to devote significant resources to responding to incorrect/misleading reporting on their tax positions in the media and questions from shareholders, NGOs and others..

Tax authorities are equipped with the knowledge and have access to the information to be able to assess a company's tax position, and it is solely within the remit of the tax authorities to make such assessments. The Commission's proposal would not enhance the tax authorities' ability to do their job.

Drawing conclusions from the data in the country-by-country reports, together with other publicly available information, risks an incomplete and misguided interpretation by members of the public, the media, NGOs, etc. For example, a company's tax liabilities may have been reduced as a result of significant levels of research and development which some governments support through their tax systems. Relatively low tax payments may also occur in a given year despite high profitability as a result of a company carrying over losses from a previous year.

Moreover, income taxes, which are the only taxes reported for country-by-country purposes, are not the only source of corporate tax revenue for governments. Companies pay significant amounts in VAT, employment taxes and other taxes, without necessarily a direct connection to the amount of income tax paid.

Making information public could jeopardise information sharing between countries

The OECD studied country-by-country reporting at length as part of its BEPS Action Plan 13 and determined that country-by-country reports should be filed with tax authorities to be used for tax risk assessment and should be kept confidential. Requiring public country-by-country reporting of tax related information to be included in the country-by-country reporting provided to the tax authorities effectively destroys the principle underpinning the BEPS agreement that taxpayers´ information is protected. It is clearly contrary to the information exchange mechanism established in Article 26 of the OECD Model Agreement according to which all information relevant to tax affairs of a specific country is considered secret and shall only be disclosed to qualifying persons of authorities concerned with tax administration.

The OECD has called on the EU not to jeopardise the agreement reached after two laborious years of negotiations. Certain EU Member States have expressed concern that a public country-by-country reporting requirement would likely violate their domestic privacy laws. The United States has on several occasions expressed confidentiality concerns in relation to sharing country-by-country information with foreign governments. Should this information be made public, the United States has indicated it would cease all exchanges of information with other tax authorities.

The current proposals would be almost impossible for businesses to comply with in practice

The data-set provided by businesses under OECD BEPS Action Plan 13 is to be used solely by tax authorities to perform a high level risk assessment related to transfer pricing, other BEPS-related risks and for economical and statistical analysis purposes. The data can be based on different sources according to BEPS. This allows for a degree of flexibility in the presented data for the reporting company. The information is to be sent to the tax authorities within 12 months of the ending of the fiscal year.

No reporting standard is mandated in the proposal for public country-by-country reporting by the EU. Further, it is not clear when the information is to be made public. The impression is however that the information is to be published at the same time as the annual/consolidated accounts. If the information is to be published at the same time as the annual/consolidated accounts, companies might not be able to use the information to be provided to the tax authorities. Therefore a second set of data might have to be provided in order to fulfil the reporting requirements.

This will lead to a significant increase in the administrative burden for companies that is not acceptable. BusinessEurope therefore believes that the date for publication should be aligned with OECD BEPS Action 13.

If the EU nevertheless proceeds with the current proposal, new reporting obligations should be practical with a minimum additional compliance burden. If the information is to be provided at same time as the annual/consolidated accounts, then the reporting entity must be able to collect the data in a flexible and efficient way.

In that respect we welcome the proposal by Commission to not define the reporting regime to be used when determining the “profit or loss before income tax” as required by Article 48(c) Nr. 2 (d) of the proposed directive, in line with the flexibility allowed for according to OECD BEPS Action Plan 13. This enables companies to choose the best available information. Companies may then report “profit or loss before income tax” either on the basis of their local tax regime, local GAAP reporting or profit or loss as derived from IFRS accounting.

However, the concern remains that presenting this information in conjunction with the required information of the amount of income tax accrued and paid (Article 48(c) Nr. 2 (e) & (f)) will cause confusion as it relates to figures that cannot be put in relation to each other without extensive narrative information and a reconciliation. As a minimum, deferred taxes must be included within the information concerning accrued taxes in order to provide a sound and comprehensive report.

Furthermore, drawing a comparison with the country-by-country requirements for banks under the EU Capital Requirement Directive IV (Directive 2013/36/EU), the additional data elements that are requested in the proposal for public country-by-country reporting should be more limited. Transparency has been served with the six data elements included in the public country-by-country obligation for banks. Banks are not required to publish data for income tax paid and accumulated earnings. Because of timing differences and certain tax facilities like loss carry forward and carry back, information about income tax accrued will provide the public better information than income tax paid. As the other reportable data will concern only the applicable fiscal year, the information about accumulated earnings also has limited value. Thus, aligning the proposal for article 48c of the amended EU Accounting Directive with the EU Capital Requirements Directive IV would require items (f) and (g) to be removed, without compromising the objective to provide more transparency. The requirement to publish the items listed in Article 48c (f) and (g)) should therefore be dropped. Instead a geographical country segmentation of taxable profits (or losses), tax expenses or tax income, current taxes and deferred tax liabilities and deferred tax assets based on the tax information already provided in the consolidated financial report – taking full account of the current country-by-country reporting obligations for banks and the oil and gas and extractive industry – would be a way to go. In this respect, auditors would already be involved with the audit of the underlying information.

Based on this, the requirement to explain material discrepancies between income tax paid and income tax accrued should also be withdrawn. This requirement is not in the OECD BEPS Action Plan 13. Imposing such a requirement would add a significant administrative burden on entities that is not demanded by tax authorities.

Also, although it appears that the auditor’s statement requirement for public country-by-country is one that states that a public country-by-country report has been created and made available on the website, there is a risk that auditors would want to audit the content of the report too. An audit requirement adds to the administrative burden, will be very costly and will not increase the comfort about the reported data as the source data has been subject to audit review already. The independent audit required under the proposed Article 48f of the amended EU Accounting Directive should therefore be removed.

There is no materiality threshold proposed related to public country-by-country reporting by the EU. The principle of materiality is however explicitly stated in Article 6 of the Accounting Directive. Since the requirement of country-by-country reporting is to be introduced as an amendment of the Accounting Directive, we strongly believe that the information should be provided based on materiality tests applied in the reporting entity when drawing up accounts. Applying the materiality principle would align country-by-country reporting with accounting in general. It should also be noted that numerical thresholds were introduced when country-by-country reporting requirements for extractives and forestry logging companies were adopted in the Accounting Directive.

Conclusion

Given the clear potential to increase uncertainty for EU based businesses, reduce investment and competitiveness, and do not contribute to the role of tax authorities, we believe the Commission should withdraw its April 2016 proposal and that the Council and Parliament members should reject it.

If the EU still concludes that public country-by-country reporting should be introduced, this should build on a geographical segmentation of tax information that is already provided in financial reporting, instead of what currently is being proposed. Reporting requirements should not only take full account of the current obligations for banks and the extractive industry and their experiences on this type of reporting, but they also should be developed in conjunction with the evaluation of country-by-country reporting to tax authorities which was agreed at the Council in May 2016,[2] and which is in line with the OECD agreement in this area.