# Luxembourg launches the implementation of the Public CbCR Directive

## OUR INSIGHTS AT A GLANCE

- On 24 February 2023, the draft law implementing the so-called "public country-by-country reporting Directive" was presented to Parliament. The draft law amends the law of 19 December 2002 concerning the register of commerce and companies and the accounting and annual accounts of undertakings as well as the Law of 10 August 1915 on commercial companies.
- The public CbCR Directive requires certain multinationals with consolidated revenues of more than EUR 750 million to publicly disclose (mainly) the corporate income tax that they pay. Non-EU multinationals doing business in the EU through subsidiaries and branches will also have to comply with the same reporting obligations as EU multinational undertakings. The reporting will have to take place within 12 months of the date of the balance sheet for the financial year in question.
- Luxembourg, like all EU Member States, has until 22 June 2023 to transpose the Directive into national law. The new obligations introduced will apply to accounting periods starting on or after 22 June 2024. Thus, for companies with an accounting year corresponding to the calendar year, the first report on income tax information will relate to the year 2025 and will have to be published before the end of 2026.

On 24 February 2023, the draft law ("**Draft Law**") implementing the so-called "public country-by-country reporting Directive"[2] (the "**public CbCR Directive**" or "**the Directive**") was presented to Parliament. The Draft Law amends the law of 19 December 2002 concerning the register of commerce and companies and the accounting and annual accounts of undertakings as well as the Law of 10 August 1915 on commercial companies.

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We provide an overview of the most important aspects of the new reporting requirements to be introduced.

### Background

The public CbCR Directive, first tabled in April 2016, was part of the European Commission action plan for a fairer corporate tax system. The idea of a public CbCR emerged shortly after "non-public" Country-by-Country Reporting (i.e. the automatic exchange of CbC reports between EU Member States) was introduced at EU level by the 4th Directive on Administrative cooperation in tax matters ("**DAC4**") as one of the measures of the OECD BEPS project. However, public CbCR has nothing to do with the BEPS project and it is more about enhancing public scrutiny than about introducing a new tool for corporate tax transparency.

For more than five years, the Directive proposal only evolved very slowly due to, among others, a disagreement on its legal basis and the related requirements for its adoption: should the Directive be based on article 50 of the Treaty on the Functioning of the European Union ("**TFEU**") and subject to the ordinary legislative procedure (which requires a qualified majority voting in the Council for its adoption) or should it be based on article 115 of the TFEU and therefore subject to the special legislative

[2] Directive 2021/2101 of 24 November 2021 amending Directive 2013/34/EU (the "**EU Accounting Directive**") as regards disclosure of income tax information by certain undertakings and branches.

procedure applicable in tax matters (which requires unanimous approval in the Council for its adoption)? Depending on whether the Directive proposal was to be seen as an accounting directive (which would extend the scope of information to be reported and published) or as a tax directive (which would bring tax transparency up to the next level through a mandatory publication of some of the information already exchanged between the EU Member States under DAC4), either qualified majority voting or unanimity would apply. Finally, on 28 September 2021, the EU Council approved the proposal (under qualified majority, as an agreement was reached on moving forward under article 50 of the TFEU).

The idea of a public CbCR has been subject to a lot of criticism during the legislative procedure and the Directive would probably not have been adopted, should unanimity have been required. Today, with the recent introduction of measures aiming to make sure that the big players achieve a minimum of effective taxation (Pillar Two), one may wonder, and this even more than at the time the Directive was adopted, if providing the public with this tax data is worth the additional administrative burden and the risk of damaging the European undertakings concerned if the information is misinterpreted, misunderstood or if commercially confidential information is exposed.

## Who will be subject to public CbCR?

The public CbCR Directive requires multinational groups with a total consolidated revenue of EUR 750 million to report if their ultimate parent company is located in the EU or is not in the EU but has EU subsidiaries or branches.

### *Luxembourg companies in the scope of public CbCR*

The following Luxembourg companies will have to draw up, publish and make a report on income tax information accessible:

- Luxembourg ultimate parent undertakings with consolidated revenues on their balance sheet date exceeding a total of EUR 750 000 000 for each of the last two consecutive financial years, as reflected in their consolidated financial statements;
- Luxembourg standalone undertakings with revenues on their balance sheet date exceeding a total of EUR 750 000 000 for each of the last two consecutive financial years, as reflected in their annual financial statements;
- Luxembourg medium-sized and large subsidiary undertakings controlled by a non-EU ultimate parent undertaking, where the consolidated revenue on its balance sheet date exceeded a total of EUR 750 000 000 for each of the last two consecutive financial years, as reflected in its consolidated financial statements;

These Luxembourg companies will only be in the scope of public CbCR if they are in the scope of the EU Accounting Directive. As a result, only the following companies are targeted:

- Limited liability companies and similar companies (*Société anonyme*, "**SA**", *Société en commandite par actions*, "**SCA**" or *Société à responsabilité limitée*, "**S.à r.l**".); as well as
- Partnerships (*Société en nom collectif*, "**SNC**" or *Société en commandite simple*, "**SCS**") when all their direct or indirect partners who are indefinitely liable are organised in the form of limited liability companies or similar.

### *Luxembourg branches in scope*

Luxembourg branches of non-EU undertakings will also be subject to these obligations under the following conditions:

- They are Luxembourg branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking or Luxembourg branches of a non-EU standalone undertaking, the revenue of which on its balance sheet date exceeded a total of EUR 750 000 000 for each of the last two consecutive financial years as reflected in its (consolidated) financial statements.
- The net turnover of the Luxembourg branch has exceeded the threshold of EUR 8 800 000 for each of the last two consecutive financial years.

### *Anti-abuse measure*

As an anti-abuse measure, the Draft Law provides that Luxembourg companies or branches not subject to the reporting/publication requirements because they do not meet the above-mentioned conditions will still have to publish and make a report on income tax information accessible where such companies or branches serve no other objective than to circumvent the reporting requirements.

*Exclusions/Exceptions*

The following exclusions and exceptions will apply:

- Total revenue falls below EUR 750 000 000: The entities referred to above will no longer be subject to the reporting obligations if the total consolidated revenue falls below EUR 750 000 000 for each of the last two consecutive financial years.
- Presence only in Luxembourg: The reporting requirements will not apply to Luxembourg standalone undertakings or Luxembourg ultimate parent undertakings and their affiliated undertakings where such undertakings, including their branches, are established, or have their fixed places of business or permanent business activity, within the territory of Luxembourg and in no other tax jurisdiction.
- Banking sector: In order to avoid double reporting for the banking sector, a specific exclusion will apply under certain conditions to credit institutions already subject to reporting obligations under article 89 of the Accounting Directive (i.e. based on Article 38-3 of the Luxembourg amended law of 5 April 1993).
- Non-EU ultimate parent undertakings or standalone undertakings already subject to similar reporting obligations: No reporting obligation will apply to Luxembourg subsidiaries and branches of non-EU undertakings where a similar report on income tax information is drawn up by the non-EU undertaking, provided that it meets certain criteria.
- Luxembourg branches of non-EU undertakings having a EU medium-sized or large subsidiary undertaking in the group: Luxembourg branches will not be required to report if the non-EU ultimate parent company has an EU medium-sized or large subsidiary undertaking in the scope of the Directive (since, in such case, the publication obligation will lie with the EU undertaking).
- Publication seriously harms the commercial position of the companies which the information relates to: An optional provision of the Directive is implemented by the Draft Law and concerns the possibility to defer the publication of certain information for a maximum of five years where the publication would seriously harm the commercial position of the companies which the information relates to. Any omission must be clearly indicated in the report together with a duly reasoned explanation regarding the reasons therefor. Unfortunately, the commentary to the Draft Law does not provide any explanations or examples of situations where the publication would seriously harm the commercial position of the companies. It also doesn't provide any information on how the related explanations will be assessed and in which case the omission would be considered as justified. This brings some legal uncertainty and some clarification in this respect would be useful. The omitted information must be made public in a subsequent report on income tax information within a maximum period of five years from the date of the original omission. Information relating to tax jurisdictions on the list of uncooperative jurisdictions for tax purposes may never be omitted.

## Which information will have to be included in the report on income tax information of companies?

The report on income tax information should provide information concerning all the activities of all the affiliated undertakings of the group consolidated in the financial statements of the ultimate parent undertaking or, depending on the circumstances, concerning all the activities of the standalone undertaking.

*Report on income tax information*

The report will have to include the following information on all members of the group:

- name of the ultimate parent undertaking or the standalone undertaking, the financial year concerned, the currency used for the presentation of the report and, where applicable, a list of all subsidiary undertakings consolidated in the financial statements of the ultimate parent undertaking, in respect of the relevant financial year, established in the EU or in tax jurisdictions included in Annexes I and II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes;
- a brief description of the nature of the activities;
- the number of employees;
- revenues, which are to be calculated either as: (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 the Directive; or (ii) the income as defined by the financial reporting framework

on the basis of which the financial statements are prepared, excluding value adjustments and dividends received from affiliated undertakings;
- the amount of profit or loss before corporate income tax;
- the amount of corporate income tax accrued during the relevant financial year, which is to be calculated as the current tax expense recognised on taxable profits or losses of the financial year in question (this excludes deferred taxes and provisions for uncertain tax charges);
- the amount of corporate income tax paid on a cash basis, which is to be calculated as the amount of tax paid during the relevant financial year, including withholding taxes paid by other undertakings with respect to payments to the undertaking or branch within a group. In the case of Luxembourg, the commentary to the Draft Law indicates that this includes notably corporate income tax, municipal business tax and capital gain tax/tax on income from movable property; and
- the amount of accumulated earnings (i.e. the sum of the profits from past financial years and the relevant financial year, the distribution of which has not yet been decided upon) at the end of the relevant financial year.

To reduce the administrative burden, undertakings may report the information referred to above in accordance with the instructions applicable to the reporting to be made based on the Luxembourg law implementing DAC4 (Law of 23 December 2016 on country-by-country reporting, as amended). The information will have to be broken down for each EU Member State which the group is active in, and also for each jurisdiction qualified as non-cooperative based on the EU list of non-cooperative jurisdictions for tax purposes available on the 1 March of the financial year for which the report on income tax information is to be drawn up.

### *Statement and notice*

If (1) Luxembourg medium-sized and large subsidiary undertakings controlled by a non-EU ultimate parent undertaking, (2) Luxembourg branches of a non-EU affiliated undertaking of a group with a non-EU ultimate parent undertaking or (3) Luxembourg branches of a non-EU standalone undertaking do not have the information they are required to publish, they must request this information from their non-EU ultimate parent undertaking or their non-EU standalone undertaking, as the case may be. If, despite this, they do not obtain the information, they will have to draw up and publish a statement containing all the information available to them and publish a notice stating that the ultimate parent undertaking or the standalone undertaking has not made the required information available to them.

## Practical aspects of the reporting/ publication

In order to avoid the reporting obligation applying to groups which would only occasionally exceed the consolidated turnover threshold of EUR 750 million, as mentioned above, a repetition criterion is introduced by the Draft Law: for the reporting obligation to apply, the consolidated revenue of the group has to exceed the EUR 750 million threshold for two consecutive financial years. Conversely, if the consolidated turnover ceases to exceed the 750 million threshold for two consecutive financial years, then the reporting obligation ceases to apply for the most recent of these two financial years.

While one has to take into account the consolidated revenue of the last two consecutive financial years to determine whether a company or branch falls within the scope of the reporting/publication obligation or not, the reporting obligation only covers one financial year, i.e. the most recent financial year.

The report has to be made accessible to the public in at least one of the official languages of the EU and free of charge no later than twelve months after the balance sheet date of the financial year for which the report is drawn up. It will have to be published on the website of one of the following (as the case may be):

- The Luxembourg ultimate parent undertaking or the Luxembourg standalone undertaking; or
- The Luxembourg medium-sized or large subsidiary undertaking or affiliated undertaking controlled by a non-EU ultimate parent undertaking; or
- The Luxembourg branch or the undertaking which opened the branch, or an affiliated undertaking of a non-EU ultimate parent undertaking or standalone undertaking.

The information shall remain accessible on the relevant website for a minimum of five consecutive years.

However, based on a provision of the Draft Law which is optional under the Directive, Luxembourg undertakings/ branches are exempt from publishing the report on income tax information and, where applicable, the statement relating to cases where the Luxembourg subsidiary or branch did not receive the information needed from the non-EU undertaking if the report on income tax information is filed with the Trade and Companies Register ("**RCS**"), published by way of a notice of filing in the *Recueil électronique des sociétés et associations* ("**RESA**") within twelve months after the balance sheet date of the financial year for which the report is drawn up and made accessible to any EU third party free of charge in an electronic reporting format which is machine-readable on the website of the RCS.

## Liability of management and supervisory bodies and potential penalties

In the same way as the Directive, the Draft Law makes a distinction between the liability of management and supervisory bodies of the ultimate parent companies and standalone undertakings on the one hand and the liability of the administrative, management and supervisory bodies of the Luxembourg subsidiary undertakings which are controlled by an ultimate parent undertaking established outside of the EU on the other hand:

- The members of the administrative, management and supervisory bodies of a Luxembourg ultimate parent undertaking or a Luxembourg standalone undertaking which has the obligation to draw up, publish and make the report on income tax information accessible are collectively responsible for ensuring compliance with the reporting obligations.
- The members of the administrative, management and supervisory bodies of a Luxembourg subsidiary undertaking which is controlled by an ultimate parent undertaking established outside the EU or the person or persons in charge of carrying out the disclosure formalities for the branch are collective responsible for ensuring, to the best of their knowledge and ability, that the report on income tax information is drawn up in a manner that is consistent with the Draft Law. This is because they might have limited knowledge of the content of the report on income tax information prepared by the ultimate parent undertaking or might have a limited ability to obtain such information or such a report from the ultimate parent undertaking.

The Draft Law extends the fine of 500 euros to 25,000 provided by the Luxembourg law of 10 August 1915 to the managers or directors of Luxembourg ultimate parent companies, standalone companies and subsidiaries who have not drawn up, published or made the report on income tax information available within a period of twelve months from the closing date of the financial year which it relates to. Furthermore, as this reporting obligation may also apply to a Luxembourg branch, it is foreseen that the permanent representatives of the company for the activity of the branch will also be subject to the same sanctions.

## Audited companies

Where the financial statements of a Luxembourg undertaking are required to be audited by one or more statutory auditors or audit firms, the audit report will have to state whether, for the financial year preceding the financial year for which the financial statements under audit were prepared, the undertaking was required to publish a report on income tax information and, if so, whether the report was published in accordance with the publication and accessibility requirements of the Draft Law.

## Next steps and implications

The new obligations to be introduced will apply to accounting periods starting on or after 22 June 2024. Thus, for companies with an accounting year corresponding to the calendar year, the first report on income tax information will relate to the year 2025 and will have to be published by the end of 2026.

Multinationals will have to add yet another project to their growing list of tax compliance projects. The new reporting requirements will not provide any additional information to the tax authorities, so it seems hard to see how they will have revenue-raising benefits for governments. However, the reporting creates a serious risk that businesses may now be subject to arbitrary trial in a court of public opinion where there is no judge, jury or right of defense. Consequently, multinationals should carefully consider their strategy for communicating around taxes.

The Draft Law faithfully transposes the Directive and the fact that the Luxembourg Government decided to introduce the two options offered by the Directive is positive. However, Luxembourg, like any other EU Member State, should carefully deal with the practical details of the implementation of the Directive given the potential risk of the new rules being challenged by the Court of Justice of the European Union ("**CJEU**") on the same ground as in the case dealing with the Luxembourg register of beneficial owners: On 22 November 2022, the CJEU ruled that the general public's access to information on beneficial ownership provided for in the EU AML Directive constitutes an interference with the rights guaranteed by the EU Charter of Fundamental Rights. Here, while it will be difficult to restrict the access to a specific category of persons like for the RBE since the purpose of the public CbCR is tranparency towards the EU public, one potential solution could be to make sure that all in scope Luxembourg undertakings have to publish their reports on the website of the RCS. This way, the publication on their website would no longer be required and, to further protect the EU rights of the undertakings concerned, one could also consider requiring the EU public to file a formal request to access the report on income tax information.

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