

The EU Public Country-by-Country Reporting Directive: Legislative and Policy Comments

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Draft

I. Background

The EU has played a part in shaping the international tax landscape lately,¹ and has been particularly active in the field of collecting and exchanging information through the Directive 2011/16/EU and its amendments (Directive on Administrative Co-operation in the Field of Taxation).² Recently, with the introduction of the Directive (EU) 2021/2101 (Public Country-by-Country Reporting Directive),³ which amends the Directive 2013/34/EU (Accounting Directive)⁴ and requires certain multinational enterprises (MNEs) to publish a report on income tax information on a country-by-country basis, another layer of secondary EU law has been added to the reporting requirements. In general, the reporting obligations stipulated by the Public Country-by-Country Reporting Directive must be implemented by in-scope MNEs for financial years starting on or after 22 June 2024,⁵ and the reports will have to be published within 12 months of the balance sheet date of the respective financial year.⁶

The implementation of public country-by-country reporting through the accounting law channel by way of amending the Accounting Directive, instead of an implementation in the tax context by way of

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¹ For some recent initiatives at the EU level, see, e.g. Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1; Directive 2017/952 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries [2017] OJ L144/1; Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L 328/1. The EU shaped the tax landscape in these instances by strengthening broader international tax initiatives. This is clearest with the global minimum tax. By adopting the OECD proposal, the EU effectively ensured that the global minimum tax affects countries around the world, thus paving the way for other countries to adopt this proposal; in this context, see Michael P. Devereux, Johanna Paraknewitz and Martin Simmler, “Empirical evidence on the global minimum tax: what is a critical mass and how large is the substance-based income exclusion?” (2023) 44 *Fiscal Studies* 9.

² Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1. For subsequent amendments, see consolidated text at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0016-20240101> [Accessed 18 April 2024].

³ Directive (EU) 2021/2101 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches [2021] OJ L 429/1.

⁴ Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19. For subsequent amendments, see consolidated text at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013L0034-20230105> [Accessed 18 April 2024].

⁵ See Accounting Directive (consolidated), art.48g. The transposition deadline for the Public Country-by-Country Reporting Directive was 22 June 2023; see Public Country-by-Country Reporting Directive, art.2. For certain early applications in individual EU Member States, see EY, EU Public Country-By-Country Reporting Developments Tracker (March 2024) at https://www.ey.com/en_gl/tax-alerts/eu-public-country-by-country-reporting-pbcr-developments-tracker-now-available [Accessed 18 April 2024]. See also Martin Cordes and Andreas Leonhardt, “Gesetzentwurf zur Offenlegung von Ertragsteuerinformationen (public country by country reporting)—Analyse aus Sicht deutscher, international tätiger Familienunternehmen” [2023] *FinanzRundschau* 41, 42.

⁶ See Accounting Directive (consolidated), art.48d(1). If the financial year matches the calendar year, the first reporting year is 2025 and the report would have to be made available by the end of 2026; see Georg Lanfermann and Marco Götzte, “Neue EU-Unternehmensberichterstattungspflichten ante portas: Public Country-by-Country Reporting” [2022] *Betriebs-Berater* 235, 236–237. For shorter publication deadlines in the rules of individual EU Member States, see EY, EU Public Country-By-Country Reporting Developments Tracker (March 2024).

amending the Directive on Administrative Co-operation in the Field of Taxation, was very controversial.⁷ The procedural concern here is that “fiscal provisions” require a unanimous decision of the Council under article 115 of the Treaty on the Functioning of the European Union (TFEU),⁸ while the ordinary legislative procedure considered applicable for an amendment of the Accounting Directive under article 50 TFEU requires only a qualified majority.⁹ Much suggests that article 115 TFEU would have been the correct legal basis and that an amendment of the Directive on Administrative Co-operation in the Field of Taxation would have been more appropriate to introduce the public country-by-country reporting.¹⁰ Underlying this procedural aspect is of course a more fundamental controversy about public country-by-country reporting;¹¹ but after several years of discussion following the first proposal of the European Commission in 2016,¹² a public country-by-country reporting of certain companies will be required under the (accounting)¹³ laws of the EU¹⁴ Member States in the near future.¹⁵

Non-EU jurisdictions have also considered public country-by-country reporting;¹⁶ and the UK, which had expressed support for the proposal of the European Commission when it was an EU Member State,¹⁷ introduced as part of the Finance Act 2016 (FA 2016) the possibility for the treasury to make

⁷ For explanations on the political controversy, see, e.g. Hubertus Baumhoff, “Country-by-Country Reporting” in Jürgen Lüdicke (ed), *Internationale Geschäftstätigkeiten in der Nach-BEPS-Welt* (Cologne: Otto Schmidt, 2018). See also Wolfgang Schön, “Etikettenschwindel im Europäischen Gesellschaftsrecht” (2021) 185 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 781.

⁸ See Treaty on the Functioning of the European Union (TFEU) art.114(2).

⁹ See specifically TFEU arts 50(1), 50(2)(g). See also Treaty on European Union (TEU) art.16.

¹⁰ For an overview of the arguments, see Florian Kitzig, “HGB § 342” in Martin Henssler (ed), *beck-online Grosskommentar zum Bilanzrecht* (Munich: CH Beck, 2023), para.8. For details, see Schön, “Etikettenschwindel im Europäischen Gesellschaftsrecht” 185 (2021) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 781.

¹¹ For an overview of issues raised in the discussion, see Baumhoff, “Country-by-Country Reporting” in Lüdicke (ed), *Internationale Geschäftstätigkeiten in der Nach-BEPS-Welt* (2018). For a broader picture, see Noam Noked “Public Country-by-Country Reporting: The Shareholders’ Case for Mandatory Disclosure” (2018) 90 *Tax Notes International* 1501; Annet Wanyana Oguttu, “Curtailing BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory” (2020) 12 *World Tax Journal* 167, 204–212.

¹² See 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 COM(2016) 198 final.

¹³ For the implementation for example in Germany through an amendment of the German Commercial Code (Handelsgesetzbuch, HGB), see Oliver Fehrenbacher and Nicolas Traut, “HGB § 342” in Ingo Drescher et al (eds), *Münchener Kommentar zum Handelsgesetzbuch, Band 4*, 5th edn (Munich: CH Beck, 2023).

¹⁴ The directive is relevant for the European Economic Area (EEA); for the legislative procedure in Liechtenstein for example, see Landesverwaltung Fürstentum Liechtenstein, Bericht und Antrag, BuA 2023/124 (23 October 2023) at <https://bua.regierung.li/BuA/default.aspx?nr=124&year=2023&backurl=modus%3dnr%26filter1%3d2023> [Accessed 18 April 2024].

¹⁵ For the EU procedure and national transpositions, see EU, Procedure 2016/0107/COD at <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32021L2101> [Accessed 18 April 2024]. See also Susanne Verloove, Peter Hoving and Roberto Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153, 155.

¹⁶ For the legislative procedures in Australia and the US as relevant examples, see Australian Government, The Treasury, Public country-by-country reporting (February 2024) at https://treasury.gov.au/consultation/c2024-488354?utm_source=IFPA+Weekly+Enews&utm_campaign=0b1e16f121-DU13022024&utm_medium=email&utm_term=0_d4b9991f6d-0b1e16f121-35205027 [Accessed 18 April 2024]; US Congress, Disclosure of Tax Havens and Offshoring Act (2023) at <https://www.congress.gov/bill/118th-congress/senate-bill/638> [Accessed 18 April 2024].

¹⁷ See HM Treasury, Explanatory memorandum on European Union documents, 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 (28 April 2016) at [https://webarchive.nationalarchives.gov.uk/ukgwa/20220322085221/https://europeanmemoranda.cabinetoffice.gov.uk/files/2016/05/DOC280416-28042016160643_\(1\).pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20220322085221/https://europeanmemoranda.cabinetoffice.gov.uk/files/2016/05/DOC280416-28042016160643_(1).pdf) [Accessed 18 April 2024]. For the UK’s position after leaving the EU and for more on the effects of the Public Country-by-Country Reporting Directive for the UK, see House of Commons, European Scrutiny Committee, Fifth Report of Session 2021–22, HC 121-v (13 July 2021),

rules for a public country-by-country reporting—an option that was however not realised initially.¹⁸ As regards the EU public country-by-country reporting, non-EU headquartered MNEs will also be affected through their presence in the EU.¹⁹ Against this outlined background, the following remarks first give an overview of the mechanics of the EU public country-by-country reporting rules and place these rules in the overall context of other reporting obligations.²⁰ In a second step the note provides some policy observations on these rules.²¹

II. Overview of the (public) country-by-country reporting legal framework

A. *In-scope undertakings, content, and form of the report on income tax*

Under the EU public country-by-country reporting rules EU Member States are obliged to require ultimate parent and standalone undertakings governed by their national laws, with (consolidated) revenues for each of the last two consecutive financial years of over €750,000,000 as reflected in the (consolidated) financial statements, to draw up, publish, and make accessible a report on income tax information for the latter of those financial years.²² This obligation only targets MNEs and consequently does not apply to standalone or ultimate parent undertakings and their affiliates if these are established, or have their fixed places of business or permanent business activity, only within a single EU Member State.²³ As a legal act of the EU, the Public Country-by-Country Reporting Directive links the reporting obligations to an EU connection of the mentioned standalone or ultimate parent undertakings; but the directive is also relevant for MNEs that are not headquartered in the EU, because it extends obligations to medium-sized and large subsidiary undertakings that are governed by the laws of an EU Member State and are controlled by a non-EU ultimate parent, if the consolidated revenue of the latter exceeds €750,000,000 for each of the last two consecutive financial years.²⁴ Medium-sized and large subsidiaries in this sense are defined by the thresholds at which subsidiaries are not small undertakings under the Accounting Directive (exceeding at least two of the following three criteria in two consecutive financial years: a balance sheet total of €5,000,000, a net turnover of €10,000,000, and an average of 50 employees).²⁵ In this case, the in-scope EU subsidiaries have to publish and make accessible a report on income tax information concerning the ultimate parent,²⁶ either with the support of the ultimate parent or by indicating the ultimate parent's failure to cooperate if necessary.²⁷ Similar obligations exist for

pp.18–28 at <https://committees.parliament.uk/publications/6670/documents/71676/default/> [Accessed 18 April 2024].

¹⁸ See FA 2016 Sch.19 para.17(6). For explanations, see Richard Stratton and Kevin Costello, “Finance Act 2016 notes: section 161 and Schedule 19: large businesses: tax strategies and sanctions for persistently uncooperative behaviour” [2016] B.T.R. 646, 649.

¹⁹ See below Pt II.A.

²⁰ See below Pt II.

²¹ See below Pt III.

²² Accounting Directive (consolidated), art.48b(1). For definitions of “ultimate parent undertakings”, “standalone undertakings”, “consolidated financial statements” and “revenues”, see Accounting Directive (consolidated), arts 48a(1)(1), 48a(1)(4), 48a(1)(2), 48a(2).

²³ See Accounting Directive (consolidated), art.48b(2). See also Manuel Campos Loureiro, “The Shortcomings of the EU Public Country-by-Country Reporting Directive” (2022) 31 *EC Tax Review* 115, 116.

²⁴ See Accounting Directive (consolidated), art.48b(4).

²⁵ For categories of undertakings, see Accounting Directive (consolidated), art.3. EU Member States may define higher thresholds for the balance sheet total or the net turnover of small undertakings but not exceeding €7,500,000 for the former and €15,000,000 for the latter; see Accounting Directive (consolidated), art.3(2). Cf. also Verloove, Hoving and Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153, 156.

²⁶ See Accounting Directive (consolidated), art.48b(4)(1). For this “Secondary Filing Mechanism”, see also Loureiro, “The Shortcomings of the EU Public Country-by-Country Reporting Directive” (2022) 31 *EC Tax Review* 115, 116.

²⁷ See Accounting Directive (consolidated), art.48b(4)(2); see also art.48b(6), under which subsidiaries and branches are released from reporting obligations, if the non-EU standalone or ultimate parent undertaking draws up and makes accessible a report on income tax information (arts 48b(6)(a), 48c), and one single EU subsidiary or branch, which has been identified in the report, has published a report on income tax information (arts 48b(6)(b), 48d(1)).

branches opened in EU Member States by non-EU undertakings, if the branches and the undertakings opening the branches fulfil certain criteria (particularly size characteristics analogous to the aforementioned situation of EU subsidiaries and non-EU parents).²⁸ Undertakings and branches that would generally not be in scope of the reporting requirements may still be obliged to publish and make accessible a report if their only purpose is to circumvent the reporting requirements.²⁹

The report on income tax information must include information on the activities of the respective standalone or ultimate parent undertaking including the activities of the affiliated undertakings consolidated in the financial statements.³⁰ The information that has to be provided consists of the name of the standalone or ultimate parent entity, the financial year concerned, the currency used for the report, and a list of all subsidiaries consolidated in the financial statements of an ultimate parent, which are established in the EU or in jurisdictions on the so-called black list or grey list of the EU on non-cooperative jurisdictions for tax purposes.³¹ Furthermore the report must entail a brief description of the nature of the activities,³² the number of employees,³³ the revenues,³⁴ the profit or loss before income tax,³⁵ the income tax accrued during the financial year,³⁶ the income tax paid on a cash basis,³⁷ and the accumulated earnings at the end of the financial year.³⁸ The information has to be presented separately for each EU Member State,³⁹ as well as for those jurisdictions which are listed on the EU blacklist or grey list on certain dates (on 1 March of the financial year for which the report is to be drawn up for the former, and additionally on 1 March of the preceding financial year for the latter).⁴⁰ For (non-listed) third country tax jurisdictions the directive requires a report only on an aggregate basis.⁴¹ The attribution of the information to the relevant tax jurisdictions shall be based on an establishment, a fixed place of business or a permanent business activity which can be subject to income tax in that jurisdiction.⁴² The report on income tax information and related statements are to be published within 12 months of the balance sheet date of the financial year which the report concerns, and shall be made accessible in at least one official EU language on the website of the MNE, or, depending on the circumstances, on the website of a subsidiary, branch or affiliated undertaking.⁴³ EU Member States have the option to prescribe that, if the report is made accessible to the public electronically and free of charge on the website of the commercial register, the website of the respective undertakings and branches can refer to this register.⁴⁴ The report (and related statements) must be available for a minimum of five consecutive years.⁴⁵ EU Member States have the option to allow businesses to omit information from the report

²⁸ See Accounting Directive (consolidated), art.48b(5).

²⁹ See Accounting Directive (consolidated), art.48b(7).

³⁰ Accounting Directive (consolidated), art.48c(1).

³¹ Accounting Directive (consolidated), art.48c(2)(1)(a). For the current composition of the respective EU lists, see Council of the European Union, Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes (20 February 2024) at <https://www.consilium.europa.eu/media/70365/st06776-en24.pdf> [Accessed 18 April 2024]. For further explanations, see Council of the European Union, EU list of non-cooperative jurisdictions for tax purposes (21 March 2024) at <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> [Accessed 18 April 2024].

³² Accounting Directive (consolidated), art.48c(2)(1)(b).

³³ Accounting Directive (consolidated), art.48c(2)(1)(c).

³⁴ Accounting Directive (consolidated), art.48c(2)(1)(d); see also art.48c(2)(2).

³⁵ Accounting Directive (consolidated), art.48c(2)(1)(e).

³⁶ Accounting Directive (consolidated), art.48c(2)(1)(f); see also art.48c(2)(3).

³⁷ Accounting Directive (consolidated), art.48c(2)(1)(g); see also art.48c(2)(4).

³⁸ Accounting Directive (consolidated), art.48c(2)(1)(h); see also art.48c(2)(5).

³⁹ Accounting Directive (consolidated), art.48c(5)(1).

⁴⁰ Accounting Directive (consolidated), art.48c(5)(2).

⁴¹ Accounting Directive (consolidated), art.48c(5)(3).

⁴² Accounting Directive (consolidated), art.48c(5)(4). See also Lanfermann and Götze, “Neue EU-Unternehmensberichterstattungspflichten ante portas: Public Country-by-Country Reporting” [2022] *Betriebs-Berater* 235, 237.

⁴³ For details, see Accounting Directive (consolidated), arts 48d(1), 48d(2). See also above fn.6.

⁴⁴ See Accounting Directive (consolidated), art.48d(3).

⁴⁵ See Accounting Directive (consolidated), art.48d(4).

temporarily, if a disclosure would be seriously prejudicial to the commercial position of the undertaking to which the report relates.⁴⁶

B. Broader context of the reporting obligations

The new report on income tax information does not exist in a vacuum, and the new reporting requirements have been added on to an already existing country-by-country reporting regime.⁴⁷ At the EU level earlier country-by-country reporting requirements had been introduced specifically for certain sectors, notably for the banking sector through the Directive 2013/36/EU (Capital Requirements Directive)⁴⁸ and for the extractive industry through the Accounting Directive.⁴⁹ Subsequently, an amendment of the Directive on Administrative Co-operation in the Field of Taxation through the Directive (EU) 2016/881 (so-called DAC4)⁵⁰ introduced country-by-country reporting for tax purposes in general for large MNEs,⁵¹ and these reporting obligations for tax purposes exist in the wider international context of the Base Erosion and Profit Shifting (BEPS) project, which brought about a country-by-country reporting mechanism that has been widely implemented internationally (BEPS Action 13).⁵² The tax reporting based on BEPS Action 13 and DAC4, however, is “private” and not “public”.⁵³ General motives for gathering and exchanging tax information lie in fostering compliance and combating tax avoidance and evasion,⁵⁴ and the intention of the introduction of the private country-by-country reporting for MNEs in the EU was to provide tax authorities with the necessary information to identify and to react to aggressive tax practices of in-scope businesses.⁵⁵ The gathering of this information on MNEs was understood in the context of measures to combat “tax fraud, tax evasion and aggressive tax planning”.⁵⁶ The newly introduced EU public country-by-country reporting aims to promote “public scrutiny of corporate income taxes”⁵⁷ and “a better-informed public debate regarding, in particular, the level of tax compliance of certain multinational undertakings active in the Union”.⁵⁸ The report on income tax information thus is clearly geared more towards public pressure on unwanted

⁴⁶ See Accounting Directive (consolidated), art.48c(6).

⁴⁷ For an overview of the development of country-by-country reporting, see Verloove, Hoving and Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153.

⁴⁸ Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338.

⁴⁹ For an overview, see Loureiro, “The Shortcomings of the EU Public Country-by-Country Reporting Directive” (2022) 31 *EC Tax Review* 115, 116; Patrick Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 168–170. See also Public Country-by-Country Reporting Directive, recital 6.

⁵⁰ Directive (EU) 2016/881 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation [2016] OJ L 146/8.

⁵¹ See Directive on Administrative Co-operation in the Field of Taxation (consolidated), art.8aa. For explanations, see Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 168–169.

⁵² See OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2015) at <http://dx.doi.org/10.1787/9789264241480-en> [Accessed 18 April 2024]; see particularly the included Model legislation related to Country-by-Country Reporting (BEPS Country-by-Country Reporting Model Legislation). For the implementation of this country-by-country reporting, see OECD, *Country-by-Country Reporting, Compilation of 2023 Peer Review Reports: Inclusive Framework on BEPS: Action 13*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD Publishing, 2023) at <https://doi.org/10.1787/21bd1938-en> [Accessed 18 April 2024].

⁵³ See Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 168–170.

⁵⁴ For a further differentiation, see below Pt III.

⁵⁵ See DAC4, recitals 1–4. See also Loureiro, “The Shortcomings of the EU Public Country-by-Country Reporting Directive” (2022) *EC Tax Review* 115.

⁵⁶ DAC4, recital 1.

⁵⁷ See Public Country-by-Country Reporting Directive, recital 2.

⁵⁸ See Public Country-by-Country Reporting Directive, recital 2; see also recitals 3, 8.

tax arrangements of MNEs and reputational considerations than the (private) tax reporting.⁵⁹ The aforementioned sector specific reporting rules at the EU level, unlike the more general tax reporting rules, already prescribed public reporting obligations,⁶⁰ and, to a certain extent, a voluntary public reporting also already existed;⁶¹ but the report on income tax information introduced through the Public Country-by-Country Reporting Directive elevates public country-by-country reporting to a new level.⁶² Beyond the tax context, the report on income tax information can also be linked to recent regulatory efforts to promote environmental, social, and governance aspects (ESG), where the Directive (EU) 2022/2464 (Corporate Sustainability Reporting Directive)⁶³ is a significant piece of legislation that stipulates reporting obligations. The respective rules exist independently of each other, but the report on income tax information can be seen as part of a broader development to regulate and exert influence on companies via reporting and accounting means.⁶⁴

The new public country-by-country reporting obligations are largely analogous to the already existing obligations of MNEs to report to tax authorities under the BEPS rules and the Directive on Administrative Co-operation in the Field of Taxation with the respective domestic implementations, but there are some differences too. In terms of the in-scope businesses, the tax country-by-country reporting rules based on BEPS Action 13 and DAC4 apply to MNE groups and set a revenue threshold of €750,000,000,⁶⁵ and, naturally, the EU rules also require a connection to the EU.⁶⁶ But differences in the scope of application of the tax country-by-country reporting and the new public country-by-country reporting exist; for example, the Public Country-by-Country Directive, unlike BEPS Action 13 and DAC4, requires the revenue threshold to be exceeded in two consecutive years.⁶⁷ In terms of the content of the report, the tax country-by-country reporting based on BEPS Action 13 and DAC4 requires the disclosure of information on revenue (broken down into revenue generated from transactions with related and independent parties), profit or loss before income tax, income tax paid and accrued, stated capital, accumulated earnings, number of employees, and tangible assets (other than cash or equivalents) regarding each jurisdiction in which the group operates.⁶⁸ Furthermore the report shall contain an identification of each constituent entity of the group (including jurisdiction of tax residence, jurisdiction under the laws of which it is organised, and the nature of the main business activities).⁶⁹ Despite the similarities to the public country-by-country reporting, certain divergences exist in this context as well;⁷⁰ and one relevant difference conceptionally is that the tax country-by-country reporting based on BEPS Action 13 and DAC4 requires a breakdown by jurisdiction in general, and not only in relation to certain

⁵⁹ Kitzig, “HGB § 342” in Henssler (ed), *beck-online Grosskommentar zum Bilanzrecht* (2023), para.5.

⁶⁰ See Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 169–170.

⁶¹ See Lanfermann and Götz, “Neue EU-Unternehmensberichterstattungspflichten ante portas: Public Country-by-Country Reporting” [2022] *Betriebs-Berater* 235, 238; Verloove, Hoving and Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153, 154–155.

⁶² See Thomas Hoppe, “The EU Public Country-by-Country Reporting—A Case Study on Tax Risk Assessment” (2024) 31:2 *International Transfer Pricing Journal*, para.2.2.2.

⁶³ Directive (EU) 2022/2464 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15.

⁶⁴ See Fehrenbacher and Traut, “HGB § 342” in Drescher et al (eds), *Münchener Kommentar zum Handelsgesetzbuch, Band 4* (2023), para.11.

⁶⁵ See BEPS Country-by-Country Reporting Model Legislation, art.1(3).

⁶⁶ See Directive on Administrative Co-operation in the Field of Taxation (consolidated), art.8aa, annex III sections I and II.

⁶⁷ For details, see Verloove, Hoving and Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153, 157.

⁶⁸ See BEPS Country-by-Country Reporting Model Legislation, art.4(1)(i); Directive on Administrative Co-operation in the Field of Taxation (consolidated), art.8aa, annex III section III.

⁶⁹ See BEPS Country-by-Country Reporting Model Legislation, art.4(1)(ii); Directive on Administrative Co-operation in the Field of Taxation (consolidated), art.8aa, annex III section III.

⁷⁰ For an overview, see Verloove, Hoving and Aviles Gutierrez, “EU Public Country-by-Country Reporting” (2022) 29 *International Transfer Pricing Journal* 153, 157.

countries.⁷¹ It is important to note in this context that the EU public country-by-country reporting rules stipulate that EU Member States have to allow in-scope companies to provide the required information on the basis of the already existing reporting obligations for tax purposes under the Directive on Administrative Co-operation in the Field of Taxation.⁷²

III. Policy considerations

A. Transparency and fairness implications invoked by the EU legislator

The EU legislator justifies the introduction of public country-by-country reporting with the aforementioned transparency considerations,⁷³ and with aims to promote “the trust of citizens of the Union in the fairness of national tax systems”.⁷⁴ Fairness is an important tax policy goal; and even though tax fairness as a concept is somewhat vague, particularly in the business tax realm,⁷⁵ ensuring that MNEs pay their “fair share” is a prominent motive in the discussion on country-by-country reporting,⁷⁶ but also in the international discussion on (business) taxation more broadly.⁷⁷ It seems intuitive, from a general conceptual viewpoint, that transparency through reporting to tax authorities may help to respond to tax planning, but also to tackle tax evasion, while transparency through public country-by-country reporting may put more public pressure on tax avoidance strategies of the affected companies.⁷⁸ In this context, empirical studies relating to (earlier) reporting regulations show certain effects.⁷⁹ These analyses suggest that the reporting obligations can lead, on the one hand, to higher effective tax rates and lower profit transfers,⁸⁰ but there seem to be, on the other hand, also further (unintended, circumventive) effects.⁸¹

⁷¹ See Hanno Kirsch, “Die Ermittlung von Wertansätzen im künftigen Ertragsteuerinformationsbericht” [2023] *Die Wirtschaftsprüfung* 226, 230.

⁷² See Accounting Directive (consolidated), art.48c(3).

⁷³ See above Pt II.B.

⁷⁴ Public Country-by-Country Reporting Directive, recital 2; see also recitals 1, 3.

⁷⁵ For details on fairness between taxpayers and countries and on questions on the incidence of corporate taxes, see Michael P. Devereux et al, *Taxing Profit in a Global Economy* (Oxford: Oxford University Press, 2021), pp.34–40.

⁷⁶ See European Commission, Introducing public country-by-country reporting for multinational enterprises—Questions & Answers (12 April 2016) at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1351 [Accessed 18 April 2024]. For a discussion of the aims and goals of the EU public country-by-country reporting (in the context of the procedural controversy already indicated; see above Pt I.), see Wolfgang Schön, “Public Country-by-Country Reporting: Corporate Law, Fiscal Law and the Principle of Unanimity” (2021) Max Planck Institute for Tax Law and Public Finance Working Paper 2021–14 at <https://dx.doi.org/10.2139/ssrn.3914704> [Accessed 18 April 2024].

⁷⁷ For this motive in the Two-Pillar Solution, see, e.g. OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, Frequently asked questions (July 2022) at <https://www.oecd.org/tax/beps/faqs-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2022.pdf> [Accessed 18 April 2024].

⁷⁸ See Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 171.

⁷⁹ For an overview of the following and further economic studies and an interpretation in the context of the report on income tax information, see Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 171. See also Verena K. Dutt, Christoph Spengel and Heiko Vay, “Der EU-Vorschlag zum Country-by-Country Reporting im Internet—Kosten, Nutzen, Konsequenzen” (2017), pp.37–49.

⁸⁰ See, e.g. Preetika Joshi, “Does Private Country-by-Country Reporting Deter Tax Avoidance and Income Shifting? Evidence from BEPS Action Item 13” (2020) 58 *Journal of Accounting Research* 333 (suggesting a moderate effect of private reporting in the BEPS context); Michael Overesch and Hubertus Wolff, “Financial Transparency to the Rescue: Effects of Public Country-by-Country Reporting in the European Union Banking Sector on Tax Avoidance” (2021) 38 *Contemporary Accounting Research* 1616 (suggesting an effect of public reporting in the banking context).

⁸¹ See, e.g. Lisa De Simone and Marcel Olbert, “Real Effects of Private Country-by-Country Disclosure” (2022) 97 *The Accounting Review* 201 (on effects of private reporting in the EU); Preetika Joshi, Edmund Outslay and Anh Persson, “Does Public Country-by-Country Reporting Deter Tax Avoidance and Income Shifting? Evidence

While considerations of fairness, transparency, and tax compliance led to the introduction of the EU public country-by-country reporting in the first place, the public nature of the report on income tax information also raises concerns precisely regarding these motives; and the evaluation of the fairness arguments and related considerations depends on whether the new reporting measure can achieve its stated objective. In earlier discussions on public country-by-country reporting, questions on the constitutionality of such a measure have been raised in EU Member States; particularly with regard to concerns over the disclosure of trade secrets,⁸² which, however, is mitigated to a certain extent by the mentioned possibility to allow companies to temporarily omit certain information from the new public country-by-country report.⁸³ The EU public country-by-country reporting mechanism supplements the existing (private) tax reporting, and it relies on public pressure on arrangements that are regarded as morally reprehensible (even if they are legal).⁸⁴ A general problem in this regard, however, lies in potential difficulties of understanding and possible misrepresentations of the report,⁸⁵ especially in the broader public audience.⁸⁶ One issue here is that once the public, journalists, campaigners or commentators misinterpret these reports and publish their views widely, it is difficult to correct misinformation in the public debate. A further specific issue of the public country-by-country reporting on the EU level in this context is that a detailed overview, broken down by countries, will only be available under these rules within the EU and a limited range of other countries,⁸⁷ and the information would indeed be of a greater significance with a further breakdown.⁸⁸ Moreover, the reconciliation with other fields of (business) tax can be problematic in this context; for example, different tax bases for ordinary corporate income taxes and the Global Anti-Base Erosion (GloBE)⁸⁹ measures may complicate the understanding,⁹⁰ and the interpretation could be made even more difficult if existing tax incentives

from the European Banking Industry” (2020) 37 *Contemporary Accounting Research* 2357 (on effects of public reporting in the banking industry).

⁸² For a constitutional perspective from France, see Conseil Constitutionnel, Décision n° 2016-741 DC (8 December 2016), paras 100–104 at <https://www.conseil-constitutionnel.fr/decision/2016/2016741DC.htm> [Accessed 18 April 2024]; on this discussion from the German perspective, see Wissenschaftliche Dienste, Ausarbeitung WD 4 – 3000 – 068/16 (2016) at <https://www.bundestag.de/resource/blob/436832/2802675c4752a138b34014635742b6c2/WD-4-068-16-pdf-data.pdf> [Accessed 18 April 2024].

⁸³ See above Pt II.A. In the context of the implementation in Germany, see, e.g. Mark Desens, Rechtsausschuss Testimony (14 April 2023), p.3 at <https://www.bundestag.de/resource/blob/943004/54d210601d06411aef2359e1a58a6952/Stellungnahme-Desens-data.pdf> [Accessed 18 April 2024].

⁸⁴ See above Pt II.B. See also Jost Kovermann, Partick Velte and Gerrit Lietz, “EU-Regulierung des öffentlichen Country by Country Reportings—Teil I: Rechtsvergleichende Analyse” [2021] *Der Konzern* 489.

⁸⁵ For a discussion of approaches to prevent misinterpretation (by providing additional information), see, e.g. Grotherr, “Zweifelsfragen, Risiken und Nebenwirkungen des künftigen öffentlichen Ertragsteuerinformationsberichts” [2023] *FinanzRundschau* 193, 202–205.

⁸⁶ Hoppe, “The EU Public Country-by-Country Reporting—A Case Study on Tax Risk Assessment” (2024) 31:2 *International Transfer Pricing Journal*, para.4; Kitzig, “HGB § 342” in Henssler (ed), *beck-online Grosskommentar zum Bilanzrecht* (2023), para.14; Rudolf Mellinghoff, “Datensammlungen, Informationsaustausch und Publizität im Steuerrecht” (2023) 100 *Steuer und Wirtschaft* 5, 11. See also Kiyoshi Nakayama, “Public Disclosure of Taxpayer Information as a Measure to Improve Tax Compliance” (2021) 27:3 *Asia-Pacific Tax Bulletin*, para.3.2.

⁸⁷ See above Pt II.A.

⁸⁸ See, e.g. Hanno Kirsch, “Der Ertragsteuerinformationsbericht—Zukünftige Erstellungs- und Offenlegungspflichten auch für (mittel-)große Tochterunternehmen und Zweigniederlassungen?” [2023] *Deutsches Steuerrecht* 54, 58. See also Public Country-by-Country Reporting Directive, recitals 16, 23. For concerns towards a further breakdown in the context of the functioning of the sharing of information for tax purposes with (non-EU) countries, however, see Siegfried Grotherr, “Zweifelsfragen, Risiken und Nebenwirkungen des künftigen öffentlichen Ertragsteuerinformationsberichts” [2023] *FinanzRundschau* 193, 202–203.

⁸⁹ See OECD, Tax Challenges Arising from the Digitalisation of the Economy—Global Anti-Base Erosion Model Rules (Pillar Two) at <https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm> [Accessed 18 April 2024].

⁹⁰ Fehrenbacher and Traut, “HGB § 342” in Drescher et al (eds), *Münchener Kommentar zum Handelsgesetzbuch, Band 4* (2023), para.3. For details on the floor created through the GloBE rules, see Michael

would be replaced by (other) subsidies, which is already anticipated in the discussion on the GloBE and country-by-country reporting rules.⁹¹

B. Concerns in practice over the burden of implementation and related issues

The potential transparency and fairness advantages considered by the EU legislator are contrasted by practical concerns over implementation costs that highlight issues of ease of administration as another important policy goal considered in tax research.⁹² Commentators discuss direct implementation and reporting costs of the EU public country-by-country reporting, but also point out certain implicit costs of the implementation and in particular highlight reputational effects and potential competitive disadvantages for certain larger European businesses.⁹³ In the context of direct costs it is worth mentioning that the new reporting obligation creates a burden for the affected businesses; this burden, however, has to be considered in the context of other existing reporting obligations, because, on the one hand, certain synergy effects exist particularly in light of the obligations following from BEPS Action 13 and DAC4,⁹⁴ and, on the other hand, more extensive reporting requirements for larger businesses compared to smaller businesses (that are out of scope of the reporting obligations) existed already with regard to the country-by-country reporting for tax purposes.⁹⁵ The additional administrative burden of preparing specifically the new report on income tax information should be limited.⁹⁶ The new public country-by-country reporting and the (private) tax reporting extend to similar information,⁹⁷ and the Public Country-by-Country Reporting Directive allows a recourse to the reporting for tax purposes under the Directive on Administrative Cooperation in the Field of Taxation precisely to ensure simplification.⁹⁸

The additional (implicit)⁹⁹ burdens of the new reporting mechanism are more difficult to evaluate. To a certain extent, issues of a potential competitive disadvantage have been addressed in the Public Country-by-Country Reporting Directive with the option to keep certain information confidential.¹⁰⁰ On further aspects, economic research may provide additional insight.¹⁰¹ For example, in respect to country-by-country reporting in the extractive industry, which is a case of public reporting that has been implemented early on in the EU context,¹⁰² findings on negative implications on firm values exist, and

Devereux and John Vella, “The Impact of the Global Minimum Tax on Tax Competition” (2023) 15 *World Tax Journal* 323, 337–343. See also Joachim Englisch, “GloBE Rules and Tax Competition” (2022) 50 *Intertax* 859.

⁹¹ See Noam Noked, “From Tax Competition to Subsidy Competition” (2020) 42 *University of Pennsylvania Journal of International Law* 445.

⁹² For a theoretical underpinning of ease of administration as a factor of a good (business) tax, see Devereux et al, *Taxing Profit in a Global Economy* (2021), pp.53–55.

⁹³ See, e.g. Dutt, Spengel and Vay, “Der EU-Vorschlag zum Country-by-Country Reporting im Internet—Kosten, Nutzen, Konsequenzen” (2017), pp.20–27. See also Rainer Kirchdörfer, “Europäische Unternehmen beim Country-by-Country Reporting nicht benachteiligen!” [2017] *Europäische Zeitschrift für Wirtschaftsrecht* 705.

⁹⁴ For the overall context of the reporting requirements, see above Pt II.B.

⁹⁵ Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 171.

⁹⁶ Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 171–172.

⁹⁷ See above Pt II.B.

⁹⁸ See Public Country-by-Country Reporting Directive, recital 14. See also above Pt II.B.

⁹⁹ See again Dutt, Spengel and Vay, “Der EU-Vorschlag zum Country-by-Country Reporting im Internet—Kosten, Nutzen, Konsequenzen” (2017), pp.21–27.

¹⁰⁰ See above Pt II.A.; see also above Pt III.A.

¹⁰¹ For an overview of the following and further economic studies and an interpretation in the context of the report on income tax information, see Velte, “The New European Public Country-by-Country Reporting Requirement” (2022) 62 *European Taxation* 168, 172. See also Dutt, Spengel and Vay, “Der EU-Vorschlag zum Country-by-Country Reporting im Internet—Kosten, Nutzen, Konsequenzen” (2017), pp.37–49; Nakayama, “Public Disclosure of Taxpayer Information as a Measure to Improve Tax Compliance” (2021) 27:3 *Asia-Pacific Tax Bulletin*.

¹⁰² See above Pt II.B.

it was assumed that this follows from reduced rents that were created by tax evasion.¹⁰³ As has been already explained, however, the new public report on income tax information comes on top of the country-by-country reporting for tax purposes that already exists today, and the public report has been identified above as a tool to tackle avoidance more than evasion.¹⁰⁴ In this context, in the literature on reputational effects it is suggested that stakeholders may differentiate between legal and illegal tax practices, as stock market responses have been found to be negative regarding the latter (evasion) but not regarding the former (avoidance).¹⁰⁵ Nevertheless, the practical tax literature points to the public reactions on recent reports on tax planning activities of MNEs for example through the Panama and Pandora Papers,¹⁰⁶ which underpin concerns over a potential burden that could follow from publicity issues routed in the public nature of the report, particularly as a result of potential misinterpretations of the report.¹⁰⁷

IV. Outlook

Overall, to a certain degree, the report on income tax information, as a new (public) component of country-by-country reporting, should be suited to serve the purpose of increasing transparency. There are, however, valid concerns about uncertainties and risks of misinterpretations, and it remains to be seen to what extent negative effects will follow that go beyond a (moderate) direct additional administrative burden. Looking ahead, the interaction between the report on income tax information and the global minimum tax could be particularly interesting.¹⁰⁸ GloBE has two stated rationales: addressing profit shifting and tax competition.¹⁰⁹ In light of this, and particularly considering the idea of creating a uniform floor of the taxes paid by certain companies, it has been doubted that there is still room for the public report on income tax information in addition to the GloBE rules (and the tax country-by-country reporting).¹¹⁰ However, the public country-by-country reporting should still be able to show differences in the tax payments in different countries to a certain extent, and therefore to foster the transparency invoked by the EU legislator.

¹⁰³ See Niels Johannesen and Dan Thor Larsen, “The power of financial transparency: An event study of country-by-country reporting standards” (2016) 145 *Economic Letters* 120.

¹⁰⁴ See above Pt III.A. See also Fehrenbacher and Traut, “HGB § 342” in Drescher et al (eds), *Münchener Kommentar zum Handelsgesetzbuch, Band 4* (2023), para.2; Patrick Velte and Maurice Münch, “Der neue Ertragsteuerinformationsbericht“ [2023] *StuB—Unternehmenssteuern und Bilanzen* 527, 530–531.

¹⁰⁵ See Kay Blaufus, Axel Möhlmann and Alexander N. Schwäbe, “Stock price reactions to news about corporate tax avoidance and evasion” (2019) 72 *Journal of Economic Psychology* 278. For explanations on further studies, see Ulrich Schreiber and Johannes Voget, “Internationale Gewinnverlagerung und Publikation länderbezogener Ertragsteuerinformationen” (2017) 94 *Steuer und Wirtschaft* 145, 153–158.

¹⁰⁶ For doubts about the appropriate interpretation of information from public-country-by-country reporting in light of the reporting on these tax scandals, see Mellinghoff, “Datensammlungen, Informationsaustausch und Publizität im Steuerrecht” (2023) 100 *Steuer und Wirtschaft* 5, 11.

¹⁰⁷ See Dutt, Spengel and Vay, “Der EU-Vorschlag zum Country-by-Country Reporting im Internet—Kosten, Nutzen, Konsequenzen” (2017), pp.21–22. See also above Pt III.A.

¹⁰⁸ The public country-by-country reporting and the global minimum tax are two fields where the EU currently advances the international business tax development through directives, and a connection between these measures exists considering similarities in the affected businesses; see above fn.1; see also Fehrenbacher and Traut, “HGB § 342” in Drescher et al (eds), *Münchener Kommentar zum Handelsgesetzbuch, Band 4* (2023), para.3.

¹⁰⁹ See Devereux and Vella, “The Impact of the Global Minimum Tax on Tax Competition” (2023) 15 *World Tax Journal* 323.

¹¹⁰ See Bundesverband der Deutschen Industrie, Rechtsausschuss Testimony (14 April 2023), p.3 at https://www.bundestag.de/resource/blob/942880/47808f241642b88a26c6066d02840526/Stellungnahme-Wuennemann_BDI-data.pdf [Accessed 18 April 2024]; see also Carmen Bachmann, Rechtsausschuss Testimony (15 April 2023), p.3 at <https://www.bundestag.de/resource/blob/943002/cb363fc6734ddf56bbfbd51eabddb10/Stellungnahme-Bachmann.pdf> [Accessed 18 April 2024]. For the broader role of country-by-country reporting regarding the so-called safe harbour rule, see OECD, *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS (Paris: OECD Publishing, 2022) at www.oecd.org/tax/beps/safe-harbours-and-penalty-relief-global-anti-base-erosion-rules-pillar-two.pdf [Accessed 18 April 2024].