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Public Country-by-Country Report for Increased Tax Transparency

The Law of 8 January 2024 amending the Belgian Code of Companies and Associations regarding the disclosure of income tax information by certain companies and branches (BSG 26 January 2024) transposed public country-by-country reporting (**CbCR**) into Belgian law. Large multinational groups and standalone companies are now required to provide greater tax transparency through the preparation, filing and disclosure of a country-by-country report containing certain tax and financial information. Depending on the situation, they will have to comply with this obligation in Belgium, in the EU or elsewhere. In any event, this information will be publicly available to the general public, including shareholders, potential investors, non-governmental organisations and (investigative) journalists. Meanwhile, the Royal Decree of 18 April 2024 further clarified the content of the (Belgian) country report (BSG 6 June 2024). Public CbCR applies to financial years starting on or after 22 June 2024.

Background

The proposal to introduce public CbCR was presented by the European Commission on 12 April 2016. Five years later, this resulted in Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards the disclosure of income tax information by certain companies and branches (the ***CbCR Directive***).

The adoption faced a number of challenges, particularly given that the CbCR Directive was introduced through an amendment to the European Accounting Directive (Directive 2013/34/EU). Therefore the ordinary legislative procedure could be applied, with the Council deciding by qualified majority, rather than the unanimity required for harmonisation in the field of taxation. Several member states disagreed with this approach, as public CbCR is primarily seen as a tool in the broader fight against aggressive tax planning. Indeed, the initiative builds on the (non-public) CbCR developed under Action Point 13 of the Action Plan to address base erosion and profit shifting (**BEPS 13**) and which was adopted within the European Union through Directive 2016/881/EU of 25 May 2016 (so-called DAC 4). Under BEPS 13 CbCR, large multinational groups are required to prepare a CbC report since 2017. However, this BEPS 13 CbC Report is only accessible to tax authorities.

The key elements of public CbCR which has now been introduced (such as the scope and content of the CbC report) are largely similar to those of the non-public BEPS 13 CbCR.

However, public CbCR goes one step further by making the data also available to the general public, including shareholders, potential investors, non-governmental organisations and (investigative) journalists. Such increased accountability, transparency and public scrutiny of large companies' tax positions would lead, according to the European Commission, to a fairer economy and fiscal justice. The European Commission also sees public CbCR as an effective tool in the fight against tax avoidance and fraud, as it considered that complex tax rules and tax secrecy allow certain multinational companies to exploit non-transparent loopholes and mismatches in tax systems within the European Union.

The new reporting obligation is essentially a financial reporting regime. Therefore CbCR is included in the Belgian Code of Companies and Associations (***BCCA***) and

further executed in the Royal Decree implementing the BCCA (***RD/BCCA***). The main elements of this regime are expanded below.

Scope

Threshold of EUR 750 million turnover

Public CbCR applies if the multinational group (or standalone company) in question has exceeded a certain size threshold.

For this purpose, the meanwhile well-known threshold of EUR 750 million (consolidated) turnover is used (it refers more precisely to the amount of reported "revenue" in groups applying international accounting standards for consolidated financial statements, or else "net turnover"). This size threshold also determines whether a group is subject to non-public BEPS 13 CbCR. It is also relevant to determine whether a group is subject to the minimum tax for multinational enterprises (Pillar 2).

However, some stability is provided for groups whose turnover hovers around EUR 750 million. Indeed, the threshold must be exceeded for each of the last two consecutive financial years on the balance sheet date for the reporting obligation to apply. The obligation then applies to the most recent of these two financial years. The reporting obligation will thereafter cease to apply if this threshold has not been exceeded on the balance sheet date in each of the last two consecutive financial years.

The Belgian government can amend the minimum threshold of EUR 750 million, after consultation in the Council of Ministers and after advice from the Central Economic Council. However, such amendment seems difficult within the current European framework (see art. 48ter of the European Accounting Directive which does not allow for a deviation).

Belgian companies subject to public CbCR

Given that public CbCR applies across the EU and in a number of third countries, it would obviously be highly burdensome and unnecessary for all Belgian companies and branches exceeding the size threshold on a group basis to have a reporting obligation in Belgium. This is particularly unnecessary if the multinational group has fulfilled that obligation in another country.

Hence, in line with the CbCR Directive, only the following Belgian companies have the obligation to prepare and disclose a CbC report (always provided the abovementioned size threshold is exceeded):

- Belgian companies that are the ultimate parent company of a multinational group (art. 3:34/1 BCCA);
- Belgian subsidiaries that are part of a group whose ultimate parent company is not subject to the laws of a member state (art. 3:8/2, §1, first indent BCCA). However, in order to avoid multiple reporting, such Belgian subsidiaries are exempt from the reporting obligation if their EU-based parent company already meets the European reporting obligation (art. 3:8/2, §1, fifth indent of the BCCA). In most case, a Belgian subsidiary will only have a reporting obligation if it acts as the regional holding company in the EU of a non-EU group, or if the non-EU group does not operate through an EU holding structure. However, even in these cases, there is no reporting obligation if the ultimate parent company of the group prepares and discloses a CbC report that is equivalent in content and form to the "EU" CbC report (art. 3:8/4 BCCA - see also below). In addition, Belgian subsidiaries are always exempt from the reporting obligation if they qualify as "small companies" in accordance with Article 1:24 BCCA (art. 3:8/2, §1, fourth indent BCCA);
- finally, Belgian standalone companies, i.e. Belgian companies that are not part of a group, are also subject to public CbCR (art. 3:8/1 BCCA). This differs from the non-public BEPS 13 CbCR, which does not apply to standalone companies.

It is logical that CbCR should only apply where there is a cross-border tax component. Consequently, purely Belgian corporate groups and standalone companies that, in their entirety (i.e., including all affiliates and establishments), are only subject to the Belgian income tax system are therefore not subject to public CbCR (art. 3:8/1, §1, 1° BCCA).

Furthermore, only Belgian companies with legal personality whose shareholders have limited liability are subject to the reporting obligation. Entities without legal personality whose shareholders have unlimited liability, such as *partnerships* are not in the scope of public CbCR.

Belgian branches

Contrary to non-public BEPS 13 CbCR, Belgian branches may also be subject to public CbCR. This is particularly the case if they are opened by a non-EU company that is part of a group whose ultimate parent company is not subject to the laws of a member State, or if they are opened by a standalone non-EU company (art. 3:20/1, §1, 1° and 2° BCCA). The CbCR obligation however logically does not apply if a Belgian subsidiary of the group is already subject to the Belgian CbCR obligation (art. 3:20/1, §1, third indent BCCA) or, again, if an equivalent non-EU CbC report (see also below) was prepared and disclosed by the ultimate parent company (art. 3:20/3 BCCA).

Also for branches the reporting obligation only applies when the size threshold of EUR 750 million is exceeded at group level. However, branches are subject to an additional threshold of EUR 9 million in annual turnover at branch level. Such threshold must also be met for two

consecutive financial years for the branch to be subject to the CbCR obligation (for the last of these two financial years).

Link with non-public BEPS 13 CbCR

The implementing RD of 18 April 2024 in which further rules in relation to the CbC report are laid down states that *"the instructions referred to in Article 321/2 ITC 92 [may] be used. If this option is used, it must be mentioned in the CbC report"* (Art. 6:4, second indent RD/BCCA). Article 321/2 ITC 92 indicates which group entities are required to file a non-public BEPS 13 CbC report. Although the scope of this reference is unclear, it appears to imply that a Belgian company or branch is not subject to public CbCR in Belgium, if the Belgian group entity is also not required to submit a non-public BEPS 13 CbC report on the basis of Article 321/2 ITC 92 due to the fact that another group company, referred to in that article, has already fulfilled this obligation. This interpretation seems reasonable and logical, but it is surprising that in such case, this provision is included in the RD/BCCA rather than in the BCCA, which otherwise sets out the scope of CbCR.

Presumably, the government came to the (correct) conclusion that the abovementioned scope of the Belgian CbCR rules may still result in multiple reporting obligations. Consider for example a non-EU group with multiple subsidiaries in Belgium. The BCCA does not clearly stipulate that only one of them has to fulfil the public CbCR. Another example is a Belgian branch opened by a company with a parent company established in the EU that fulfils the public reporting obligation there. The BCCA does not clearly exempt such Belgian branch from CbCR.

However, the reference to the non-public BEPS 13 obligation may extend beyond that. Non-public BEPS 13 CbCR (and therefore also art. 321/2 ITC 92) allows for the CbC report to be filed by an entity other than the ultimate parent company, the so-called surrogate parent entity. As previously stated, this is not the case under the CbCR included in the BCCA. However, the reference to art. 321/2 ITC 92 may indicate that Belgian companies and branches are also exempt from public CbCR in cases where a surrogate parent entity prepares and discloses a public CbC report.

Hence, it appears that art. 6:4, second indent RD/BCCA has resulted in further streamlining and alignment with the BEPS 13 CbCR. As the scope of the reference is nevertheless very unclear, it would be helpful should the above interpretation be confirmed by the government.

Indeed, the reference to "the instructions referred to in Article 321/2 ITC 92" could also be interpreted in another way, in particular as a reference to the general and specific instructions included in the explanatory note to the "non-public" CbC form (275 CBC), as specified in Article 321/2, §5 ITC 92. However, as the mere use of these instructions can hardly be regarded as an "option" within the meaning of Article 6:4 RD/ITC 1992 (see above), this interpretation seems hardly plausible.

Exemption for credit institutions

For some time already, Belgian credit institutions and stockbroking firms (and Belgian ultimate parent companies related to Belgian credit institutions and stock broking firms) are subject to specific rules on public reporting regarding income taxation (for credit institutions, this is set out in Article 106 of the Law of 25 April 2014 and for stock broking firms, this is set out in Article 109 of the Law of 20 July 2022). Consequently, companies that prepare and disclose a report in accordance with the aforementioned provisions are not subject to the public CbCR provisions included in the BCCA.

Companies active in the extractive industry or logging of primary forests are required to prepare an annual "report on payments to governments" and this, if applicable, also on a consolidated basis (arts. 3:8 and 3:33 BCCA). Such report should also be made public by filing it with the National Bank of Belgium and includes, amongst other elements, the amount of income taxes paid to each government in the EU or in a third country. However, this report does not include all the other tax and financial information that is required to be included in the public CbC report and is also has a somewhat different (not purely tax) finality. These companies are therefore not exempt from the obligation to prepare and disclose a CbC report.

Content of the CbC report

Country-by-country

The peculiarity of a CbC report is that the included tax and financial information (see below) is presented separately on a country-by-country basis. This is in principle also the case here, at least as far as EU member states are concerned.

With regard to countries (or rather "tax jurisdictions") outside the EU, the information can in principle be aggregated, unless it concerns so-called non-cooperative jurisdictions or tax havens (art. 6:5, §3 RD/BCCA). In particular, for the following non-EU tax jurisdictions, tax and financial information must be included in the report on a country-by-country basis: (i) the tax jurisdictions included on the Belgian lists of tax havens, as set out in articles 734quater and 179 of RD/ITC 92; (ii) the tax jurisdictions included on the so-called European "black list" of non-cooperative jurisdictions (Annex I to the Council conclusions on the revised EU list of non-cooperative tax jurisdictions); (iii) the tax jurisdictions on the so-called European "grey list" of non-cooperative jurisdictions (Annex II to the aforementioned Council

conclusions); and (iv) jurisdictions identified by the Global Forum on Transparency and Exchange of Information for Tax Purposes as a State that does not effectively or substantially apply the standard on exchange of information on request (art. 6:1, 4° and 5° and art. 6:5, § 3, 3° RD/BCCA). Note that with regard to tax jurisdictions on the European "grey list", the EU directive only takes them into account if they have been on the list for two consecutive years, while the Belgian CbCR requires a separate presentation as soon as these tax jurisdictions are included in the list.

The fact that the information for tax jurisdictions outside the EU is in principle aggregated constitutes an important deviation from the BEPS 13 CbCR. In the non-public BEPS 13 CbC report, information is always presented on a jurisdictional basis.

Tax and financial information

The content of the public CbC report is included in art. 6:5, §1 RD/BCCA.

First of all, the CbC report includes the name of the relevant standalone company, ultimate parent company or non-EU ultimate parent company as well as a list of all entities included in the consolidated financial statements (or, if it is a standalone company, a list of all branches) to the extent that they are established in an EU member state or in one of the aforementioned non-cooperative jurisdictions or tax havens.

Of course, the relevant financial year should be included, and the applicable currency. It concerns the currency in which the annual accounts of the standalone company, the consolidated accounts of the ultimate parent company or the consolidated accounts of the ultimate non-EU parent company are prepared and disclosed. In the event that the subsidiary is responsible for preparing the CbC report (see below), the currency is the currency used for the preparation of the subsidiary's financial statements.

As regards the tax and financial information, the following must be included and this, where required (see above), on a country-by-country basis (art. 6:5, §1 RD/BCCA):

- a brief description of the nature of the activities;
- the number of employees on a full time basis;
- revenues generated from third parties and related parties, excluding dividends received from related companies;
- the amount of profit or loss for the financial year before income tax;
- amount of income tax accrued during the relevant financial year (equal to all tax expenses of the current relevant financial year minus deferred taxes and provisions for uncertain tax liabilities);
- the amount of income tax paid on a cash basis; and
- amount of accumulated profit at the end of the relevant financial year.

If applicable, the CbC report should include a comprehensive explanation for any significant discrepancies between the amount of income tax accrued and the amount of income tax paid on a cash basis, taking into account, if applicable, the corresponding amounts from previous fiscal years (e.g. carried-forward tax credits).

In order to arrive at a "country-by-country" presentation, the above tax and financial information is to be allocated to tax jurisdictions on the basis of the presence of an establishment (or permanent establishment), or alternatively, on the basis of the existence of permanent business activities which, by virtue of the company's or group's activities in that tax jurisdiction, are subject to income tax (art. 6:5, §2 RD/BCCA).

The content of the public CbC report largely corresponds to the content of the (non-public) BEPS 13 CbC report. However, the public CbC report is somewhat more limited than the BEPS 13 report, since it does not require information on paid-up capital and tangible fixed assets.

The European CbCR regime provides that member States may allow the temporary omission from the report of certain information that should in principle be disclosed, if such disclosure would be seriously prejudicial to the commercial position of the undertakings to which the report relates (art. 48c, Nr 6 of Directive 2013/34/EU). Such omissions must then be clearly indicated in the report, with a duly reasoned explanation of the reasons for the omission, and the omitted information must still be made public in a later report within no more than five years. Contrary to e.g. the Netherlands, Germany and France, Belgium has not made use of this option. It is remarkable that the preparatory works do not include any explanation or discussion regarding this important decision.

Missing CbC information

If the CbCR obligation falls upon a Belgian subsidiary or branch of a non-EU parent or standalone company, then expectedly the group's central management will prepare such CbC report and provide it to the Belgian subsidiary or branch so that they can fulfil their CbCR obligation.

It is however possible that such Belgian subsidiary or branch does not receive a complete CbC report. In such a case, the subsidiary or branch must request all information from such parent or standalone company to prepare the CbC report (arts. 3:8/3 and 3:20/2 BCCA).

If this non-EU parent or standalone company does not provide all the necessary information, the subsidiary or branch must prepare and disclose the CbC report on the basis of all the information available to it (or obtained from the parent company) at that time and must include a

statement in the CbC report indicating that the parent company or standalone company did not make the necessary information available (arts. 3:8/3 and 3:20/2 BCCA).

Disclosure via National Bank of Belgium and website

The CbC report must be filed with the National Bank of Belgium on the one hand (separately from other documents such as the annual accounts or annual report) and published on the website of the Belgian entities on the other hand (art. 3:36/1 BCCA). The disclosure must take place within 12 months after the end of the financial year for which the country report was drawn up (art. 6:7 RD/BCCA).

Companies are exempted from the obligation to publish the country report on their website, provided that the website refers to the exemption and to the filing of the CbC report with the National Bank of Belgium.

The European Commission will determine the model and format for electronic submission of the country report (art. 6:6 RD/BCCA).

The CbC report must remain available free of charge on the website of the Belgian entity for five years after publication.

Equivalent non-EU country report

As mentioned above, the CbCR in principle applies to Belgian subsidiaries and branches belonging to a group whose ultimate parent company is a non-EU company. But they can be exempted from this obligation if the ultimate parent company prepares and discloses a CbC report.

This "non-EU CbC report" must then meet certain requirements. For example, its content must be consistent with the content of the EU CbC report (as shown above and also included in art. 48c of Directive 2013/34/EU). In addition, the CbC report must be disclosed on the website of the non-EU ultimate parent company within 12 months from the balance sheet date of the financial year for which the report is prepared. Such CbC report must be disclosed in at least one of the official languages of the European Union. Moreover, it must state the name and registered office of the Belgian subsidiary concerned and must remain uninterruptedly available on the website of the ultimate parent company for at least five years.

Audit obligation

Public CbCR also creates a new obligation for statutory auditors or audit firms who audit the annual accounts of Belgian parent companies, standalone companies and subsidiaries of a non-EU parent company. When auditing the annual accounts, they must state in the audit report whether or not the company concerned is obliged to prepare and publish a public CbC report in respect of the financial year preceding the financial year of the annual accounts to be audited and, if applicable, confirm whether or not the CbCR obligation has been complied with (Articles 3:75, §1, 10°/1 and 3:80, §1, 6°/1 BCCA). Auditors that audit the annual accounts of branches, if applicable, are not subject to this additional obligation.

However, such statutory auditors or audit firms are not required to audit the content of the CbC report.

Responsibility and sanctions

The CbC report must be prepared and filed with the National Bank of Belgium by the management body of the Belgian in scope companies (or, if the branch is required to publish a CbC report, by the persons responsible for the management of the branch). Any sanctions for non-compliance with the reporting requirements will therefore be imposed on these persons.

Non-compliance may result in a fine of up to EUR 10,000, to be increased with surcharges. In case of a violation with fraudulent intent, a prison sentence is also possible.

In addition, the enterprise court has the authority - at the request of the Minister of Finance, the Minister of Economy, the public prosecutor or any interested party - to order a Belgian subsidiary or branch to comply with its reporting obligations. The latter sanction may be imposed in particular if the sole purpose of the incorporation or opening of a Belgian subsidiary or branch is to circumvent the reporting rules (e.g. by splitting up activities in order not to exceed the threshold for "small" companies or the threshold of EUR 9 million for a branch).

Entry into force

Public CbCR is applicable for financial years starting on or after 22 June 2024.

This means that companies with a financial year corresponding to the calendar year will have to prepare and file a first country report relating to financial year 2025 by 31 December 2026, if the size threshold is exceeded on the balance sheet date for each of the financial years 2024 and 2025, unless they are otherwise exempt.

Concluding remarks

Public CbCR marks another step towards increased tax transparency. As from now, the general public, including shareholders, creditors, potential investors, journalists and non-governmental organisations, will have a better insight into the tax position of large companies. The Directive itself also mentions that public CbCR is a tool to increase transparency regarding the activities of multinational enterprises and to enable the public to assess the impact of these activities on the real economy. It also refers to improving the ability of shareholders to properly assess the risks taken by companies and to base investment strategies on accurate information, and to improving the ability of policymakers to assess the effectiveness and impact of national legislation. Public CbCR is also expected to have a positive impact on the rights of employees to information and consultation, and on the quality of dialogue within companies by increasing knowledge about their activities.

Tax administrations will obviously also have access to the public CbC reports. Admittedly, these do not contain more information than the non-public BEPS 13 reports that are already available to tax administrations, but potentially the public CbC report could be more easily accessible to certain tax authorities. Moreover, non-public BEPS 13 CbC information is not available with respect to standalone companies.

As mentioned above, the Belgian CbCR requirement does not allow for the temporary omission of competitively sensitive information from the CbC report. It is possible that this consideration could play a role in a group's decision as to which group company prepares and discloses the CbC report, in cases where the rules allow such flexibility.

In any case, companies should be prepared for questions or criticism from various quarters. This should be taken into account when preparing the CbC report. It would for example be highly recommended to identify (and be able to explain) any counter intuitive, deviating or contradictory figures or data contained in the report.

On the other hand, some companies in the past already decided to spontaneously publish such tax and financial information for example in the context of ESG reporting. For them, public CbCR is not a big step in itself, but they will want to ensure that the different reports are and remain consistent.

Finally, public CbCR can play a role in takeover transactions. A public CbC report may indeed provide potential bidders with information to assess whether competition law notifications and/or foreign direct investments reviews are required in the event of an (unwanted) bid on a company, before or without the company specifically providing this information to the bidder.

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