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Director
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Per email to: MNETaxTransparency@treasury.gov.au

Bern, 27 April 2023

SwissHoldings Comment Letter
Exposure Draft: Multinational tax transparency (ED) introduced on 6 April 2023

Dear Madam/Sir,

SwissHoldings represents the interests of 62 Swiss-based multinational enterprises from the manufacturing and service sectors (excluding the financial sector) such as Nestlé, Roche, Novartis, ABB, Kuehne+Nagel, Schindler and Holcim. We very much welcome the opportunity to provide comments to this Exposure Draft. Our response has been prepared in conjunction with our member companies.

We note that the proposal as currently drafted essentially requires any large global group with Australian operations or an Australian presence to report certain confidential global data on a jurisdiction-by-jurisdiction basis and to have this publicly published, i.e., world-wide on an annual basis, irrespective of where the group is based and hence would capture our member companies.

Importantly and relevantly the proposal goes further than the existing non-public country-by-country (CbC) reporting pursuant to Action 13 of the Organisation for Economic Co-operation and Development's (OECD's) base erosion and profit shifting project or that required by the European Union (EU) in its Directive 2021/2101. That is, the proposal (as currently drafted) creates an unharmonized, separate public reporting regime on top of these existing measures leading to:

a) material uncertainty and additional annual (i.e., ongoing) complexity and compliance costs and

b) a requirement to publish commercially confidential and sensitive information about the global operations of our member companies with far reaching, complex and difficult (if not impossible) impacts to assess let alone quantify.

We are deeply concerned about this measure and kindly ask to clarify how an Australian regime could obligate such public disclosure of non-Australian information of foreign groups including that

of our member companies. In particular we are concerned about the assertion of non-compliance with an Australian law should such information not be publicly published and the proposal to impose penalties (our members take pride in complying with laws and regulations around the world), the proposal to proceed with the measure with little global consultation, that it goes further than any other measure our member companies are currently exposed to globally and its far reaching and complex ramifications. If enacted as currently proposed, the measure will unfortunately force our member companies to not only have to grapple with an additional layer of annual compliance costs, material uncertainty and complexity but also be forced to make commercial assessments on the consequences of compliance. That is, our member companies will need to consider all implications, including financial and competitive, on their entire global operations if required to disclose publicly commercially sensitive information. We respectfully believe that this is a disproportionate ask, driven by our member companies having investments in Australia.

We certainly welcome global developments and a global dialogue on tax transparency matters and we acknowledge Australia's concerns in this regard. We also further acknowledge that there is no global standard of today on tax transparency although one is likely to emerge, and we strongly believe that any consensus approach or standard should be developed internally within the OECD and the Inclusive Framework ("IF"). This would allow all relevant stakeholders to provide input in assessing its risks and benefits, any unintended consequences, and its ability to appropriately meet any stated objectives considering any current or proposed global developments.

We therefore kindly ask Treasury to take another comprehensive look at the proposed measure and to focus its leading efforts on a global dialogue in this regard, to alleviate the unprecedented uncertainty the announced measure has caused for our member companies. We kindly ask that at the very least, the enactment of any legislation is delayed such that our member companies can better assess its consequences on their entire global operations and their current and proposed future investments in Australia.

Our specific concerns have been elaborated on below.

1. **Any such measure should be simple and efficient and agreed upon in an international setting (if required to disclose non-Australian information) by considering its full risks and benefits and its ability to meet the stated objective considering any relevant global developments**

We submit that any public transparency reporting regime adopted in Australia requiring the disclosure of non-Australian (i.e. extra-territorial) information should, to the extent possible, be consistent with the manner and form of the prevailing regime of public CbC reporting globally, as it develops, i.e. by assessing the full risks and benefits of such an approach and its ability to meet any stated objective by all relevant stakeholders.

We further note that looking forward, the scope for global entities to avoid taxes and the consequential harm to public confidence will be further limited by Pillar 1 and Pillar 2 reforms of the OECD. The ATO also already has access to the globally agreed CbC reports and is fully equipped to take any corrective measures if required by virtue of such access.

We kindly submit that there needs to be an acknowledgement that tax laws both nationally and internationally are highly complex. Such acknowledgement exists in many other fields whereby public reporting of certain confidential information simply does not exist and/or experts are required

to assess adherence to a certain regulation or law. The publication of such tax disclosures, even with a narrative (which itself can be burdensome, especially for larger global groups with complex structures within a jurisdiction such as our member companies) may result in a lot of confusion for the world-wide community in trying to understand the data. We are also concerned that such information may be used to misinterpret economic realities. Indeed, this is one of the reasons why the OECD BEPS Action 13 specifically preserved the confidentiality of CbC reports. The ATO itself lists numerous disclaimers on its website in connection to the interpretation of the information published in the Corporate Tax Transparency report.

Further, the proposed measure as currently drafted, requires additional disclosures than that in the current non-public CbC reports ("CbC reports") or pursuant to the EU Directive. This would inevitably require the establishment of separate processes to comply with an additional regime and additional information requirements and lead to increased complexity and an excessive compliance burden on our member companies. This is further exacerbated by the need to compare the information requirements across the different regimes. As the proposal is to publicly publish this information yearly, such costs would be ongoing, i.e. permanent. This is also compounded by a lack of globally consistent guidance on numerous elements proposed to be included in the disclosures including but not limited to, 'intra-group transaction' and whether there is consistency with an OECD standard and disclosures around tangible and intangible assets, let alone the ability to use 'regulations' to add additional unknown public disclosure requirements (all leading to unacceptable uncertainty and risks for our member companies). This lack of guidance also means that the information to be published and thus made publicly available may be presented inconsistently reducing its comparability and any perceived usefulness to the global public.

We further note that in a few cases, although the Australian requirements appear similar to that of the CbC reports, they are in fact different, leading to further complexity. For example, per subsection 6(d) there is a requirement to disclose *"revenue from related parties that are not tax residents of the jurisdictions,"* whereas the accompanying explanatory memorandum ("EM") refers to this as simply *"revenue from related parties"* (paragraph 1.18). The CbC reports on the other hand, include all intercompany transactions (i.e. including domestic transactions). Another example is in connection to FTEs, which per the draft measure require to be published *"at the end of the income year"* (subsection 6(b)) versus the use of either year-end or average numbers for CbC reports. Indeed, we question the assertion that most of the information required to be published under this draft measure is already reflected in the CbC report (paragraph 1.27 of the EM).

We are also highly concerned for the proposed need for disclosures to be *"based on amounts as shown in the audited consolidated financial statements for the entity for the period that corresponds to the income year"* per subsection 8. This appears to mean that the global entity is required to report such information based on Group GAAP. Yet, in line with OECD BEPS Action 13, several global groups prepare their CbC reports "bottom up", i.e., starting with local financial statements of their subsidiaries. It would be an excessive, if not an impossible requirement for such global groups to prepare a second "top-down" version based on different financials for the Australian requirements. We note that our member companies are already facing a significant compliance burden due to Pillar 1 and 2 reforms. Finally we further note that Australia already has existing tools such as the Corporate Tax Transparency report and a robust public financial accounting reporting requirements providing information to the public, whilst preserving confidentiality between taxpayers and the ATO.

We therefore suggest that Treasury undertake further analysis of the developing global model(s) and relevant related global developments prior to determining a recommended approach for Australia and reconsiders the measure as currently proposed as soon as possible to alleviate the unprecedented uncertainty created by it for our member companies.

2. The measure should take time to develop such that an appropriate balance is struck with the need for the disclosures versus the unintended consequences. At the very least we kindly ask for a delay on the enactment of this legislation

The EU developments have been underway for a number of years (draft EU legislation on public CbC reporting was issued on 12 April 2016), indicating the challenges in mandating disclosure requirements even on a regional basis, let alone a global one. In line with the broader principle of aligning any proposed Australian tax transparency mandatory reporting regime with the prevailing global approach, Australia should monitor international developments in tax transparency reporting, including implementation of the EU model. This will allow the cost benefit analysis of increased transparency to be well understood given the increased compliance burden it will place on our member companies and any unintended commercial implications on their entire global operations. That is, we stress that any benefit of such public reporting is currently unclear and untested.

At the very least we kindly ask that the measure is delayed, and that the intended start date of 1 July 2023 be moved to income years starting on or after 1 July 2024. A deferral of the start date would allow member companies to better assess whether they have access to the requisite information and do so with the benefit of globally consistent guidance. In addition, system changes are required due to the enlarged scope of the ED compared to current CbC reporting requirements (and several inconsistencies). These system changes take at least one year to be implemented making the current timelines unrealistic.

3. The requirement to potentially disclose information on worldwide intangible assets and related general uncertainty in this regard

We are extremely concerned with the proposal to publish certain highly sensitive information on effectively worldwide intangible assets. Depending on the precise definition of intangible assets, such information may either not currently exist per jurisdiction, be reported on an accounting basis having regard to different accounting standards, be excessively onerous or simply be impossible to collect per jurisdiction, let alone have a specific ‘value’ attached to it.

As an example, innovation-based companies like those in the pharma industry may be burdened with annual reporting obligations in respect of 500k+ patents and trademarks registered around the world. Additionally, and again depending upon the definition of intangible assets, the pharma industry may now also be required to disclose additional information, for example in respect of commercially confidential manufacturing processes and early-stage research data, which but for this draft measure would never be disclosed to the public. We expect the same outcome for our members in other varied industries they operate in.

Our concern is that such information is not only difficult if not impossible to compile on a consistent and thus meaningful basis but also commercially confidential and sensitive with any public disclosure having significant commercial impact on the entire global operations of our member companies. We are also considering the interaction with trade secret protections regarding certain

information.

It is unlikely that at least certain of our members will comply with the measure if doing so will mean that it impacts their business or conflicts with common law rights protecting trade secrets.

To clarify, our member companies are often required to disclose certain information and are certainly willing to do so and already do on an annual basis for example as part of CbC reporting, but to tax authorities around the world on a strictly confidential basis. We believe it is the role of the tax authority to review and assess compliance with the tax laws due to the reasons we have already elaborated on above.

Once again, we welcome the opportunity to provide feedback to this draft measure. In summary due to our concerns, we strongly but kindly ask that Treasury either refrains from this measure altogether and continues its leading position at the OECD on such matters and/or at the very least the measure is amended as delayed such that our member companies have the ability to perform a full assessment of its implications on their entire global operations.

Yours sincerely,

SwissHoldings
Federation of Industrial and Service Groups in Switzerland

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