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**Public consultation on "Public country-by-country reporting": comments from the Mouvement des Entreprises de France (MEDEF)**

28 April 2023

Dear Sir/Madam,

We thank you for the opportunity to participate in the public consultation on "Public country-by-country reporting" which is currently being envisaged by the Australian Government as part of the Australia's October 2022-23 Budget.

The *Mouvement des Entreprises de France* (MEDEF) is the largest representative business organisation in France, encompassing 173,000 member companies, 122 territorial organisations in continental France and in the overseas departments, 77 professional federations bringing together all business sectors (industry, services, construction, trade, etc.) and 14 associated organisations and partners. These represent 10.2 million employees (i.e. more than one-third of all French employees).[1] Over 95 % of our member companies are small-and medium-sized enterprises, with an average of 47 employees. We interact with many stakeholders including public authorities and Governments at national, European and international level on key tax issues.

We would like to share with you some comments on the Australian Government's announcement for a transparency measure in the form of a public Country-by-Country reporting requirement (public CbCR). As you know, the European Union (EU) has adopted a Directive on public CbCR at the end of 2021 which is currently in the process of being implemented in all the Member States of the EU, including France. The EU Directive was the result of a thoughtful and prudent political consensus,

[1] For more information of MEDEF's mandates, actions and membership, please visit our website at https://www.medef.com/en/who-are-we/overview. Our identification number in the EU Transparency Register is 43763731235-75

mindful of the need for a careful balance between increased transparency and the protection of businesses' legitimate interests. As such, we believe that the provisions of the Directive can provide some useful background to the debate around public CbCR.

We would be pleased to further discuss and explain our views. We of course remain fully available should you have any clarification question.

Yours sincerely,

Tax Affairs – MEDEF

# Key points

We would like to underline the following key points for your consideration:

## 1. *Enhancing transparency by ensuring global consistency: the importance of aligning the Australian public CbCR with existing international legal standards*

- The Australian public CbCR would introduce another model in addition to the existing OECD and EU standards. Companies that have operations across the world, including in Australia, may therefore be subject to several CbCR requirements, the scope and the extent of which would vary depending on the standard considered. As far as we understand, the public CbCR requirement proposed in Australia would notably be different and more extensive than other existing standards. We are concerned that a multiplication of unilateral and different initiatives measures in an unconcerted may have the potential to weaken existing international coordinated initiatives. We are also concerned that companies may be subject to an evolving requirement in Australia.

- We note that public CbCR has not been agreed at OECD level and that the Action 13 BEPS standard provides that CbC information should be exchanged only with tax authorities under strict confidentiality and appropriate use conditions. We believe that the proposed Australian measure may raise concerns for foreign investors and may create extra-territorial effects which may be viewed as not being compatible with the legal framework of other countries.[2] [3] The EU public CbCR Directive[4] contains certain features that mitigate these risks and concerns, and that is the result of a carefully balanced and prudent political consensus: it provides for (ii) reporting of aggregated data for non-EU jurisdictions (except non-cooperative jurisdictions), (ii) for an option to defer the publication of certain commercially sensitive information for 5 years, (iii) and it recognises that EU subsidiaries/branches of non-EU groups may not be able to provide a full CbCR.

- Public CbCR poses intrinsic challenges in respect of preserving commercially-sensitive information (sometimes economically-strategic information) and in respect of not jeopardising competition between companies. This is especially the case when the main competitors of a company subject to public CbCR are not themselves subject to such requirements in their home country (we illustrate in annex the types of information that could be gained by a competitor through public CbCR, being noted that these

[2] We notably question whether a broad public CbCR requirement could be viewed by certain countries as a breach of the local filing conditions under the Action 13 OECD BEPS standard.

[3] There is notably a question as to whether a broad public CbCR would be compatible with certain constitutional frameworks. It is noteworthy to recall the decision of the French Constitutional Court, the *Conseil Constitutionnel*, dated 8 December 2016 which found a draft legal provision which aimed at introducing a public CbCR in France as being unconstitutional on the ground of freedom to conduct a business (which is part of the EU Charter of Fundamental Rights). Such provision was notably too broad.

[4] See Directive (EU) 2021/2101 of the EU Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

concerns would apply for both Australian and foreign groups). While we understand the request for more corporate transparency, we believe that it is crucial to preserve a level playing field and fair competition among businesses in the interests of consumers, investors and other interested stakeholders. The EU public CbCR Directive acknowledges that "*the information should be limited to what is necessary to make effective public scrutiny possible, in order to ensure that disclosure does not give rise to disproportionate risks or disadvantages for undertakings in terms of competitiveness or of misinterpretations regarding the undertakings concerned*".[5]

- In order to recognize the transparency efforts of other jurisdictions and to take into account other international standards, we respectfully call for the Australian Government to provide for an exemption from its proposed public CbCR requirement for multinational groups that are headquartered in the EU and that are subject to EU public CbCR (including the public CbCR requirement applicable to banks in the EU)[6]. In any case, the rules should include an exception from publication for data that is otherwise publicly available e.g., through an EU public CbCR or through a public stock exchange filing.

- We would also respectfully request that the public CbCR requirement in Australia be limited to only certain countries which would legitimately be subject to increased disclosure such as non-cooperative jurisdictions. We would encourage the Australian Government to require that the disclosure of information be limited to Australian operations, with the rest of the world reported as aggregated data (except non-cooperative jurisdictions) and to adopt similar safeguards as in the EU public CbCR Directive. Should the reporting of aggregated data not be accepted, we would respectfully request that aggregated data per large geographical regions be considered. We believe that these proposals would benefit both the Australian and foreign headquartered groups.

- Australian subsidiaries and branches of foreign headquartered groups may not have access to the information required to provide a full CbCR covering all jurisdictions where the group has operations (in particular, there may be legal obstacles to the sharing of information). We would encourage the Australian Government to consider the provisions of the EU public CbCR Directive which recognizes that the management bodies of EU subsidiaries controlled by an non-EU parent might have limited ability to obtain information from the ultimate parent. In such case, the Directive provides that their responsibility should encompass ensuring, to the best of their ability, that the reporting is in accordance with the Directive. Where the information is not complete, their responsibility is limited to publishing a statement indicating that the ultimate parent did not make the necessary information available.

- The scope and content of the Australian public CbCR raises specific difficulties and challenges for all companies[7] (our understanding is that this would be a major concern for Australian headquartered groups as well): for instance, the requirement to report a list of tangible and intangible assets may create a huge burden for most international groups which may have hundreds or thousands of such assets. In general, any deviation

[5] See recital 13 of the above-mentioned Directive.

[6] See Article 89 of the Capital Requirements Directive 2013/36/EU (CRD IV).

[7] We understand that under the public CbCR requirement in Australia, the following information would be required in addition to the Action 13 BEPS OECD standard: 1) effective tax rates; 2) expenses from related party transactions and 3) a list (including book values) of tangible and intangible assets.

between different reporting standards will create risks of misinterpretation between different reporting sets, administrative burden and costs. This may also entail reputational damage to businesses if incorrect conclusions are drawn by third parties based on different sets of data. It would also multiply compliance burdens on companies and would impose reconciliation between the different reportings, which is extensive work and costs for companies.

- Finally, we are also concerned that the data reported under the public CbCR requirement be published on an Australian Governmental database: such database will be centralizing a huge amount of strategic and commercially-sensitive information of many multinational groups, which would be Australian and foreign taxpayers (i.e. the financial data as such but also many other information e.g. the list of all tangible and intangible assets). This raises risks in terms of cyber security, protection of sensitive data, right of correction, etc… We believe that tax certainty should be a priority. There should not be a bias to the detriment of MNEs: because misleading interpretations of the data published in a public CbCR may result in severe damage (notably reputational damage), it is necessary to make it clear that the data from a public CbCR cannot provide definitive answers on the tax situation of a taxpayer. Public CbCR should be considered only as a tool to suggest questionings, as the Action 13 BEPS standard provides for. We would respectfully ask the Australian Government which safeguards are envisaged in respect of these issues.

## 2. *Issues related to the publication of effective tax rates*

We understand that the Australian public CbCR would include the disclosure of effective tax rates on a country-by-country basis, which may potentially follow the OECD's Pillar 2 rules:

- This requirement seems premature as Pillar 2 is not yet implemented globally. The computation of an effective tax rate under Pillar 2 rules is complex. It will be very difficult for companies to achieve this by 2024 in all jurisdictions. Including Pillar 2 information in the CbCR before the effective implementation date of Pillar 2, and more importantly before the Globe Information Return is even filed, will likely result in misinterpretations and uncertainty.
- The domestic minimum top-up tax that is expected to be paid in many countries should be included in the effective tax rate, as well as the top-up tax that could be paid in the country of the parent company.
- We would like to underline that the publication of the ETR may in fact run counter, and even discard, the simplification solutions that are being developed at the OCDE (*de minimis*, CbCR Safe Harbour), the purpose of which are to not burden companies with a complex calculation when there is no top-up tax at stake. If companies were required to compute a complex Pillar 2 calculation in order to report ETRs for the purpose of the Australian public CbCR, this means that the Pillar 2 simplification solutions will not be applicable in practice. A the very least, the rules should make it clear that a simplified effective tax rate calculation can be carried out (e.g. based on the CbCR information as per the transitional CbCR Safe Harbour).

- Taxpayers should have the possibility to provide explanations in a "comment" section (qualitative and not quantitative), e.g. in case the calculation of the effective tax rate under Pillar 2 cannot be reasonably estimated at such an early stage.

### *3. The need for sufficient lead-time to implement the new requirements*

The proposed timeline (fiscal years starting on or after July 1, 2023) seems extremely difficult to achieve. An adaptation of a company' accounting and tax reporting systems will be needed to satisfy compliance requirements, which should take on average 12 to 18 months.

By way of comparison, the EU Directive adopted in 2021 provides that the new requirements will apply to fiscal years opened as of 22 June 2024.

The proposed timeline for implementation does not allow taxpayers to implement the requirements. We believe the new rules should not apply earlier than the first income year commencing from 1 July 2024, which would be consistent with the EU public CbCR framework.

As a final remark, we would like to mention that we also refer to the contribution of ICC with respect to their more detailed comments.

## *Appendix*

A company subject to public CbCR may be in direct commercial competition with a competitor company which not subject to such requirement. The latter may be able to calculate the following ratios relating to the first company based on its published data and to compare them with its own ones:

- profit margin (profit before tax / total revenues)
- effective tax rate (income tax accrued / profit before tax)
- revenue per unit of economic activity (total revenues / number of employees)
- profits per unit of economic activity (total profit before tax / number of employees).
- etc.

These ratios, as well as the other data in the public CbCR will provide a myriad of information:

- the commercial strategy of the company subject to public CbCR (eg. number of employees over the years which gives a clear indication of the sales force in relation to the turnover)
- whether the company is in a mature market (indicators could be: level of PBT; revenue per unit of economic activity; profits per unit of economic activity)
- the willingness to access a given market (indicators could be: number of employees)
- the company's profitability (indicators could be: PBT and profits per unit of economic activity)
- its fiscal pressure (ETR)
- its market penetration and market share, etc.