TEMASEK

5 March 2024

By email to: MNETaxTransparency@treasury.gov.au

Director
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Dear Sir,

Public Country-by-Country Reporting Aligned to International Standards as Objective Measure of Transparency

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Temasek congratulates the Australian Treasury ("**Treasury**") on the significant progress made in fulfilling the Australian government's election commitment to introduce a multinational tax integrity package to address the tax avoidance practices of multinational enterprises ("**MNEs**") and improve transparency through better public reporting of MNEs' tax information. We support the government's balanced approach in seeking "to target activities deliberately designed to minimise tax, while also considering the need to attract and retain foreign capital and investment in Australia, limit potential additional compliance cost considerations for business, and continue to support genuine commercial activity."[1]

We appreciate the efforts of Treasury in consulting stakeholders on the initial Multinational Tax Integrity and Tax Transparency package on 5 August 2022, the October 2022–23 Budget transparency measure proposal for MNEs to prepare for public release of certain tax information on a country-by-country basis and a statement on their approach to taxation ("**Public CbCR**") on 6 April 2023[2] and incorporating the feedback received to refine the Public CbCR proposal. In particular, we support Treasury's refinement of the original Public CbCR measure to more closely align with the European Union's public country-by-country regime[3] ("**EU Public CbCR**"), defer the start date by 12 months to 1 July 2024, and introduce policy changes on the reporting threshold and approach to disaggregated reporting.

We note, however, the Exposure Draft legislation and explanatory materials ("**Exposure Draft**") deviates significantly from both the Organisation for Economic Cooperation and Development's ("**OECD**") CbCR standard and the EU's Public CbCR regime and suggest amendments so the Public CbCR measure may better achieve the intended balance of improving tax transparency whilst

[1] https://treasury.gov.au/consultation/c2022-297736
[2] https://treasury.gov.au/consultation/c2023-383896
[3] Directive implementing the EU Public CbCR available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021L2101

considering the need to attract and retain foreign capital and investment and continue to support genuine commercial activity.

I. Overview

Making CbCR information public goes beyond the G20-OECD Base Erosion and Profit Shifting ("**BEPS**") consensus where CbCR information is exchanged government-to-government on the basis of the CbC Multilateral Competent Authority Agreement ("**MCAA**") signed by over 100 jurisdictions and where each signatory jurisdiction has ultimate control over exactly which exchange relationships it enters into, and confidential taxpayer information is strictly safe-guarded. [4]

Australia is a member of the G20-OECD BEPS Inclusive Framework ("**IF**") committed to implementing the G20-OECD BEPS recommendations, including the CbCR standard in BEPS Action 13. Australia is also a signatory to the MCAA and have CbCR exchange relationships with 75 jurisdictions[5] including a number of the Listed Jurisdictions (see discussion below) such as Singapore. Therefore, for the purposes of tackling BEPS, there does not appear to be a compelling need for Public CbCR since the Australia Taxation Office ("**ATO**") can already obtain the information it needs through information exchange.

We understand Treasury has already considered but decided not to adopt industry feedback asking the government not to proceed with Public CbCR. We therefore explain below why deviations from the OECD CbCR and EU Public CbCR raise significant concerns and make recommendations to refine the Exposure Draft to address these concerns by aligning the Exposure Draft to the EU Public CbCR regime.

II. Concerns and Recommendations

1. Need to Observe International Comity and Due Process

As described above, a unilateral measure to publish CbCR information will *per se* go beyond the MCAA construct predicated upon each signatory jurisdiction having ultimate control over their exchange relationships, with confidentiality of the information exchange assured. There is no indication in the Exposure Draft Australia's MCAA counterparties or counterparties in bilateral exchange arrangements have been consulted.

Similarly, there is no indication in the Exposure Draft that any of the 41 Listed Jurisdictions had been consulted or acquiesced to disclosure on a jurisdictional basis. This is a fundamental departure from both the BEPS IF's consensus approach and the EU Public CbCR regime. An important feature of the EU regime is that EU member states - whose information is required to be disclosed on a jurisdictional basis - have had the opportunity to amend, debate, vote and agree to the EU Directive implementing EU's Public CbCR regime.

Further, the basis for determining the 41 Listed Jurisdiction according to the Exposure Draft explanatory statement infers it is a *"blacklist"*:

> "The jurisdictions specified in the Determination are those that are ***typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities***.

[4] The OECD notes, as of October 2022, that there were over 3300 bilateral exchange relationships activated with respect to jurisdictions committed to exchanging CbC reports including both the MCAA and bilateral exchange arrangements. See https://www.oecd.org/tax/transparency/documents/whatisthemultilateralcompetentauthorityagreement.htm

[5] Available at https://www.oecd.org/tax/beps/country-by-country-exchange-relationships.htm

> Requiring selected tax information to be published on a CBC basis for these jurisdictions provides greater transparency of how CBC reporting groups structure their tax affairs in these jurisdictions.[emphasis added]"

The explanatory statement in elaborating that "the Act does not specify any conditions that need to be satisfied before the power to make the Determination [to list a jurisdiction] may be exercised" is ironic when considering the underlying premise of the Public CbCR measure is to improve transparency.

This lack of clear criteria undermines confidence the determination of Listed Jurisdictions was made objectively. The 41 Listed Jurisdictions compares with the 12 black-listed countries deemed uncooperative by the EU (as of 20 February 2024) required to disclose public CbCR.[6] This grouping of compliant jurisdictions includes Singapore, which has never appeared on any blacklist, with EU blacklisted jurisdictions which have persistently failed to adopt international standards[7], is clearly unjustified. For instance, apart from implementing the BEPS minimum standards as a fellow G20-OECD BEPS IF member like Australia, Singapore contributes to the crafting of Pillar One and Pillar Two rules to counter BEPS on the steering committee[8]. Singapore has also participated in the Forum on Harmful Tax Practice's peer review of tax incentives and has none of its current incentive regimes deemed harmful[9]. Singapore was one of the first countries to sign (on 7 June 2017) the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting[10] and volunteered to be among the first few jurisdictions in Asia to undergo peer review on the implementation of the Mutual Agreement Procedure. This track record of complying with international standards was additionally affirmed by the Global Forum on Transparency and Exchange of Information for Tax Purposes which reported that " Singapore has in place a robust program ensuring timely and effective exchange of information."[11]

Further, there is no indication in the Exposure Draft that fundamental due process has been observed. This includes the right of the affected jurisdictions to learn of and respond to the allegation of facilitating profit shifting activities, a channel for bilateral engagement and a process to be taken off the list if robust measures, such as adoption of exchange of information and BEPS Pillar Two global minimum tax, address the profit shifting concern.

Recommendation 1

In the interest of international comity and observing the letter, if not the spirit of the MCAA and bilateral exchange agreements,

(a) Jurisdictions considered for listing to be consulted before hand;
(b) Listing criteria to be transparent and based on internationally accepted standards;
(c) Proper due process should be articulated, such as the right to object, negotiate and come to a mutual agreement on a pathway to address any shortcomings; and
(d) Listing cannot be a unilateral determination without the consent of the affected jurisdiction.

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[6] https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/
[7] As of 20 February 2024, there were 12 black-listed countries deemed uncooperative by the EU and another 10 grey-listed with pending commitment.[7] This is far fewer than the 41 in the Exposure Draft.
[8] https://www.oecd.org/tax/beps/steering-group-of-the-inclusive-framework-on-beps.pdf
[9] https://www.mof.gov.sg/news-publications/press-releases/Singapore-s-Tax-Incentives-Meet-International-Standards-on-Countering-Base-Erosion-and-Profit-Shifting-(BEPS)-Activities
[10] https://www.mof.gov.sg/news-publications/press-releases/Singapore-to-Sign-The-Multilateral-Convention-to-Implement-Tax-Treaty-Related-Measures-to-Prevent-Base-Erosion-and-Profit-Shifting
[11] https://www.oecd.org/tax/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-singapore-2018-second-round-9789264306165-en.htm

A straight-forward way to achieve this is to adopt the EU approach to selecting candidates for jurisdiction level disclosure. Beyond the EU, jurisdictions identified as non-cooperative by the EU are first put on the EU's "grey" list for a minimum of two years before they are black-listed and subject to jurisdictional level disclosure under the EU CbCR regime. Crucially, EU's listing is based on failure to adhere to objective international standards, such as adoption of BEPS measures and exchange of information.[12] There is a continuous process of the EU engaging with jurisdictions that do not comply. Jurisdictions which undertake reforms to adopt international standards have a clear pathway to being delisted by the EU. In fact, Australia was placed by the EU on their grey-list and given a specific deadline (31 December 2021) to amend a tax regime that was deemed harmful by the EU.[13] Australia made the required amendments and was subsequently taken off the grey-list.

The advantage of adopting the EU listing mechanism lay in pegging the conditions for listing to internationally recognised OECD standards, in line with Australia being a member of the OECD, rather than having to set and articulate a separate set of standards. Australia can adopt the EU's engagement process and offer an "off-ramp" for affected jurisdictions which make changes that address Australia's BEPS concerns.

If the EU approach is not adopted, a more involved approach would be to first articulate a clear set of criteria for determining which jurisdictions are "typically associated with tax incentives, tax secrecy and other matters likely to facilitate profit shifting activities". Next, the conditions to the exercise of the power of determination should be set out. Subsequently, Australia's competent authority should systematically engage potential Listed Jurisdictions prior to any determination and attempt to resolve any BEPS concerns though bilateral negotiations where possible.

2. Too Low Threshold When Compared to EU Public CbCR Regime

For non-EU-headquartered MNEs, the EU Public CbCR regime applies to "medium-sized" or "large" subsidiaries regulated by the national laws of a Member State and, a qualifying branch in any of the EU's member states. A "medium-sized" or "large" subsidiary must fulfill at least two out of three requirements (balance sheet total, net turnover and average number of employees) for that category on two consecutive balance sheet dates.[14] By comparison, the materiality threshold in the Exposure Draft is aggregated Australian sourced turnover for the income year of AUD 10 million or more.

This AUD 10 million one-size-fits-all threshold is set too low compared to the threshold of Net Turnover for EU "medium-sized" subsidiary of at least EUR 40 million (approximately AUD 66 million). Although simple to administer, the AUD 10 million threshold is blunt and lacks the flexibility of the EU's three factor threshold in being able to cater to businesses of vastly different nature. To illustrate, the average number of employee threshold for EU "medium-sized" subsidiaries is at least 250 employees. This helps distinguish business models with structurally fewer staff but high turnover such as professional services from other businesses such as retail with many sales outlets and employees.

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[12] The EU website describes their criteria as follows: "The criteria have been designed to evolve over time, so that they are aligned with international tax good governance standards, developed notably in forums of the Organisation for Economic Co-operation and Development (OECD) such as the Global Forum on transparency and exchange of information for tax purposes, the forum on harmful tax practices and the inclusive framework on base erosion and profit shifting." The listing criteria relate to (a) tax transparency; (b) fair taxation and (c) measures against base erosion and profit shifting ('anti-BEPS measures'). See https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/

[13] https://kpmg.com/xx/en/home/insights/2021/02/etf-442-updates-to-the-eu-list-of-non-cooperative-jurisdictions.html

[14] https://www.tpa-global.com/2023/02/08/an-overview-of-the-new-eu-public-country-by-country-reporting-obligations/

Recommendation 2

We recommend adopting the EU's three factor approach and a higher threshold of EUR 40 million. Public CbCR has worldwide implications for an MNE in having to deal with audits and enquiries across the many jurisdictions beyond Australia. Hence, the imposition of Public CbCR burden should be carefully targeted to appropriate businesses by applying the three-factor approach and calibrated to commensurate with the size of such MNEs' presence in Australia. MNEs with more employees and a larger Australian presence under a higher EUR 40 million threshold would more likely have the resources in Australia to handle public queries. These larger MNEs will more likely have a presence in the EU, thus any additional effort to administer the same test in Australia would only be incremental.

3. Going Beyond OECD's CbCR Requirements

The Exposure Draft sets the threshold of AUD 1 billion in annual global income (approximately EUR 601 million) that is considerably lower than the commonly accepted EUR 750 million in global turnover for an MNE to come within scope of the OECD and EU CbCR regimes. This means foreign MNEs which do not even compute or prepare, much less file CbCR in their home countries become compelled to make public CbCR disclosures in Australia. More broadly, currency fluctuations will cause these MNEs to be subjected to CbCR requirements in Australia albeit they may be exempted in their home countries pursuant to both the OECD and EU requirements.

Even for MNEs which do file CbCR in their home jurisdictions, the Exposure Draft further demands and discloses information beyond what is required under the OECD CbCR template. For instance, the MNE group's parent has to describe the CbC reporting group's approach to tax. Moreover, in relation to each of the 41 Listed Jurisdictions, the MNE has to provide reasons for the differences between income tax accrued (current year) and the amount of income tax due if the income tax rate applicable to the jurisdiction were applied to profit and loss before income tax.

The foregoing misalignment vis-à-vis the OECD and EU CbCR standards exacerbates the risk of misinterpretation of CbCR data by the public and stakeholders such as shareholders and commentators not familiar with tax. As it is, the OECD already permits a CbC reporting MNE to use data from its consolidation reporting packages, from separate entity financial statements, regulatory financial statements, or internal management accounts.[15] Therefore, even without the added complications of approach to tax and technical reasons for the differences between income tax accrued (current year) and the amount of income tax, MNEs already have to expend considerable resources to explain to the public differences between CbCR and financial accounting numbers in their annual reports and the proper inferences to be drawn from the data. For instance, a common misconception is that high profits in a small country means profit shifting when it can well be explained by heavy investment into research and development resulting in valuable intangibles being created.

Recommendation 3

The Exposure Draft to adopt the EUR 750 million threshold and eliminate the extra information required beyond the standard OECD CbCR template. The former immediately avoids the uncertainty arising from applying a separate Australian threshold. The latter will reduce compliance burden and potential misinterpretation by the public at relatively little opportunity cost. This is because the same information can already be obtained elsewhere in the public domain. For example, many listed MNEs such as Rio Tinto already publish their approach to tax as part of their annual report or ESG reporting package.

[15] https://www.vmi.lt/evmi/documents/20142/739250/guidance-on-the-implementation-of-country-by-country-reporting-beps-action-13.pdf/222d4f37-9362-bff3-dc9f-ad8a2d91aa8b?t=1669971213444

Countries such as the UK have increasingly legislated to require tax strategy disclosure.[16] The ATO can readily obtain the more technical information such as reasons for the differences between income tax accrued (current year) and the amount of income tax due through information requests made on the MNE.

4. Save Tax Administration Resources by Exempting Entities with Low BEPS Risks

Our final observation is the Exposure Draft leaves the ATO Commissioner with wide powers to exempt an undefined reporting entity or class of reporting entities from reporting or from disclosing a particular type of otherwise required information. The Exposure Draft, however, only specifies the ATO Commissioner may exempt "government related" entities.[17] In this regard, tax certainty can be enhanced, and tax administration resources saved if the Exposure Draft clearly identifies and exempts meritorious classes of entities where the risks of base erosion and profit shifting is low. Such classes may include

(a) MNEs exempted from G20-OECD Pillar Two global minimum tax such as shipping and sovereign wealth funds. This would give effect to the same policy reasons for exemption as those Australia had agreed to as a member of the BEPS IF;
(b) MNEs which achieve a green risk rating i.e. high assurance or justified trust, as assessed by the ATO[18];
(c) MNEs whose Australian sourced turnover and profits have been substantially covered by Advanced Pricing Agreements, Mutual Agreement Procedures or settlements with the ATO; and
(d) MNEs whose Australian entities maintain a clean record in relation to audits and penalties for at least 5 continuous years.

Conclusion

The direction taken by Treasury to align the Public CbCR measure with EU's Public CbCR regime is laudable as it reduces complexity and compliance burden for MNEs. However, the alignment is incomplete in a number of key areas such as thresholds and the determination of Listed Jurisdictions for jurisdictional level disclosure. As explained above, such misalignment detracts from the policy objectives of the Public CbCR measure and there is much to be gained in terms of certainty, reduced compliance costs and observance of international comity by amending the Exposure Draft in these areas to align closely to the EU Public CbCR regime.

Finally, there would not be any compromise of multinational tax integrity and instead tax certainty would be enhanced and ATO administrative resources saved if classes of entities with low BEPS risks are identified upfront and conferred exemption in the Exposure Draft.

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[16] UK companies or groups that are part of a MNE group that meets the OECD's 'Country-by-Country Reporting' framework threshold of global turnover over EUR 750 million need to publish a strategy. See https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy

[17] Paragraph 1.19 of the explanatory statement which states "As the requirement to publish the selected tax information will cover a wide range of entities, there is a chance that it may apply to government entities that are subject to alternative disclosure or accountability regimes through government budget processes. The Commissioner may exempt government related entities from this requirement. This ensures that the application of this rule does not inappropriately affect these entities."

[1818] https://www.ato.gov.au/businesses-and-organisations/corporate-tax-measures-and-assurance/large-business/in-detail/findings-report-top-100-income-tax-and-gst-program/top-100-income-tax-assurance-program

We hope the foregoing is useful and thank the Treasury for this opportunity to make representations. We are glad to address any questions your kind office may have regarding the above matters.

Yours faithfully,

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