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Will EU Findings Press US For Greater Tax Transparency?

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Although much attention has been paid to the Organization of Economic Co-Operation and Development's (OECD's) country-by-country (CbC) reporting recommendations, they are not the only potential reporting obligations on the horizon that could impact U.S.-based multinational enterprises (MNEs).

Saul Mezei

The European Commission — the European Union's executive body — is scheduled to release its findings regarding tax transparency in early 2016, which could include public disclosures of information similar to the OECD's CbC reporting recommendations. If the E.C. and EU countries agree on public disclosure, such precedent might bolster the rhetoric of corporate governance activists and compel U.S.-based MNEs and even the U.S. Treasury to respond to calls for increased tax transparency.

Overview of OECD's Final CbC Reporting Requirements

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In October 2015, the OECD — a forum in which 34 member countries on four continents collaborate to promote policies that improve economic and social well-being — published final reports on all 15 "actions" in its plan to combat base erosion and profit shifting (BEPS) in the tax arena. Action 13 concerns transfer-pricing documentation and CbC reporting. The final report recommends a three-tiered documentation structure effective beginning in 2016 (with the first CbC reports due by the end of 2017). Although the OECD's recommendations do not bind member states, a number of member states have already adopted CbC reporting or are in the process of developing legislation to do so. The U.S. Treasury Department recently issued proposed regulations on CbC reporting that are generally consistent with the OECD's recommendations. Regardless of how the U.S. ultimately implements CbC reporting, the reporting model contemplated by the OECD means that its adoption by other major economies potentially impacts many U.S.-based MNEs.

The E.C. tax transparency reporting proposal is expected to go beyond the OECD's in at least one critical respect — while the OECD proposal requires the filing of reports with tax authorities on a confidential basis, the E.C. is contemplating public disclosure. MNEs are justifiably concerned that public disclosure of confidential financial information (e.g., geographic earnings) will harm their competitiveness.

Overview of E.C. Tax Transparency Initiative

On June 17, 2015, the E.C. issued a communication to the European Parliament and Council outlining "5 key areas for action" to promote a fair and efficient corporate tax system in the EU.[1] The fourth "key area for action" is "further progress on tax transparency."

The E.C. communication detailed various strategies to combat taxpayer exploitation of European tax loopholes and initiated an "inception impact assessment." Among other things, the inception impact assessment considers "to what extent further action in terms of transparency can help to solve the issues at stake."[2] To assist in the inception impact assessment, the E.C. launched a "public consultation on further corporate tax transparency" — a survey in which individuals and companies could respond to the ideas about increased tax reporting transparency. The E.C. initiated the survey on June 17, 2015, and the survey concluded on Sept. 9, 2015.

The inception impact assessment speculates that the following benefits and obstacles will be considered when evaluating the need for greater tax transparency:

- Designation as a conscientious taxpayer;
- Added costs and resources to comply;
- Better allocation of income tax revenues among the member states and a more competitive environment;
- Increased risk of disclosing confidential tax-related information; and
- Negative impact on foreign investment in the EU and the emigration of business from Europe if greater transparency is mandatory.

Early Indications

The E.C. is scheduled to publish its findings by the end of the first quarter of 2016. Early indications suggest the E.C. will implement tax transparency requirements that go further than the OECD's CbC reporting requirements:

- On July 8, 2015, the EU Parliament passed an amendment to the EU Shareholder Rights Directive. The amendment would force companies domiciled within a member state to disclose publicly the following information about itself and any "third country" in which it operates a subsidiary: name, nature of activities and geographic location; turnover (revenue); number of employees on a full-time equivalent basis; profit or loss before tax; tax on profit or loss; and public subsidies received.[3] The E.C. rejected this proposal as "premature" on the grounds that the inception impact assessment must be completed prior to passing binding legislation.[4]

- The E.C. surveyed individuals, companies, and organizations, primarily located in Europe, for their opinions on corporate tax transparency. The responses from the companies and organizations surveyed indicated a preference for increased transparency.[5]

    - Roughly 73 percent endorsed the EU instituting policies that increase corporate tax transparency to the same extent or to a greater extent than OECD BEPS Action 13.
    - 52 percent responded positively to the public disclosure of "tax-related information."
    - Respondents were split when it came to whether "stricter rules" on tax transparency would place EU-based companies at a competitive disadvantage vis-a-vis non-EU MNEs.
    - Similarly, respondents were divided on whether transparency "towards the public" would have negative EU economic repercussions.
    - 48 percent of the companies surveyed supported a mandatory description of enterprises' tax management policies.

- Pierre Moscovici, E.C. commissioner for economic and fiscal affairs, recently revealed his stance on the public disclosure: “I have never concealed my preference for imposing public disclosure requirements on companies — requirements which, once again, would go further than the global standard developed by the OECD, which is limited to exchanges between administrations, which is — I know — a considerable achievement in itself. However, I understand the complexity of this issue. This is why the Commission is currently examining all the possible options ….”[6]

- In a recent seminar hosted by the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, E.C. official Erik Nooteboom commented that “I can say for sure that the [inception initial assessment] proposal will go beyond the BEPS action plan. The major outstanding questions that remain concern what specific information companies will be called on to report.”[7]

- The LuxLeaks disclosures and E.C. investigations on state aid and inappropriate tax practices continue to make headlines, as the E.C. disclosed yet another investigation of a U.S.-based MNE — McDonald’s.

Uncertain Future

The French Legislature broadly supported new legislation requiring public CbC reporting for French-based MNEs. But it recently rejected such a measure out of a fear that being a first mover in that regard could damage “the country’s competitiveness by progressing on the issue while other countries drag their feet.”[8] It appears that any future movement on public reporting in France and elsewhere in the EU awaits the E.C.’s revision of the Shareholder Rights Directive. Despite well-publicized concerns from legislators in the U.S., the Treasury Department released proposed CbC reporting regulations that incorporate the confidential-disclosure provisions of BEPS Action 13. The proposed regulations require the U.S. Treasury and the IRS “to closely review the [foreign] tax jurisdiction’s legal framework for maintaining confidentiality” and stop automatic exchange of CbC reports if confidentiality requirements are not met.[9] There is no indication of support for public tax reporting in the legislative or executive branches of the U.S. government.

Given that certain U.S. legislators oppose the OECD’s disclosure standards and that U.S. Treasury officials support the confidentiality of taxpayer information, the U.S. is unlikely to lead the charge for public disclosure. If the E.C. and EU countries agree on tax transparency via public disclosure, however, such precedent might bolster the rhetoric of corporate governance activists and compel U.S.-based MNEs and even the U.S. Treasury to respond to calls for increased tax transparency.

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