

# Article

## *The Shortcomings of the EU Public Country-by-Country Reporting Directive*

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*The Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards the public disclosure of income tax information by certain undertakings and branches, entered into force on 21 December 2021 and must be implemented by all EU Member States until 22 June 2023. It introduces the so-called ‘Public Country-By-Country Reporting’ system in the European Union. With these new transparency rules, the EU seeks to raise greater public scrutiny on the tax planning practices carried out by certain undertakings with activity in the EU. Despite its many achievements, the directive has several shortcomings, namely in what concerns compliance with legal certainty, issues in its implementation and effectiveness for achieving its ratio legis. After mapping these issues, we will put forward proposals that could be adopted by either the European or domestic legislator (the latter, at the implementation stage).*

**Keywords:** Tax Planning, European Union, Tax Transparency, Public Country-By-Country Reporting, Legal Certainty, European legal harmonization

### 1 INTRODUCTION

Over the past two decades, significant steps have been taken to improve international tax transparency. Taxpayers (as well as third parties in certain situations) are increasingly obliged to report their tax information to tax authorities and the public.<sup>1</sup>

In the European Union, country-by-country reporting has been introduced, firstly, in a limited manner, to companies belonging to certain sectors of activity, such as the banking sector<sup>2</sup> and the extractive industry.<sup>3</sup> It was only with the Final Report of Action 13 of the Base Erosion and Profit Shifting (BEPS) Action Plan that a proposal came for extending this regime, indistinctly, to any activities.

In 2016, the European Union implemented private country-by-country reporting with the Directive 2016/881.<sup>4</sup> Under this regime, multinational enterprise’s (MNE’s) exceeding a total of EUR 750,000,000 of

consolidated revenue in a tax year must draw up a country-by-country report in which they share their tax information on their presence in the various jurisdictions in which they operate to the competent authority of a Member-State. Subsequently, that authority shall, by means of automatic exchange of the information contained in it, communicate the report to any other Member State in which, based on the information, one or more constituent entities of the MNE group are either resident for tax purposes or subject to tax concerning the business carried out through a permanent establishment.

This instrument aims to allow tax authorities to have early access to tax-relevant information to monitor large multinational companies’ income so that they can react to tax planning practices responsible for the erosion of tax revenues in a timely and effective way.

Since its adoption, the pressure for the public disclosure of this information has been gradually increasing. The goal of that pressure is to allow the various stakeholders of companies and the public to scrutinize their tax conduct. With a regime like that, everyone would be able to assess the connection between the economic presence of an undertaking in a jurisdiction and the tax that it effectively pays. It should be noted that one of the central objectives of the BEPS plan was precisely to realign tax with the value creation, and this would precisely allow the general public to assess that.

After several advances and setbacks, the public country-by-country reporting regime entered into force on 21

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<sup>1</sup> See K. Nakayama, *Public Disclosure of Taxpayer Information as a Measure to Improve Tax Compliance*, 27(3) Asia-Pac. Tax Bull. 2–6 (2021).

<sup>2</sup> See Directive (EU) 2013/36 of the European Parliament and of the Council of 26 Jun. 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ L 176 (2013).

<sup>3</sup> See Directive (EU) 2013/34 of the European Parliament and of the Council of 26 Jun. 2013 on the annual financial statements, consolidated financial statements, and related reports of certain types of undertakings, OJ L 182 (2013).

<sup>4</sup> See Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146 (2016).

December 2021 through Directive (EU) 2021/2101 of the European Parliament and the Council, responsible for amending Directive 2013/34/EU.<sup>5</sup> According to it, large multinational companies, whether subject or not to EU law,<sup>6</sup> must draw up and publicly disclose a report containing tax-relevant information relating to their economic activity on a website.

The Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive by 22 June 2023.<sup>7</sup> The laws, regulations, and administrative provisions transposing the articles of the Directive apply, at the latest, from the commencement date of the first financial year starting on or after 22 June 2024.<sup>8</sup>

## 2 THE DIRECTIVE'S REGIME

### 2.1 Who Will Be Affected?

The new Article 48b, as introduced by Directive (EU) 2021/2101, stipulates that ultimate parent undertakings of a group and standalone undertakings, governed by national law of a Member State, where the revenue on their balance sheet date exceeded for each of the last two consecutive financial years a total of EUR 750,000,000, have to draw up, publish and make accessible a report on income tax information as regards the latter of those two consecutive financial years. For ultimate parent companies, the relevant revenues are the one reflected in their consolidated financial statements. For standalone undertakings, reference is made to the number reflected in their annual financial statements.

The Directive gives definitions of these two types of entities<sup>9</sup>: (1) the 'ultimate parent undertaking', means 'an undertaking which draws up the consolidated financial statements of the largest body of undertakings'; (2) the 'standalone undertaking' means 'an undertaking which is not part of a group as defined in Article 2, point (11)<sup>10</sup>.

To be subject to this regime, the entities must transpire the above-mentioned revenues threshold for two consecutive years. Similarly, they will no longer be subject to the reporting obligations where the total of revenues indicated on its balance sheet date falls below EUR 750,000,000 for each of the last two consecutive financial years.

The Directive extends its scope outside European territory through a Secondary Filling Mechanism. As a result, reporting obligations have to be met by any medium-sized and large subsidiary undertakings governed by the laws of a Member State and controlled by an ultimate parent undertaking that is not governed by the law of a Member State.<sup>11</sup> This will be the case if such an external parent company has exceeded a total consolidated revenue of EUR 750,000,000 in each of the last two consecutive years. In that case, the European subsidiary shall prepare a report with information on the income tax of its parent company for the most recent of these two consecutive financial years.<sup>12</sup>

In addition to subsidiaries, branches opened on European territory by undertakings that are not subject to the law of a Member State may also be subject to reporting obligations if they comply with certain requirements.<sup>13</sup>

Subsidiary undertakings or branches which do not comply with the conditions laid down in the preceding paragraphs may nevertheless be obliged to publish and make accessible a report on income tax information where such subsidiary undertakings or branches serve no other objective than to circumvent the reporting requirements.<sup>14</sup> Unfortunately, the Directive does not provide further guidance on what that may mean.

As we've pointed out, the regime only applies to multinational entities leaving aside both standalone or ultimate parent undertakings and their affiliated companies where such undertakings, including their branches, are established or have their fixed places of business or permanent business activity within the territory of a single Member State and no other tax jurisdiction.<sup>15</sup>

An exception is also made for companies in the EU banking sector that are already subject to the publication of a report containing similar information, according to

<sup>5</sup> Directive (EU) 2021/2101 of the European Parliament and of the Council of 24 Nov. 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, OJ L 429 (2021).

<sup>6</sup> To be covered, they only need to be established in the territory of the EU, through subsidiaries or branches.

<sup>7</sup> See Art. 2 of Directive (EU) 2021/2101.

<sup>8</sup> See Art. 48g of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>9</sup> See Art. 48a (1) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>10</sup> According to Art. 2 (11) of Directive (EU) 2013/34, 'group' means a parent undertaking and all its subsidiary undertakings.

<sup>11</sup> Note that obligation falls only on medium and large-sized European subsidiaries, in accordance with the criteria arising from Art. 3 (3) and (4) of the Directive 2013/34/EU and has not been extended to micro and small undertakings.

<sup>12</sup> See Art. 48b (4) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>13</sup> According to Art. 48b (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101, it is cumulatively required that: (1) the net turnover of the branch has exceeded the threshold as transposed pursuant to Art. 3(2) for each of the last two consecutive financial years; (2) the undertaking that opened the branch is either an affiliated undertaking of a group whose ultimate parent undertaking is not governed by the law of a Member State and the consolidated revenue of which on its balance sheet date exceeded for each of the last two consecutive financial years a total of EUR 750,000,000, as reflected in its consolidated financial statements, or a standalone undertaking the revenue of which on its balance sheet date exceeded for each of the last two consecutive financial years a total of EUR 750,000,000 as reflected in its financial statements; (3) the ultimate parent undertaking does not have a medium-sized or large subsidiary undertaking as referred to in para. 4 of the Art. 48b.

<sup>14</sup> See Art. 48b (7) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>15</sup> See Art. 48b (2) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

Directive 2013/36/EU, provided that such report includes information on all their activities, and in the case of ultimate parent undertakings, on all the activities of all the affiliated undertakings included in the consolidated financial statements.<sup>16</sup>

Finally, and also according to the Directive, the EU Member States may require auditors to state, in their findings, whether an entity was required to publish a report and, if so, whether the report was published by the Directive.<sup>17</sup>

## 2.2 Which Information Would Be Reported and Published?

MNE's will now have to publicly disclose, on an annual basis, similar information to those they already disclose under private country-by-country reporting. The report shall include: (1) the name of the ultimate parent undertaking or the standalone undertaking; (2) a brief description of the nature of their activities; (3) a list of all subsidiary undertakings consolidated in the financial statements of the ultimate parent undertaking, in respect of the relevant financial year, established in the Union or tax jurisdictions included in Annexes I and II to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes.

The report shall also contain information about: (1) the number of employees on a full-time equivalent basis; (2) the revenues obtained; (3) the amount of profit or loss before income tax; (4) the amount of income tax accrued during the relevant financial year; (5) the amount of income tax paid on a cash basis; (6) the amount of accumulated earnings at the end of the relevant financial year.<sup>18</sup>

The data must be presented separately for each Member State. However, where a Member State comprises several tax jurisdictions, the information shall be aggregated at the Member State level.<sup>19</sup>

For third states, the information must be displayed on an aggregated basis.<sup>20</sup> However, a similar level of detail to the one required to a Member State (i.e., disaggregated information by jurisdiction) is necessary for jurisdictions listed in Annex 1 to the Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes on 1 March of the financial year to which the report relates, as well as for jurisdictions which have been cumulatively listed in Annex 2 to the Council Conclusions

on the revised EU list of non-cooperative jurisdictions for tax purposes, on 1 March of the financial year to which the report relates and 1 March of the previous financial year.<sup>21</sup>

The information shall be attributed to each relevant tax jurisdiction based on establishment, the existence of a fixed place of business, or a permanent business activity which, given the group's activities or standalone undertaking, can be subject to income tax in that tax jurisdiction.<sup>22</sup>

## 2.3 Where and When Should the Information Be Reported?

The undertakings shall publish the report containing their tax information within twelve months of submitting the balance sheet for the financial year for which the report has been drawn up, and it shall remain accessible on a website for a minimum of five consecutive years.<sup>23</sup>

The Directive gives some flexibility as to the determination of the relevant website for publication,<sup>24</sup> allowing alternatively the use of the multinational undertaking website, or its subsidiary or branch one, in the situation where the report is drawn up by one of these constituent units of the parent company.

It is also established that, alternatively, Member States may allow the report to be published on the website of the register of a Member State, referred to in Article 16 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, as long as the website of the undertakings and branches, contains information on that exemption and a reference to the website of the register.

In any case, the information shall be made accessible to the public in at least one of the official languages of the Union and free of charge.

## 3 THE RATIO-LEGIS OF THE DIRECTIVE

Given the diversity of interests and objectives pursued by the Directive, we have decided to split its analysis into three different levels: state, corporate, and public level.

<sup>16</sup> See Art. 48b (3) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>17</sup> See Art. 48f of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>18</sup> See Art. 48c (1) and (2) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>19</sup> See Art. 48c (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>20</sup> See Art. 48c (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>21</sup> Annex I lists non-cooperative jurisdictions for tax purposes, which do not comply with certain international tax standards, or by the non-adoption of automatic exchange information mechanisms and minimum standards of the BEPS project, such as the establishment of harmful tax regimes and which favour offshore structures. In turn, Annex II identifies non-EU jurisdictions which, despite not complying with all international tax standards, have made sufficient commitments to reform their tax policies. It should be remembered that these lists are updated twice a year. See <https://www.consilium.europa.eu/pt/policies/eu-list-of-non-cooperative-jurisdictions/> (accessed 5 Feb. 2022).

<sup>22</sup> See Art. 48c (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>23</sup> See Art. 48d (1) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>24</sup> See Art. 48d (2) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

### 3.1 At the State Level

At the state level, the Directive aims to protect tax revenues and the normal functioning of tax systems.<sup>25</sup>

The European Union is guided by the existence of a single market, and therefore corporate taxes should be fairly split between the various Member States, ensuring that taxation takes place in the State where profits are generated.

In the current state, and even after implementing BEPS, it remains possible to implement mechanisms that allow the transfer of profits to jurisdictions that provide a beneficial tax treatment to large multinationals or to specific parts of their income. Domestic measures are generally ineffective to counter this and may even exacerbate the problem by introducing further fragmentation of the internal market, thus creating new burdens for taxpayers and arbitrage opportunities that can be exploited in the context of tax planning.

For these reasons, the public country-by-country reporting appears as an essential mechanism for strengthening state tax systems.

### 3.2 At the Corporate Level

The Directive seeks to intensify the tax transparency of undertakings. With this regime, relevant data on their economic and tax activity will be publicly disclosed, such as the amount of taxes paid. This information will be seen by numerous stakeholders, such as the shareholders, who will have a clearer picture of the tax policies carried out by the company<sup>26</sup>; or investors, who will be able to make more conscious investment decisions, based on the comparative analysis of the information provided by the various multinationals.<sup>27</sup> At a time when corporate social responsibility policies become increasingly important, companies will not want to neglect tax ethics and justice and will seek to adapt their tax behaviours so as not to suffer reputational losses.

### 3.3 At the Public Opinion Level

With the adoption of the public country-by-country reporting, the EU seeks to strengthen the public's trust in the fairness of European tax systems.

The Union allows citizens' to assess the attitude of multinational companies also based on their tax behaviour. Taxes effectively paid (and their proportion in the global amount of taxes and activity of the multinational) becomes a new variable or dimension of the relationship between companies and their suppliers and customers, employees, and the public.

With these new transparency requirements, public scrutiny is used to ensure the effective contribution of large multinationals to state systems, given the threat of potential changes in consumer behaviour.

With the publication of data on the tax policies that a company relies on, the intensity of syndication on tax evasion schemes and aggressive tax planning is increased, thus further reducing the space for transgressive behaviour of tax rules and principles of the European Law.

## 4 THE NORMATIVE SHORTCOMINGS OF THE REGIME

### 4.1 Infringements of the Principle of Legal Certainty

In our view, when drafting the regime, the legislator should have paid more attention to the issues created by the use of fuzzy or undefined concepts. In our opinion, this may lead to subjectivity in the interpretation and to a wide margin of discretion for the authorities of the various Member States in case they read the provisions of the Directive differently. Such disparities may be taken advantage of by the undertakings subject to these obligations, which will tend to seek the jurisdiction that offers them greater protection, in a phenomenon known as jurisdiction shopping.

#### 4.1.1 *The Safeguard Clause and the Concept of 'Seriously Prejudicial'*

The Directive states that, when transposing the Directive, Member States may adopt a safeguard clause,<sup>28</sup> allowing one or more specific elements of information to be temporarily omitted from the report. This can take place if the disclosure is seriously prejudicial to the commercial position of the undertakings to which the report relates. Nevertheless, such information must anyhow be disclosed in a subsequent report, to be submitted no later than five years from the date of the initial omission.<sup>29</sup>

The provision's wording leaves unanswered the question of knowing what's the meaning to attribute to the expression 'seriously prejudicial'.<sup>30</sup> We believe that the

<sup>25</sup> For empirical studies on the effects of the disclosure of tax information on the collection of taxes, see Nakayama, *supra* n. 1, at 10–12.

<sup>26</sup> See N. Noked, *Public Country-by-Country Reporting: The Shareholders' Case for Mandatory Disclosure*, 90(14) *Tax Notes Int'l* 1507 (25 Jun. 2018).

<sup>27</sup> See R. Müller, C. Spengel & S. Weck, *How Do Investors Value the Publication of Tax Information? Evidence from the European Public Country-by-Country Reporting*, ZEW Discussion Paper No. 21-077 (2021); O. Lally, *Why Mandatory Public Country by Country Reporting Is Good for Business*, EUROAD – European Network on Debt and Development, 1 (18 Aug. 2021); R. Murphy, *Country-by-Country Reporting – Holding Multinational Corporations to Account Wherever They Are*, Task Force on Financial Integrity and Economic Development, 14 (2009).

<sup>28</sup> See Art. 48c (6) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>29</sup> It is important to note that the information concerning certain tax jurisdictions, listed on the Annexes I and II of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, may never be omitted.

<sup>30</sup> Note that a similar clause was established in the Art. 19a (1) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2014/95 of the European Parliament and of the Council of 22 Oct.

current draft of the rule does not ensure full respect for the principle of legal certainty, which states that the law must be clear, precise, and foreseeable in their effects.

This type of clause, using vague and indeterminate concepts, imposes severe obstacles.<sup>31</sup> If implemented as such by the Member-States, it will leave to the discretion of the reporting entities determination of what information is to be considered ‘seriously prejudicial’. From our point of view, the legislator has left an inadmissible wide margin of discretion allowing undertakings to exploit this clause as an instrument to circumvent (at least temporarily) the obligations arising from this Directive.<sup>32</sup>

Sometimes undefined and indeterminate concepts can be interpreted by reference to prior court decisions. We should note that, after an extensive examination of the case-law of the Court of Justice of the European Union (CJEU), this is not the case.

We started by looking for decisions in which the European Courts had ruled on the expression: ‘seriously prejudicial’. In all matches, the Court has never defined the expression or set out guidelines for its interpretation or application. While the provision of Article 48c of the Directive refers to prejudice to an undertaking’s commercial position, the rules analysed by the European Courts which contained this expression addressed a resulting injury to other recipients (i.e., the European Union itself).<sup>33</sup>

We’ve also searched for similar terms such as, for example, ‘serious prejudice’ or ‘severe prejudice’. As for the first term, the decisions founded are not capable of being applied to the scope of the safeguard clause. As for

the second expression, there were no cases in which it was used.

The purpose of using this technique by the legislator may have been to leave it to the Member States to fulfil this indeterminate concept. The European Parliament has also proposed that it should be a competent national authority giving substance to this provision.<sup>34</sup> Although a reference to such an intention is not present in the Directive’s text, such a solution seems highly critical.

Domestic legislators will be expected to have different approaches. Of course, a more permissive legislator will tend to adopt the formulation that offers greater subjectivity, as opposed to a legislator who wants to ensure greater effectiveness of the system, which will tend to adopt a wording that provides greater legal certainty. Given these differences in attitude, multinationals will likely take advantage of this diversity.<sup>35</sup>

One option to tackle these issues would be to stipulate a duty for undertakings to request authorization to omit the information. To ensure the effectiveness of this mechanism, the request should be addressed jointly to the European Commission and to the competent authority from the relevant Member State. Therefore, the omission would be dependent on a favourable double decision. Thus, in each case, it would be up to these two entities to balance which of the two interests would be prevailing: the commercial position/interest of the company or the public interest (domestic and/or European) in the public disclosure of the information.<sup>36</sup> In order to assist Member States defining cases where the publication of information shall be considered seriously prejudicial to the commercial position of the undertakings to which it relates, the Commission should also adopt guidelines by means of a delegated act.<sup>37</sup>

2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330 (2014).

<sup>31</sup> See D. Szabó & K. Sørensen, *New EU Directive on the Disclosure of Non-financial Information (CSR)*, Nordic & European Company Law, Working Paper no. 15-01, 336 (27 Apr. 2015); C. Spengel, *The EU Proposal for Country-by-Country Reporting on the Internet. Costs, Benefits and Consequences*, The Foundation for Family Businesses, 15 (2017); C. Mio et al., *Carrot or Stick? An Empirical Analysis of the Different Implementation Strategies of the EU Directive on Nonfinancial Information Across Europe*, Corporate Social Responsibility and Environmental Management, 6 (10 Feb. 2021); K. Roo, *The Role of the EU Directive on Non-financial Disclosure in Human Rights Reporting*, 2015(6) Eur. Co. L. 284 (2015); P. Drahn, *Adoption of EU Business and Human Rights Policy: The Use of Discretion in the National Transposition of EU Directives* 262 (1st ed., Springer International Publishing 2020).

<sup>32</sup> It should be noted, however, that the information to be communicated by the entities attached to the obligations resulting from private country-by-country reporting may never be omitted because there is no safeguard clause in that regime. Thus, although the omission of public reporting (for a maximum period of five years) may be verified, the tax authorities will continue to have the information shared with them through the mechanism established in the private country-by-country reporting. This information will be sufficient to allow States to carry out audits and any additional settlements of the tax due by companies.

<sup>33</sup> See Judgment of 13 Dec. 2001, Commission/Cwik (C-340/00 P, ECR 2001, at I-10269) ECLI:EU:C:2001:701, paras 17–23. See also Judgment of 15 Sep. 2005, Ireland/Commission (C-199/03, ECR 2005, at I-8027) ECLI:EU:C:2005:548, para. 31.

<sup>34</sup> See V. Klaveren, V. Vliet & C. Sahin, *Initiatieven en kansen omtrent publieke Country-by-Country-Rapportage*, 149(7323) Weekblad fiscaal recht 2020/37, 236 (27 Feb. 2020).

<sup>35</sup> The Irish Government has held a public consultation seeking the views of various stakeholders on the solutions to be adopted in its domestic regime. In particular, the question was what their position was on the safeguard clause. See Department of Enterprise, Trade, and Employment of the Government of the Ireland Republic, *Public Consultation on the Transposition of Directive (EU) 2021/2101 as Disclosure of Income Tax Information by Certain Undertakings and Branches* (20 Dec. 2021), <https://www.gov.ie/en/consultation/ab800-public-consultation-on-the-transposition-of-directive-eu-20212101-as-regards-disclosure-of-income-tax-information-by-certain-undertakings-and-branches/#> (accessed 5 Feb. 2022).

<sup>36</sup> Note that the European Parliament advocated a similar solution to the one proposed here. See [Am. 69/rev], [Am. 47], [Am. 48], [Am. 70/rev], [Am.50] of the Position of the European Parliament (P8\_TC1-COD(2016)0107) adopted at first reading on 27 Mar. 2019 with a view to the adoption of Directive (EU) ... / ... of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, OJ C 108 (2021).

<sup>37</sup> Identically, and as a result of the Art. 2 of Directive 2014/95/EU, the European Commission established guidelines to the safeguard clause used in that regime. See Communication from the Commission, *Guidelines on Non-financial Reporting (Methodology for Reporting Non-financial Information)* (2017/C 215/01), 14–19 (5 Jul.

A double-favourable decision should be required, as the autonomous authorization by a single Member State could lead to it becoming a 'harbour of opacity' by taking decisions that tend to be favourable to multinational undertakings wishing to omit information, to attract their establishment into national territory. Although this measure would ensure that the safeguard clause would only be used when special circumstances were at stake, it would also lead to greater bureaucracy and complexity of the system.<sup>38</sup>

For these reasons, the optimal solution for the satisfaction of the desired *rationale* with this regime would be to suppress the safeguard clause because only in this way would the regime's effectiveness be guaranteed, and the arbitrariness left to the entities would be diminished.

#### 4.1.2 The Allocation of the Indicators to the Relevant State

According to the Directive, the reported information 'shall be attributed to each relevant tax jurisdiction on the basis of establishment, the existence of a fixed place of business, or of a permanent business activity which, given the activities of the group or standalone undertaking, can be subject to income tax in that tax jurisdiction'.<sup>39</sup>

The Directive does not prescribe any rules on allocating the indicators relating to more than one jurisdiction. For example, how to allocate an employee who works in more than one group unit. Or how to allocate royalties relating to an intangible that, under the rules on transfer pricing, is allocated to units in the group located in more than one jurisdiction.

The wording of this rule of the Directive also imposes issues in terms of legal certainty. It is difficult to interpret the expression 'can be subject to income tax in that tax jurisdiction'. Is it referring to the situation in which the company does not yet have a permanent establishment in a jurisdiction but understands that it may have one?

The expression is liable to be interpreted as having a prospective value, determining that the undertaking must report and assign the information to jurisdictions for which it is already subject to income tax, as well as in relation to those in which it is not yet subject to tax but may be in the future.

To address these ambiguities, in our opinion, the standard's wording should be changed, and the expression 'can be subject' should be replaced by 'can be foreseeably subject'. However, this could also require the reporting in cases outside of the rationale since they would have to disclose information in respect of

any jurisdiction in which it could foreseeably be subject to income tax.

Alternatively, the multinational undertakings could be obliged to report only the information regarding jurisdictions in which there was an effective economic presence and effective subjection to tax at the time of the public disclosure.

#### 4.2 The Absence of a Sanctioning Regime

The Directive dictates that the Member States shall establish the responsibility of the members of the administrative, management, and supervisory bodies of the ultimate parent undertakings or the standalone undertakings, for ensuring the publication and accessibility of the report. In the cases in which the secondary filling mechanism is applied, such responsibility shall fall on the members of the subsidiary companies' organs and the person(s) designated to carry out the disclosure formalities of the branch.<sup>40</sup>

The rule does not indicate what type of responsibility would it be, leaving each Member State to set up the liability regime.

The Directive (EU) 2013/34, amended by this regime, has also only determined that the Member-States should provide for penalties and take all the measures necessary to ensure that those penalties are enforced in an effective, proportionate, and dissuasive way.

The European legislator should have gone further, promoting greater harmonization by setting a sanctioning regime to ensure the regime's protection against non-compliance by entities subject to these obligations. This omission may result in disharmony in European legislation, as certain internal legislators may adopt different solutions in relation to non-compliance.

As an example of the disparities that could be generated, we should look at the disparities between the domestic regimes adopted from Italy and Spain due to the transposition of the sanctioning regime of Directive (EU) 2014/95.<sup>41</sup> While Italian law has determined that penalties for the omission of relevant information, non-compliance, or failure to submit within a timeframe, could amount to values between EUR 20,000 and EUR 150,000, Spanish law did not prescribe any sanctions.

These disparities in the implementation of the sanctioning regime will be another factor in which the entities subject to these obligations will pay attention, as they may seek the jurisdiction that grants softer sanctions.

To avoid jurisdiction shopping, the European legislator should have set minimum and maximum limits as a

2017), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01)) (accessed 5 Feb. 2022).

<sup>38</sup> See Szabó & Sørensen, *supra* n. 31, at 336.

<sup>39</sup> See Art. 48 (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>40</sup> See Art. 48e of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>41</sup> See S. Posadas & L. Tarquinio, *Assessing the Effects of Directive 2014/95/EU on Nonfinancial Information Reporting: Evidence from Italian and Spanish Listed Companies*, 11(89) Admin. Sci. p. 4 (31 Aug. 2021).

framework. Within the limits set by the European legislator, it would be up for the national legislator to determine the sanctioning regime in accordance with its legislation, thus ensuring consistency with its legal system.

According to the principle of subsidiarity, the Union shall act only if and in so far as the Member States cannot sufficiently achieve the objectives of the proposed action.<sup>42</sup> However, the imposition of these limits does not interfere with this principle since the desired objective with the imposition of sanctioning limits – the protection of the transparency – is better achieved at the Union level due to the dimensions and effects of this regime.<sup>43</sup>

It could be said that harmonization at the sanctioning level would breach the equivalence principle, which leaves domestic authorities to ensure that claims under EU law are as protected as claims under national law. Strictly speaking, there isn't really an internal situation entirely identical to the one we are dealing with here. In this context, we are not dealing with an omission of a tax payment or merely a deletion of communication of information to the tax authority but of an omission of public reporting of tax information.

### 4.3 Obstacles Imposed to the Directive's Rationale

The way in which the information to be reported is presented is essential to ensure the correct interpretation and comparison of the data by the various stakeholders. With a greater degree of detail and disaggregation in the presentation of this information, the recipients can have a clear picture of the activity and tax policy of each undertaking.

In a regime that seeks to raise public scrutiny of citizens, the further concern should've had been paid into the creation of procedures to ensure that information is provided by entities subject to these obligations. Furthermore, to ensure the effectiveness of this regime, it should've contained mechanisms that better ensured that the reports released faithfully report the tax reality of the undertakings.

Nevertheless, under the Directive, we find provisions that lead to greater permeability to practices that could hinder the protection of their rationale. To ensure that public scrutiny is raised on this tax information, we promote solutions to better solve these problems.

#### 4.3.1 *The Absence of a Centralized Website for the Publication and Issues With the Language Utilized on the Reports*

It is established that, alternatively, Member States may allow the report to be published on the website of the

register of a Member State, referred to in Article 16 of Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, as long as the website of the undertakings and branches, contains information on that exemption and a reference to the website of the register.<sup>44</sup> Difficulties may arise in finding this register website since there may not be a domestic rule that has expressly determined it.

It should also be noted that the article of the Directive does not require the reference to contain a link to the relevant page of the register, nor that it is made in a readable format and in the English language.

If the report is published on the parent company's website, the subsidiary, or a branch, there may also be obstacles imposed, either as to the accessibility to the report or the analysis of the information contained therein.<sup>45</sup>

That being the case, the legislator should have determined the creation or the use of a centralized European website, in which all reports could be submitted by the undertakings and be consulted by the public.<sup>46</sup>

Also, to facilitate public scrutiny, comparison of data, and studies on the information to be communicated, the exact format of the file to be used should be established. This format (*Excel*, for example) should allow, through software applications, to extract specific data or even its entire structure.

Directive lays down only that the Member States shall ensure that the report is made accessible to the public in at least one of the official languages of the Union. As of today, the EU contains twenty-four official languages, and most of them are unknown to other EU citizens. Therefore, the Directive should have required companies to draw up and allow free consultation of a version of the report (also) in English.

#### 4.3.2 *The Obstacles Imposed by the Aggregation of the Information on the Member-State Level*

The report shall present the information on an aggregated basis at the Member State level, imposing severe obstacles on the data analysis.

Even if the parent company retains several constituent entities in a single Member State, the information reported would regard the overall activities carried out in that jurisdiction. This will allow undertakings to undercover information concerning the existence of a shell company in a jurisdiction. The MNE may

<sup>44</sup> See Art. 48d (3) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

<sup>45</sup> That would be that case where the website subordinates the reading of the report to the completion of successive CAPTCHA's (cognitive tests) or, the situation in which the website allows the continuous appearance of pop-up ads that make the information less visible.

<sup>46</sup> This could be the European e-Justice Portal, which already allows the search for companies from all EU countries and access the information on it in their national register of companies, in the 'search for a company in the EU' section.

<sup>42</sup> See Art. 5 of the *Treaty on European Union*, OJ C 326 (26 Oct. 2012).

<sup>43</sup> As alluded to by Art. 5 (3) of the *Treaty on European Union*.

(purposely) place a constituent through which it performs substantial activity to cover another one used only as a tax planning structure.

The same problems may also be posed when the multinational has constituent entities operating with substance in a jurisdiction and uses the aggregation of the information to cover up constituent units located in a special tax zone inserted in that same State.<sup>47</sup>

To solve these issues, the Directive's regime should have established full disaggregation of the information regarding each of the group's units in the same jurisdiction.

Although the costs associated with fulfilling these obligations may increase by obtaining information relating to each constituent unit of the group, better clarity would have been ensured in the interpretation of these figures.

#### 4.3.3 *The Insufficiency of the Secondary-Filing Mechanism*

The Directive stipulates that the Member States should require European subsidiaries/branches controlled by third-country undertakings to be obliged to publish and make available the tax information report for the ultimate parent undertaking.

Where that information or report is not available, the subsidiary or the branch shall request its ultimate parent undertaking to provide it with all necessary information to enable it to meet its obligations.<sup>48</sup> If the ultimate parent undertaking does not provide all the required information, the subsidiary undertaking shall draw up, publish, and make accessible a report on income tax information containing all information in its possession, obtained or acquired, and a statement indicating that its ultimate parent undertaking did not make the necessary information available.

With the adopted solution, we believe that there is an excessive margin for the parent company, located in a Third State, to refuse to provide the information necessary for the subsidiary or branch to comply with the obligations resulting from this Directive. In this way, the scope that this measure seeks to achieve for companies located outside the Union will be compromised. However, it is difficult to imagine another scenario since the parent company is located in a Third State and is not subject to EU law.

To overcome this obstacle generated by the impossibility of granting this information from the ultimate parent undertaking established outside the Union, the legislator should have adopted another measure that

could best ensure the knowledge of the multinational's tax information at the European level.

Therefore, a better solution would be to make the reporting obligations fall on the main subsidiary operating in the European Union. Similarly, as the solution laid down in the Directive for the ultimate parent undertakings located in the Member States, that main subsidiary, to be determined by objective criteria to be fixed by the legislature, would have to draw up and prepare its own reports, as well as those of each of the subsidiaries and branches constituting it.

Since the main subsidiary may not be fully aware of the tax information of each of its 'sister companies', we do not consider it reasonable, for reasons of practicality and complexity, that it should also have to communicate the information of each of them in relation to the income tax.

To better interpret the information to be published, it would also be necessary for the main subsidiary operating in the European Union to also indicate, in its report and in that of each of its subsidiaries and/or branches, the name or firm of the parent company (along with its tax ID number).

However, we believe that the same obstacles imposed by the non-disclosure of information by the ultimate parent undertaking located outside the Union could be imposed by the main subsidiary operating in the Union. Although this company is subject to European jurisdiction, the current sanctioning regime of the Directive is not sufficiently rigid to prevent non-communication by entities subject to reporting obligations.

For this reason, it would be important for the reporting obligations to be imposed on another entity in the event of non-compliance by the main subsidiary operating in the European Union (i.e., the main subsidiary of the main subsidiary operating in the European Union). This system would be repeated along with the different levels of the chain of subsidiaries in the event of successive non-compliance.

When establishing such a solution, it would be appropriate for the legislator to provide a clear and objective definition of this figure which we have proposed ('main subsidiary operating in the European Union'). After all, the determination of the entity subject to this subsidiary obligation would be dependent on the definition to be made by the legislature. For instance, the main subsidiary could be the one with the highest value of annual revenues.

## 5 CONCLUSIONS

The Public Country-by-Country reporting regime, established on the Directive (EU) 2021/2101, is a decisive step in strengthening international tax transparency, as it allows public scrutiny to be intensified on the tax

<sup>47</sup> See in this regard, the examples that are given in point 10 in Financial Transparency Coalition, *European Commission Proposal on Public CBCR – Questions and Answers 7* (5 Jul. 2016), <https://financialtransparency.org/materials/qa-cbcr-european-union/> (accessed 5 Feb. 2022).

<sup>48</sup> See Art. 48b (4) and (5) of Directive (EU) 2013/34, introduced by the Art. 1 of Directive (EU) 2021/2101.

policies carried out by large MNEs, allowing to assess how they allocate taxable income between the various countries in which they operate. With the Directive, corporate tax policies become a new variable of the relationship between a large enterprise and its stakeholders.

However, the current regime of the Directive has several shortcomings. These problems, in our view, should be corrected both at the level of the implementation of the Directive in the various Member States and at the time of a future revision of the Directive.

The current wording on some of its rules does not ensure full respect for the principle of legal certainty, which states that the rules of law must be clear, precise, and foreseeable in their legal implications. By using fuzzy or indeterminate concepts and expressions, situations of interpretative subjectivity arise, which can be used by companies to avoid the effective fulfilment of their obligations.

The legislator should have also promoted greater legislative harmonization on the sanctioning regime by setting minimum and maximum limits on the applicable sanctions. This would guarantee greater effectiveness of the regime and prevent jurisdiction shopping resulting from the coexistence of very lenient and burdensome regimes.

Finally, although the Directive aims to increase international tax transparency, it introduces solutions that paradoxically impose obstacles to the promotion of public scrutiny. Therefore, the legislator should've adopted solutions that established: (1) the determination of a centralized website for the publication of the reports; (2) the full disaggregation of data for each of the constituent units that an undertaking holds in a jurisdiction; (3) the acquisition of tax-data referring to the activities that multinational groups in which the parent company is subject to the law of a third state hold in the EU territory.