Confédération Fiscale Européenne Joint PAC/FC Opinion Statement 1/2017 on the European Commission public consultation 'Disincentives for advisers and intermediaries for potentially aggressive tax planning schemes'

Submitted to the European Commission on 15 February 2017

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 20 European countries with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe. CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions that you may have concerning the CFE comments. For further information, please contact Wim Gohres, Chair of the CFE Professional Affairs Committee wim.gohres@nl.pwc.com *or the CFE Brussels Office* brusselsoffice@cfe-eutax.org *+32 2 7610091, Avenue de Tervuren 188A, Brussels.*

CFE, the leading European federation of tax advisers, is pleased to submit comments to the European Commission on the public consultation of 10 November 2016 concerning introduction of effective disincentives for advisers, promoters and enablers of aggressive tax planning schemes resulting in tax avoidance or evasion. CFE welcomes the initiatives and efforts of the European Commission to contribute to more efficient tax systems where a level-playing field is secured throughout the EU internal market.

Further to the reply to this consultation, CFE wishes to summarise the main points and remarks related to the above European Commission initiative in an Opinion statement.

1. Executive summary

1.1. CFE highlights the positive role of the tax advisers in Europe and their contribution to the rule of law- **tax advisers play a fundamental role in making complex tax systems work**;

1.2. Considering the intrinsic complexity of tax systems, any envisaged disclosure regime must **not undermine the ability of taxpayers to seek advice and tax advisers to provide it;**

1.3. **CFE supports Commission's efforts for improved tax transparency –** by doing so, the EU should seek to implement OECD recommendations, in particular Action Point 12, in a coordinated way to ensure level-playing field within the EU;

1.4. In respect of the objectives of this policy initiative, CFE believes that the EU should continue to facilitate administrative cooperation between Member states to tackle cross-border abuse and to **improve voluntary compliance of taxpayers** by introducing reassurances on the fairness of the tax system;

1.5. While mandatory disclosure regime could be a useful instrument for provision to the tax authorities of information about tax arrangements that might undermine the integrity of the tax system, CFE believes that the European Commission should take into account **the principle of subsidiarity** and the need for intervention at EU level, considering that several EU Member states have already introduced mandatory disclosure regimes;

1.6. Any disclosure obligations should take into account **the right against self-incrimination**; any upcoming proposal should include exemption for tax advisers similar to the one laid down in Article 34(2) of the Anti-Money Laundering Directive[1];

1.7. The country-specific scope of the right of non-disclosure and confidentiality, as well as professional privilege, need to be respected in any future proposal in light of the **diverse regulatory ambient for the tax profession in Europe**;

1.8. Excessively burdensome mandatory disclosure rules at EU level could potentially decrease the attractiveness of the EU Internal market, which could run affront to the efforts of making the EU the most dynamic and innovative market in the world.

[1] Directive (EU) 2015/849 of 20 May 2015

2. General remarks CFE welcomes the European Commission's efforts to address the issues of aggressive tax avoidance, and to contribute to tax transparency and integrity of the tax systems. As the most representative body of the European tax advisers, we are supportive of European Commission's policy and legislative agenda to the extent it contributes to better and more efficient business environment, where tax advisers are able to provide timely advice.

While CFE supports the EU objectives in the fight against tax evasion and aggressive corporate tax avoidance, we are concerned about the possibility that contemplated proposals in respect of effective disincentives, could potentially go beyond the final recommendations of OECD.[2] Any disproportionate measures that might go beyond OECD recommendations, might have an adverse impact on the business environment and the tax profession.

3. Country-specific and regulatory aspects/ Subsidiarity At the outset, we would like to draw attention to the subsidiarity principle of the EU Treaties. While there could be a legal basis for harmonisation of this matter at EU level, we call on the Commission to assess the necessity for harmonisation at EU level from a proportionality/ internal market perspective. An appropriate level playing field could effectively be maintained while entities are subject to national disclosure regimes, as suggested by OECD BEPS Action Point 12.

Several EU member states have already introduced mandatory disclosure national regime, i.e. the DOTAS in the UK, disclosure rules in Ireland and Portugal. The DOTAS process in the UK has been assessed as successful by the UK tax authorities.[3] The fact that national disclosure regimes are assessed as successful, questions the need for EU action from an EU internal market perspective.

Country-specific regulatory aspects need to be taken into account when assessing the appropriate EU mandatory disclosure rules (**"MDR"**) policy decision. Considering the divergent regulatory environment for the tax professionals in Europe, certain MDR policy options (i.e. Code of Conduct for Tax Professionals), if transposed to national codes, may amount to regulation for unregulated (or self-regulated) professionals, or additional layer of regulation for regulated professionals.

There is also a possibility of increased compliance burden imposed on tax advisers – i.e. training for staff on the details of the regime, developing internal compliance policies, procedures etc. On basis of the subsidiarity argument, MDR need to be appropriate for a particular Member state and for the addresses of such rules (taxpayers or tax advisers). Otherwise, the proposed rules could be difficult to follow from

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[2] Communication COM(2016) 451 final of 5 July 2016 , page [8]: "The Commission will work closely with the OECD and other international partners on a possible global approach to greater transparency on advisors' activities, going beyond the recommendation in BEPS Action 12."

[3] "DOTAS has proved to be highly successful and the Government has used information from DOTAS to introduce a range of anti-avoidance measures every year since 2004 - a total of 49 measures, closing off over £12 billion in avoidance opportunities", HMRC Consultation Document of 9 December 2009

the outset, and unlevel the playing field of the profession. For instance, if EU-wide rules target diverging national professional regulation environments, such an approach could result in ineffective rules. The rules might be effective in a particular country, but not in another. This could distort the level playing field at the level of the profession, the tax compliance environment, and ultimately, the EU internal market.

EU should continue to facilitate administrative cooperation between Member states to tackle cross-border abuse and to improve voluntary compliance of taxpayers by introducing reassurances on the fairness of the tax system. Member states should also be encouraged to use the instruments under EU law for cooperation and exchange of information, tax rulings, GAARs, the Parent-Subsidiary Directive, and the Anti-Tax Avoidance Directive.

CFE wishes to point out that disclosure mechanisms should be relevant for specific Member states, whilst practices should not depart from OECD recommendations. Adequate national legislation, where deemed appropriate by Member states, should be supported by EU's coordinating efforts.

4. Design features of a potential disclosure regime CFE believes that mainstream tax advice should be left outside of scope of any envisaged MDR. Objective criteria limiting the scope of the reporting obligation to relevant scenarios (cases) should be considered by the European Commission.

Therefore, as a design principle, any proposal should seek to ensure that the rules do not impose a compliance burden for tax advisers, and any benefit of the identification of reported avoidance scheme must be balanced with lowest possible compliance burden for all stakeholders involved. Also, rules need to be clear, concise and easy to understand to avoid further 'red tape' perception.

Any future impact assessment should include reference to quantifiable cost/ benefit analysis in the sense of identifying and quantifying the compliance burden on the tax advisers and businesses, depending on the envisaged regulatory model.

5. Tax advisers contribute to the rule of law CFE believes that the tax advisers contribute to the rule of law and the positive business dynamics of the European market. By providing timely tax advice, the tax advisers serve the general public interest to the best of their abilities. The pursuit of the profession of tax advisers is thus in the best interest of the European economy. It is in this respect important to appreciate and advance both the taxpayer right to tax advice and the positive role of the tax adviser in performing their duties. CFE refers in that respect to the CFE Guidelines (Professional Code)[4] and CFE's Manifesto[5] on the ethical and professional principles that guide the work of the European tax advisers that perform their duties under the umbrella of the CFE.

[4] CFE Guidelines – Professional Code: http://www.cfe-eutax.org/sites/default/files/Professional%20Code_20042012.pdf

[5] CFE Manifesto: http://www.cfe-eutax.org/sites/default/files/Manifesto_Paris%202009_final.pdf

6. Tax advisers ensure compliance Tax advisers play an important role in ensuring taxpayer compliance. They are bound by law and/ or codes of conduct of their professional bodies, ensuring their independence and professional integrity. CFE believes these prerogatives should be respected and safeguarded. The right to effective legal representation and a client confidentiality is part of taxpayers' fundamental rights to privacy and a fair trial. These will only be effective if clients can trust that information shared with their adviser will remain confidential and that tax advisers are not seen as watchdogs of the administration, national or international. Tax professionals, when representing clients in tax matters, should be granted recognised privilege throughout the EU, not only if they are member of the profession of lawyers or state regulated accountants or tax advisers. The importance of tax advisers´ independence and qualification should not be undermined by applying one-size-fits-all approach. [6]

Mandatory disclosure regime in any form or level should not hinder the provision of quality tax advice to taxpayers. The vast majority of the tax advisers are not involved in developing, promoting or selling aggressive tax planning schemes. Potentially excessive administrative burden resulting from regulation at EU level might result in fewer possibilities for taxpayers to get access to affordable, timely and good quality tax advice.

7. Scope of the right of non-disclosure The rights and obligations of tax advisers should be fully respected in any upcoming proposal. The right of non-disclosure is considered a common standard for the legal profession and is often referred to as client-attorney privilege in the United States, or legal professional privilege. As recognised by Article 6 of the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights, the right of fair trial includes this principle. Article 8 of the ECHR guarantees the confidentiality aspects related to the right of protection of correspondence and the right of non-interference by public authorities with this right (professional privilege).

The existence of national specific laws or case-law which deals with the scope of the right of non-disclosure indicates:

- the importance of this right at level of the profession,
- the different regulatory ambient in this respect among various EU countries, and,
- derived right of non-disclosure could exist based on case-law, again country specific. [7]

The European Professional Affairs Handbook for Tax Advisers[8], based on surveys conducted with member-organisation of the CFE, specifies the *modus operandi* of the right of non-disclosure:

[6] CFE Opinion Statement PAC 2/2016 and FC 8/2016 on the role of tax advisers with regard to tax avoidance submitted to the European Institutions and OECD, June 2016; More on the European tax advisers' priorities in the period 2014-2019: http://www.cfe-eutax.org/sites/default/files/European%20Tax%20Advisers'%20Priorities%202014-2019,%202page%20version.pdf

[7] See, page 6 of the NOB (Dutch Order of Tax Advisers) Opinion Statement 'The Tax Advisers and the Right of Non-Disclosure', cf. CJEU judgment C-550/07 (*Akzo/Akcross*); On the existence of a derived right of non-disclosure: Judgment of the Supreme Court of the Netherlands *NJ 1994*, 552 of 29 March 1994

[8] On the different regulatory aspects of the tax profession in Europe, *European Professional Affairs Handbook*, Second Edition, *CFE and IBFD (2013)*

- In 5 of 22 European countries, tax advisers enjoy right of non-disclosure guaranteed by law/ case-law (Croatia, Netherlands, Ireland, Romania, Slovakia), but does not extend to criminal proceedings;
- In Austria and Germany, where tax advisers may represent clients before criminal courts, they also enjoy right of non-disclosure;
- in France the right of non-disclosure for tax advisers is extended by law towards tax authorities, tax and criminal courts and public prosecutors; equally strong in Poland and the Czech Republic;
- In Greece, Italy, Latvia, Portugal, Spain, Switzerland, Ukraine and the United Kingdom a right of non-disclosure is not guaranteed for tax advisers unless they are lawyers;
- Belgium accords a right of non-disclosure of client information to the state, also related to requests from tax authorities. There are exceptions in the Belgian legislation (i.e. anti-money laundering legislation) and where the professional needs to be heard as a witness by a court.

Mandatory disclosure of tax avoidance schemes at present exists as a legal obligation in the UK, Portugal and Ireland.

The above indicates that the scope of the right of non-disclosure and related rights are guaranteed by instruments of international law, while the exact scope of the right of nondisclosure is operationalised by law or case-law in different jurisdictions. MDR must therefore be appropriate to the compliance environment in a specific jurisdiction, which questions regulation at EU level in light of the subsidiarity arguments. Some of the problems envisaged by CFE include difficulties in implementation and doubling of rules in jurisdictions which operate General Anti Avoidance Rules (GAARs).[9]

CFE refers to the Opinion Statement PAC 2/2016 and FC 8/2016., in respect of the position adopted by the CFE and its member organisations with respect to the right of non-disclosure. Where tax advisers are obliged to notify tax administration of certain arrangements, unless prohibited by law, tax advisers should inform the client of this obligation, prior to the client´s decision to enter into the said arrangement; tax advisers shall not be obliged to report to the tax administration any documentation other than a description of the arrangement itself; if the tax adviser is not certain whether to notify the tax authorities or not, for example, if by reporting they would infringe the taxpayer's fundamental rights, they should seek professional legal advice before disclosing such information.[10]

8. Elements of a potential disclosure regime

8.1. Who should report? CFE believes that the reporting obligation should rest with one party- the taxpayer.[11] Wherever a taxpayer is assisted by a tax adviser, the tax adviser will be obliged by law, professional code or duty of care, to inform the taxpayer of a reportable scheme and, in all probability,

[9] See, *cf.* CFE and AOTCA Joint Opinion Statement FC 7/2015 and PAC 1/2015 on Mandatory Disclosure Rules (April 2015)

[10] CFE Opinion Statement PAC 2/2016 and FC 8/2016

[11] CFE Member organisations from the United Kingdom (CIOT and ICAEW) refrain from endorsing this CFE position

will assist the taxpayer to report. Reporting from tax advisers, which are bound by professional secrecy, could require explicit waiver of such rights. These obligations are country-specific: in some countries, the client may not waive these rights. In countries which already operate mandatory disclosure regimes, i.e. the UK, the obligation to report ordinarily rests with the tax adviser with a default to the taxpayer where legal privilege applies and the client does not waive it. Also, where there is no promoter or external adviser, for example in case of in-house schemes, the obligation to report also rests with the taxpayer. Having in mind these country-specific developments, CFE again underlines the subsidiarity principle and the country-specific regulatory issues that might arise in a MDR designed at EU level.

8.2. Hallmarks General hallmarks could be designed at EU level, i.e. confidentiality from competitors, confidentiality from the tax authorities, standardised (off-the-shelve) schemes could serve as appropriate general hallmarks. Specific hallmarks on the other hand are necessarily pertaining to specificity of a particular tax system of a Member state and are therefore impossible to design at EU level.

De minimis/ threshold test should also be included in any future proposal, in order to exclude insignificant schemes from the reporting obligation. Mandatory disclosure rules should not concern legality of tax schemes, as they would normally be intended at providing exceptional information to authorities limited to cases substantially affecting state revenues. This will ensure that mandatory disclosure rules are better targeted and the ambit of the rules is appropriate to ensure better compliance and lower administrative burden.

Presumably, there will always be aggressive avoidance schemes which will not have been disclosed as they would fall outside envisaged hallmarks, but this should by no means entail introduction of hypothetical hallmarks, i.e. 'a general artificial arrangement or an artificial series of arrangements created for the essential purpose of avoiding or evading taxation and which leads to a tax benefit', as indicated in the questionnaire. Hallmarks need to be designed in relation to objective and factual criteria.

In respect of the general hallmarks, unusually high fees or contingency fees should not be *per se* be assumed to relate to abusive, mass-marketed or novel avoidance schemes, as there might be legitimate reasons to justify the higher level of fees, e.g. reputation of the adviser, complexity of the structure, size of transactions involved, urgency, multiple location of client offices etc. They should not therefore trigger disclosure *per se.* It would therefore seem more appropriate to rely on a combination of hallmarks, to achieve the intended result.

8.3. What to disclose? For proportionality and privacy reasons, if a future Commission proposal considers a reporting obligation placed on the tax advisers, they should be obliged to report only the scheme itself based in its eligibility for mandatory disclosure, not the related correspondence, documentation, memos, client emails etc. CFE wishes to point out to the principles of privacy related to the publication of sensitive commercial information, the issue of <u>who</u> is handling this information and <u>to whom</u> it might be transferred or exchanged, what type of IT safeguards would be in place.

Potentially, large amount of data that would be disclosed and held by various institutions related to both businesses and individuals, and this merits considerations as to the practical protection of the right of privacy and confidentiality. CFE believes that information should be disclosed to national tax authorities only. Considering that mandatory disclosure might entail breach of the confidentiality principle, disclosures in the public interest ought to take into account relevant judicial authorisations. [12] Mishandling of sensitive commercial might adversely affect businesses and taxpayers' rights.

Data and documentation already covered by other reporting obligations, such as EU legislation on automatic exchange on tax rulings, or country by country reporting, should be excluded from any mandatory disclosure obligation. Double reporting obligations should be avoided.

8.4. When to disclose? If the disclosure obligation is on the tax adviser, they should be obliged to report once the scheme has been made available to the client. If the obligation is on the client, then it might be when they put the arrangement in place. Thus, obligation on the tax adviser to disclose the scheme when it was made available to the client would embrace two aspects: all the elements of the deemed aggressive tax planning scheme necessary for its implementation are in place; and, confirmation by the client that the scheme is to be put in place, or the client wishes to enter into the proposed transactions. Mere preparatory or ancillary activities or communication with the client should not be covered and this should not trigger disclosure obligation. Correspondence confidentiality is also covered by the principle of professional secrecy.

For instance, in Ireland, the legislation requires disclosure within five working days. With respect to 'bespoke' schemes, the disclosure is required at the date the promoter becomes aware that the scheme, or part of it, was implemented. Regarding 'standard' schemes, disclosure is required from the date the promoter makes the scheme available for implementation.

9. Retroactivity The European legal order is based on rule of law. Thus, any proposal should consider disclosure obligations that have *pro futuro* effect only. Retrospective rules undermine the confidence of the legal system and in the EU institutions. As such, these are in breach of the principles of legal certainty and legitimate expectations, binding principles of EU law.

10. Domestic/ international tax schemes Regarding international tax schemes, it should be noted that complex structures and transactions entail multiple advisers that are responsible for particular aspects of the scheme. Frequently there will be a mixture of firms of tax advisers, accountants, lawyers and clients involved, each responsible for only part of the transaction, even separate offices within the same network of firms. If the proposal includes multiple reporting to multiple authorities in multiple jurisdictions, these could amount to confusion and undue or excessive compliance burden.

The administrative burden for the tax administrations could be significant, whether they would have the administrative resources to process these type of data. Identical schemes reported in different countries

[12] Philip Baker QC, IFA Studies on International Fiscal Law Volume 100b

may be interpreted differently, so this may give rise to additional costs for dispute resolution, possibly litigation costs etc. Additionally, not all intermediaries involved have sufficient knowledge and oversight of the structure or the material tax consequences for every party of the transaction. Therefore, Member states should not be obliged by upcoming EU proposals to hold advisers responsible where they are based outside their jurisdictions. In Ireland, for instance, there is exception in circumstances where the tax adviser has insufficient knowledge of the overall scheme as they are providing advice on one part of the scheme. Potentially extraterritorial reporting obligations might create enforcement problems and extremely complicated compliance burden in jurisdictions with no significant connection with aggressive or abusive tax planning practices. [13]

11. Publication of information The information to be disclosed should not be made available to the general public. Sensitive commercial information should not be made public for obvious reasons, as it could affect taxpayers' right of privacy. If the disclosure obligation for the tax advisers goes further than the disclosure obligation for taxpayers, taxpayers could refrain from asking for professional tax advice and could instead put the scheme in place by themselves or by taking advice from a consultant who is not bound by professional rules. Additionally, this might benefit large companies that have their tax affairs dealt with by an internal tax department, instead of consulting a tax adviser. This could both undermine the effectiveness of any envisaged MDR, but could also potentially affect the work of the tax advisers in terms of level playing field in the profession.

12. Self-incrimination The right against self-incrimination is a fundamental right. Any disclosure obligation should take this right into account. Therefore any upcoming EU proposal should guarantee an exemption for tax advisers, similar to the exemption of Article 34(2) of the Anti-Money Laundering Directive.[14] Where for reasons of self-incrimination the taxpayers are prevented from disclosing, the tax adviser should not be required to report or be held liable criminally for enacting, promoting or assisting in tax avoidance scheme. This is *raison d'etre* of the legal privilege and the right against self-incrimination, which cannot be circumvented by asking someone else to report. The right of non-disclosure with regard to taxation arises from the client's fundamental right of access to tax advice and is, as such, a right associated with the client and not with the tax adviser. The client's right to tax advice is a prerequisite of the tax adviser's obligation of confidentiality on tax matters.

13. Secret reporting The provision of comprehensive tax advice is dependent on a relationship based on trust between the client and the tax adviser. Any duty to make secret disclosure could seriously undermine this relationship. Such an obligation would also discourage taxpayers from effectively seeking tax advice

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[13] For instance, these type of extraterritorial compliance obligations already exist in the US FATCA legislation, in which context the above considerations are to be taken into account

[14] Article 34(2): "'Member states shall not apply the obligations laid down in Article 33(1) to […] tax advisers only to the strict extent that such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings.", Directive (EU) 2015/849 of 20 May 2015

and assistance in tax matters from tax professionals bound by professional ethical standards, which could as a result mean lower overall compliance with the law. The role of tax advisers in securing compliance in this respect is crucial. In the environment of provision of tax advice, unlike in anti-money laundering environment, the client-adviser relationship is crucial, so it is not justifiable to introduce obligation of secret reporting.

14. Potential penalties CFE believes that nothing in the envisaged Commission proposals should prevent taxpayers from obtaining access to impartial tax advice. If the European Commission aims to target a small minority who is persistently in breach of the law, any envisaged legislation should be sufficiently clear and precisely targeted and serve as disincentive to those only, not to the vast majority of tax professionals who are acting within the law.

15. EU Code of Conduct for professionals providing tax advice In respect of the possibility of adopting a European Code of conduct for tax advisers, as an alternative policy instrument to mandatory disclosure (option “E” - possible policy actions of the public consultation). Such EU-wide Code of conduct would potentially establish common rules, ‘soft-law’, which would not be binding, but presumably transposed into the national codes of conduct of the professional associations. This type of EU action could pose compliance, supervision and enforcement problems. EU Code of conduct might also create unlevelled paying field at the level of the profession, considering that the provision of tax advice outside of professional organisation would not be covered by the EU Code of conduct. Even if the EU Code of conduct for professional organisations providing tax advice applies to all actors, it would not cover schemes conceived and set up by the taxpayer himself (i.e. by internal tax department of a company).

End/