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**Opinion Statement PAC 3/2017 on the European Commission Proposal for a
Council Directive amending Directive 2011/16/EU as regards mandatory automatic
exchange of information in the field of taxation
COM/2016/025 final - 2016/010 (CNS)**

Submitted to the European Commission on 27 July 2017

CFE is the European tax advisers' association. Our members are 26 professional organisations from 20 European countries with more than 200,000 individual members. CFE aims 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 and policy 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 the Chair of CFE Professional Affairs Committee Wim Gohres wim.gohres@nl.pwc.com or the CFE Brussels Office brusselsoffice@cfe-eutax.org +32 2 761 00 91, Avenue de Tervuren 188A Brussels.

Executive summary

- i.** CFE welcomes the European Commission policy approach for increased transparency and efforts to strengthen the integrity of the tax systems, in particular the renewed efforts for increased tax certainty;
- ii.** The design of certain aspects of the proposal leaves scope for uncertainty and faces the challenge of divergent implementation in the member states. Definitions need to be clear and concise, as rules that are too widely drawn are overly burdensome for taxpayers and unhelpful for tax authorities, which stand to receive massive numbers of disclosures but very little useful information; in particular the definitions of ‘cross-border arrangement’, ‘taxpayer’ and ‘made available’;
- iii.** The proposal could benefit from including a requirement for member states’ tax administrations to issue implementation guidance, providing clarity in relation to determining what is required to be disclosed;
- iv.** CFE advocates adherence to the OECD BEPS 12: 2015 Final Report principles, whereby the member states define country specific hallmarks together with a list of excluded tax regimes and outcomes that are not required to be disclosed. These hallmarks could then be assembled on EU level and become reportable except for the excluded arrangements
- v.** Bearing in mind that hallmarks define what constitutes a reportable cross-border arrangement, these essential features should be well-defined, clear and concise. Hallmarks should be part of the main text of the directive;
- vi.** CFE believes that the main benefits test also belongs to the main text of the directive. The main benefits test needs to be applicable to all hallmarks in order to ensure that the reporting obligation is limited to relevant arrangements only;
- vii.** The directive should specify a range of penalties applicable to infringement of national provisions adopted pursuant to the directive concerning *Article 8aa*) and *Article 8aaa*). Conversely, penalties that are ‘effective, proportionate and dissuasive’ could be subject to different interpretation by member states;
- viii.** CFE welcomes the professional privilege waiver as well as the non-retroactivity of the proposal;
- ix.** Bearing in mind the intrinsic complexity of tax systems, the EU legislation should not undermine ability of taxpayers to seek tax advice, and for tax advisers to provide it. A clear distinction needs to be acknowledged between ordinary tax advice (as it is provided by the vast majority of tax advisers) and marketed, ‘off-the-shelf’ schemes (provided by a small minority). This difference

should also impact the timing and deadline of the reporting. In all situations the CFE proposes that reporting should be done no later than 20 working days after the start of reporting obligation.

I. Comments on the policy framework

CFE, the European association of tax advisers, has already stated its preliminary remarks in respect of the mandatory disclosure rules and effective disincentives for tax advisers in its Opinion Statement PAC/FC 1/2017 of 15 January 2017¹. The comments below relate to the European Commission proposal of 21 June 2017.²

1. Transparency

1.1 CFE welcomes the European Commission policy approach for increased transparency and efforts to strengthen the integrity of the tax systems, in particular the renewed efforts for increased tax certainty.

1.2. Mandatory disclosure of reportable cross-border tax arrangements that undermine the integrity of the tax systems could be a helpful instrument for tax authorities if the mechanism is designed in an adequate and proportionate manner.

2. Comments on the framework

2.1. In respect of the framework of the instrument (mandatory disclosure of reportable cross-border arrangements to tax authorities coupled with an automatic exchange of information), CFE believes that such a policy choice could work well at EU level and might help in establishing better cooperation between member states and improving voluntary compliance of taxpayers.

2.2. The design of certain aspects of the proposal leaves nonetheless scope for uncertainty and faces the challenge of divergent implementation in the member states. Definitions need to be clear and concise. Conversely, inconsistency in the wording might undermine the purpose of this instrument. Rules that are too widely drawn, resulting in too much disclosure, are overly burdensome for taxpayers and unhelpful for tax authorities, which stand to receive massive numbers of disclosures but very little useful information. They also potentially divert valuable resources that could be put to better use.

2.3. Recent EU anti-avoidance legislation (ie. EU Anti-Tax Avoidance Directives “ATAD” 1 & 2) Directive on administrative cooperation on advance cross-border rulings (“DAC 3”), Directive on administrative cooperation on country-by-country reporting (“DAC 4”), Directive on Double Taxation Dispute Resolution Mechanisms) promises to address many loopholes effectively superseding the need for EU-wide mandatory disclosure.

¹ CFE Opinion Statement PAC/FC 1-2017 of 15 January 2017 <https://goo.gl/SuHXMW>

² Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation COM/2016/025 final - 2016/010 (CNS)

3. Implementation guidance

3.1. The proposal could benefit from including a requirement for member states' tax administrations to issue implementation guidance, providing clarity in relation to determining what is required to be disclosed.

3.2. Tax authorities should be required to provide meaningful examples of the types of transactions that fall within each hallmark. Clarity could be further improved by tax administrations providing examples of what is not required to be reported, that is what is considered to be ordinary tax planning. Outlining such examples of transactions that are considered routine and not subject to disclosure rules, coupled with a detailed guidance from the tax authorities could help to improve the clarity of the rules.

3.3. CFE suggests that implementation guidance and examples are prepared in consultation with taxpayers and tax advisers and should be made available prior to mandatory disclosure rules coming into effect.

3.4. Ongoing publication of the reported information by tax authorities will also be important. The publication of details of the type of schemes that have been disclosed by taxpayers would help to provide clarity for all taxpayers.

3.5. Tax authorities should declare publicly what is their view of the reported arrangements, whether they are acceptable not, accompanied with their reasoning as to the non-acceptability.

4. Ordinary tax advice v. mass-marketed schemes

4.1. Bearing in mind the intrinsic complexity of tax systems, the EU legislation should not undermine ability of taxpayers to seek tax advice, and for tax advisers to provide it. A clear distinction needs to be acknowledged between ordinary tax advice (as it is provided by the vast majority of tax advisers) and marketed, 'off-the-shelf' schemes (provided by a small minority).

4.2. CFE welcomes the professional privilege waiver as well as the non-retroactivity of the proposal. 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. 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.

5. Adherence to the OECD principles

5.1. In spite of the absence of minimum standard under the OECD BEPS Action point 12, the legislative efforts of the EU need to adhere to the principles of the OECD BEPS project. The forthcoming results of OECD Working Party 11 are of relevance to ensure consistency between the mandatory disclosure frameworks in the EU and the rest of the world.

5.2. CFE believes that a more appropriate solution is that the member states define country specific hallmarks as recommended by BEPS Action 12 paragraph 240 together with a list of excluded tax regimes and outcomes that are not required to be disclosed. These hallmarks could then be assembled on EU level and become reportable except for the excluded arrangements. This would prevent the reporting of arrangements which are not considered to be aggressive avoidance. It is not clear why the European Commission has deviated from this approach.

5.3. CFE also proposes that the directive excludes from the obligation to report those arrangements which have already been reported on the basis of another directive such as the Directive on automatic exchange of cross-border rulings.

5.4. CFE also proposes that the definition of a cross-border arrangement entails the requirement that there is a tax impact in at least two jurisdictions. This is now a separate criterion under the Commission's proposal, but not a standard requirement.

6. Hallmarks

6.1. The proposal places the hallmarks in an Annex to the directive, with *Article 23a*) and *Article 26a*) empowering the European Commission to adopt delegated acts on basis of Article 290 of the Treaty on the Functioning of the European Union ("TFEU") in order to amend the list of hallmarks on potentially aggressive tax planning arrangements. 'Annex IV' in relation to hallmarks could thus be amended by the European Commission on basis of Article 290 TFEU, whereas this Treaty article concerns amendment or supplementation of non-essential elements of the legislative act. Hallmarks define what constitutes a reportable cross-border arrangement, and as such they are an essential element of the directive. On that basis, the main benefits test and the hallmarks should be placed in the main text of the directive and thus amended in accordance with the procedure laid down in Article 115 TFEU (unanimity).

With regard to the hallmarks some CFE members feel that the EU proposal may be appropriate to make necessary changes to the Annex in response to updated information on arrangements or series of arrangements.

6.2. The hallmarks need to be consistent, clear and concise. Bearing in mind that hallmarks define what constitutes a reportable cross-border arrangement, these features are essential parts of the directive and should be well defined, limited in scope and related to objective and factual criteria.

7. Proportionality

7.1. In respect of the proportionality of the policy response, whereby European Union actions need not exceed what is necessary to achieve the objective of the Treaties for better functioning of the EU internal market, the policy response with respect to mandatory disclosure rules needs to be justified and proportionate.

7.2. As noted in CFE Opinion Statement of 15 January 2017, mandatory disclosure obligations are *prima facie* in breach of the principles of privacy and confidentiality as guaranteed by Article 8 of the European Convention of Human Rights, unless justified and proportionate.

II. Comments on the substantive aspects of the proposal

8. Burden of disclosure

8.1. The proposal places the burden of disclosure of reportable cross-border arrangements on the intermediary, with default to the taxpayer where the disclosure obligation is not enforceable due to legal professional privilege, absence of intermediary within the EU or in-house schemes. The purpose of this policy effort is assisting tax administrations to identify and to track arrangements that undermine the integrity of the tax systems and to exchange information on such abusive arrangements, without undue burden on the work of tax advisers.

8.2 As a matter of principle and practicality CFE believes the obligation to disclose should be placed on the taxpayer, with the tax adviser (if present) to inform the taxpayer on the obligations to report and explain the consequences of non-complying and to provide technical assistance and support where needed. The tax adviser in such situation has a duty of care to inform the taxpayer and if the taxpayer is not willing to comply should terminate his engagement with the client. In choosing the taxpayer as the obliged reporter, the reporting obligation would start after the first steps of implementation. For bespoke advice this is a balanced approach as it will exclude non-implemented schemes from reporting. Other than schemes which are offered to all kind of tax payers, there is no reason to report such a bespoke non implemented scheme.

8.3 The CFE recognises that for promoters of fully designed “off-the-shelf” schemes, capable for immediate implementation without serious modification by potential clients (according to the ‘made available’ definition of the UK DOTAS) should be reported as soon as they are made available for implementation. In such cases, CFE accepts that in this case the intermediary or promotor should carry the burden of reporting. CFE proposes that the UK definition of ‘made available’ becomes part of the proposal for this reason. In this way undue burden on tax advisers and taxpayers is avoided in line with the recommendation of OECD BEPS 12. The DOTAS ‘made available’ definition thus makes the distinction between who has to report and consequently when to report.

8.4. CFE Member organisations from the United Kingdom (CIOT and ICAEW) do not support the CFE position and believe that, as in the UK’s Disclosure of Tax Avoidance Scheme (DOTAS), the principal obligation to disclose should fall on the tax adviser except in those cases where the tax adviser is prevented from disclosing as a result of the legal professional privilege of the client. In such cases (and where there is no external adviser e.g. in-house schemes or a non-UK based promoter does not disclose the scheme) the obligation to disclose falls to the taxpayer. The DOTAS scheme is regarded as having achieved policy objectives similar to those expressed by the Commission.

8.5 In view of the position of some of CFE member organisations CFE suggests as an alternative that the decision who should report is left to the member state. This would mean that there should

be a mechanism to prevent reporting of the taxpayer in one member state and of the intermediary in another member state or accept that the same arrangement is reported twice.

9. Tests to trigger disclosure and the applicable time period

9.1. In respect of the timing of disclosure and the tests that trigger disclosure, a single test in respect of the timing of disclosure would seem to be more appropriate, whereby the taxpayers shall disclose no later than 20 working days once the first step in the implementation has taken place, i.e. for promoters of 'off-the-shelf-schemes' no later than 20 working days beginning on the day after the reportable cross-border arrangement has been made available.

9.2. National legislation, such as DOTAS in the UK, is supplemented by detailed guidance to provide certainty on the application of the tests that trigger disclosure in respect of the timing of the reporting (i.e. 'makes a firm approach test' and 'makes a scheme available for implementation' test). In the absence of detailed guidance, *Article 8aaa 1)* of the directive could be difficult to implement and will lack sufficient clarity and certainty to satisfy the basic requirements of the rule of law.

10. Definitions

10.1. The definition of 'cross-border arrangement' under *Article 1 e)* should benefit from redrafting, whereby a reportable scheme ought to have 'a tax-related impact on a least two jurisdictions'. In a similar vein, the term 'taxpayer' should not be defined as a 'person that uses a reportable cross-border arrangement to potentially optimise their tax position'. For the purposes of this directive, a person or entity that benefits from reportable cross-border arrangement could be entitled a 'reportable taxpayer', as not all taxpayers engage in cross-border tax planning.

10.2. The proposal does not specify or carry sufficient guidance in respect of the arrangements where more than one tax adviser is involved in a cross-border arrangement. The directive aims to establish disclosure obligation only for the intermediary that carries the responsibility vis-a-vis the taxpayer, without any specific reference or guidance on the applicability of this standard/ test. This might create confusion as to the member state where the disclosure should occur, as well as the adequate identification of the intermediary that carries the responsibility for disclosure. This issue may be solved if the taxpayer has the obligation to report except in cases of promoters of pre-designed schemes.

11. Penalties

The proposal envisages penalties for non-compliance, whereby the provision of *Article 8aaa)* lacks clarity as to their scope in view of the implementation in member states. The proposal could benefit from specifying a range limiting the scope for penalties applicable to infringement of national provisions adopted pursuant to the directive concerning *Article 8aa)* and *Article 8aaa)*. Otherwise, the penalties that are 'effective, proportionate and dissuasive' could be subject to different interpretation by member states, potentially adopting penalties that might be truly dissuasive in one, but objectively lenient in another member state.

III. Comments in relation to the hallmarks

12. In respect of the suitability of designing hallmarks at EU level that could flag potentially aggressive tax planning arrangements with cross-border implications, CFE has already put forward its position that an appropriate solution would embrace the OECD BEPS approach with country specific hallmarks.

13. CFE believes that the main benefits test belongs to the main text of the directive. The main benefits test needs to be applicable to all hallmarks in order to ensure that the reporting obligation is limited to relevant arrangements only.

15. The specific hallmark B3) related to the arrangements designed for passing-through of funds using interposed entities without commercial justification could also benefit from clarity, in the sense of specifying that it potentially relates to highly contrived and artificial arrangements designed for the sole purpose of obtaining a tax advantage. This too would need to be coupled with detailed guidance to avoid divergent implementation and interpretation.

16. The specific hallmarks under C) need to be linked to the main benefits test, and specify that these hallmarks indicate reportable transactions only when such transactions are without commercial justification and payment was made for the sole purpose of obtaining a tax advantage.

17. The specific hallmark C1b) concerns deductible cross-border payments made between related parties that become reportable when the receiving jurisdiction levies a statutory corporate tax rate lower than half of the average rate in the EU. With respect to this hallmark, it needs to be specified that this condition would only be satisfied where there is no commercial justification for the deductible cross-border payment towards the lower-tax jurisdiction, and the payment was made for the sole purpose of obtaining a tax advantage. Therefore establishing a link to the main benefit test seems appropriate.

18. In respect of the hallmarks E), the arrangements that do not conform with the arm's length principle and the OECD Transfer-Pricing Guidelines, including allocation of profits between members of the same corporate group should also be specified to include that the arrangement was made for the sole purpose of obtaining a tax advantage without any commercial justification. Thus, the hallmarks E1) and E2) need to be linked to the main benefit test.