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Opinion Statement PAC 1/2016

on a “Fair Taxpayer Label”

Prepared by the CFE Professional Affairs Committee

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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

The CFE is registered in the EU Transparency Register (no. 3543183647-05).

Background

The European Parliament, in a resolution of 16 December 2015¹ (“Dodds-Niedermayer-Report”, reference 2015/2010(INL)), has requested the European Commission to submit a legislative proposal, according to the following recommendation:

“Recommendation A2. A new 'Fair Tax Payer' label for companies who engage in good tax practices

The European Parliament calls on the European Commission to bring forward a proposal as soon as possible on a voluntary European 'Fair Tax Payer' label.

- *The proposal should include a European framework of eligibility criteria, under which the label could be awarded by national bodies.*
- *This framework of eligibility criteria should make clear that the 'Fair Tax Payer' label is only awarded to those companies that have gone above and beyond the letter of what is required of them under Union and national law.*
- *Companies should be motivated by this 'Fair Tax Payer' label to make paying a fair share of taxes an essential part of their corporate social responsibility policy, and to report on their stance on taxation matters in their annual report.”*

The European Commission has responded to this request in its impact assessment of 12 April 2016 on the potential for further transparency on income tax information (paragraph 4.1.4 and Annex R)², by stating:

“An EU labelling system may build on national competent authorities, such as e.g. tax or other authorities. However, to involve authorities would appear as too rigid and burdensome for a voluntary labelling system implying rubber stamping of companies. Instead, a lighter touch system where private stakeholders would comply with criteria set at EU level may be more accurate. Compliance with standards set by an EU framework could e.g. be verified regularly and publicly attested by an independent third party (auditor...). In this way, market participants could freely decide to join the EU system as "labellers", allowing them to grant marks / label to companies for a fee.”

Introduction

CFE is commenting on the proposal for a Fair Taxpayer Label for two reasons:

- Tax advisers’ task is to ensure the respect of taxpayers’ rights. Depending on which criteria a taxpayer label would be based and by whom it would be awarded, there may be repercussions for the protection of taxpayer rights.
- Assessments for a taxpayer label (in the following: audits) are a potential business for tax advisers and other operators, although we estimate that the economic relevance of such audits for tax advisers would remain limited;

¹ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0457>

² SWD/2016/0117 final: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016SC0117>

CFE is not in principle in favour or against introducing a voluntary taxpayer label, but would like to be sure that a taxpayer label, if introduced, is done in a way that does not harm taxpayers, e.g. by creating inequality among taxpayers, by preventing taxpayers from making use of their rights under tax or procedural laws, or by distorting competition through sending misleading messages. As shown in the following, a lot of issues need to be considered and a number of concerns remain. CFE would be strictly against any mandatory taxpayer label.

In the following, the term “taxpayer label” is used for a voluntary label awarded to taxpayers in EU or other European countries, relying on fairness or other criteria.

Key questions and objectives

The idea of a taxpayer label is relatively new and while a number of interesting approaches have been presented, these are significantly different and none of these have gained wide recognition in the European public yet³, so that it seems too early to consider any of these “best practice”.

Any proposal for a taxpayer label will have to answer the following three questions:

1. What will be the criteria for awarding the label?
2. Who will audit, award, monitor and if necessary, revoke the label?
3. Will a label be awarded at national or EU level and should the criteria be harmonised?

These answers to these questions will have to bear in mind the following key objectives of a taxpayer label, assuming that these are commonly agreed.

- **A taxpayer label must not be misleading**
- **A taxpayer label must fully respect taxpayer rights**
- **A taxpayer label should be designed to become a success**

1. What will be the criteria for awarding the label?

The European Parliament has voted in favour of a label awarded for the payment of a “*fair share*” of taxes and for reporting on corporate tax policies in the annual report, thus a combination of fairness and transparency.

a) Compliance with the law

A taxpayer label would be misleading if it was granted for mere compliance with the law. Respecting the law is self-evident and should not be considered something that deserves an award. Only taxpayer behaviour that exceeds what is required by law should be eligible for a taxpayer label.

Compliance with the law should be a condition for the awarding of the label, and non-compliance should be a reason for revoking it.

³ As the European Commission explains in its impact assessment of 12 April 2016, „*after a few years of existence, the Fair Tax mark in the UK attracted 17 companies, of which one is in the FTSE 100 and one in the FTSE 250* “.

Such condition should however remain workable in practice. There may be cases where minimal instances of non-compliance, e.g. missing a deadline, might not justify the refusal of the granting of a label to an overall more-than-compliant taxpayer. There should therefore be a materiality threshold that takes into account circumstances like the size of the taxpayer, the amounts at stake, or whether the failure has been repeated or systematic.

In the interest of legal certainty and to safeguard the taxpayer's rights, only legally binding administration or court decisions should be considered in the audit.

b) Fairness

A taxpayer label would be misleading if it promises more than it can keep. It should only refer to fairness if it is able to ensure that the amount of tax paid is actually "fair".

Alone the payment of a particular effective tax rate or of a particular total tax contribution cannot be a valid criterion for assessing fairness. Depending on the taxpayer's situation, even a high tax rate or a high amount paid may be less than required by law, and thus be illegal.

The fairness of a tax payment cannot be assessed without determining the amount legally due.

Determining the amount legally due will often be a burdensome exercise, as it will often require interpretation of the law and involve elements of appreciation. The outcome of the audit will often be little foreseeable for the taxpayer and may be disputed by the taxpayer himself or other stakeholders.

We therefore recommend that a taxpayer label should not be based on complex criteria which require a legal assessment and elements of appreciation, such as paying a "fair share" of taxes or the non-use of certain tax planning arrangements.

c) Co-operative compliance

Some tax administrations offer "co-operative compliance" or "enhanced relationship" programmes to corporates. These programmes are generally based on the idea of creating a relationship of trust between taxpayer and tax authority and to provide voluntary transparency by the taxpayer in exchange for increased legal certainty. Where such programmes are only offered to some taxpayers, e.g. large businesses, equal treatment of taxpayers requires that taxpayers who are not eligible to these programmes should not be excluded from the possibility of obtaining a taxpayer label.

Compliance should not be confused with acceptance of the tax authority's position. Where taxpayers and administration "agree to disagree" and make use of their rights, e.g. to appeal a tax assessment, this should not result in a negative behavioural rating.

d) Tax transparency

We recommend that a label should rely on criteria compliance with which can more easily be assessed, such as voluntary transparency. This could include e.g.

- Voluntary country by country reporting, for companies not obliged by national or EU law, or including criteria which go beyond the statutory requirements,
- Voluntary publication of information on tax rulings received, or
- Voluntary inclusion of tax strategy reports in annual reports.

A label granted on the basis of transparency could require the disclosure of figures that may be relevant for assessing the magnitude of tax contribution, e.g. the effective corporate tax rate throughout the EU, or the total tax contribution in the EU, but the granting should not depend on the value of these figures, as this would confuse transparency and “fair share”- criteria.

2. Who will audit, award, monitor and, if necessary, revoke the label?

The European Parliament’s resolution mentions that the label “*could be awarded by national bodies*”, implying state administration, but leaving also other options.

a) Public bodies

Certification is a business and we believe that by default, certification should be a market-driven initiative unless there are compelling reasons why it should be a state responsibility. We would like to remind that the EU legislator has decided that the statutory audit of companies’ annual accounts, which is beyond any doubt a very important responsibility, should be carried out by audit firms, meaning private operators. We also observe that there is a multitude of well-functioning labels in areas of great importance to societies in Europe and beyond, e.g. fair trade and environmental protection, defined and awarded by private operators. Therefore, it is not apparent why the audit of fair or transparent taxpayer behaviour needs to be done by states.

Where the audit is carried out by tax administration, this creates a conflict of interest, as the tax administration will generally be under political pressure to secure and increase its revenues. There is a risk that the audit process will be used to impose tax administration’s view on the taxpayer applying for a label, especially if the label is based on complex criteria that involve elements of appreciation.

The risk is particularly high if the label is granted by the same authority that deals with the taxpayer’s tax assessments. A tax administration official who has been unsuccessful in a case against a taxpayer could be tempted to seek late justice by qualifying the taxpayer’s behaviour as “unfair”.

A label granted by public bodies, in particular if based on complex criteria, would also require a significant investment of resources by administration which will not be available in many countries. Tax administrations should not be obliged to reorganise their staff which would result in cuts in more important areas such as taxpayer service or enforcement of tax law.

High administrative fees will be detrimental to the success of a taxpayer label, but if fees were low, the majority of other taxpayers would have to bear the cost of a public relations exercise of a number of corporate taxpayers, which is not acceptable.

We conclude from this that a taxpayer label should not be awarded by public bodies.

If a label granted by public bodies should nevertheless be proposed, refusal of the label would be an adverse decision against which a legal remedy must be provided, allowing review by a different person.

a) Private operators

Where the audit is carried out by a private operator, there should be safeguards to ensure that the operator is sufficiently qualified and independent.

This would imply that the operator is neither associated with (or in the case of a company, controlled by) the audited company nor with the tax adviser who has prepared the tax returns.

The fee for an audit should be due irrespective of whether the label is granted, to avoid a bias of the auditor.

If, contrary to our recommendation, the criteria for granting the label are complex and require a legal assessment, this assessment would have to be carried out by a duly qualified person, and there should be a definition of the qualification requirements. Our member organisations have experience in defining qualification requirements for tax-related activities and we would be pleased to contribute this experience if required.

It should be noted that in some countries that require a particular qualification for giving tax advice, the audit might already be considered tax advice, so that only tax advisers fulfilling the statutory requirements could carry out the audit.

3. Will a label be awarded at national or EU level and should the criteria be harmonised?

The European Parliament's resolution implies that a taxpayer label be awarded at national level, applying a defined EU set of criteria.

If a label were to be awarded at EU level, a separate audit would have to be made for each member state in which the taxpayer is active. This would multiply the cost, time and effort needed to obtain the label. Moreover, there could be disagreement on whether the economic activity in a given member state would already require an audit for that member state. The risk is high that such label would become unworkable, especially if it relied on complex criteria like fairness. Therefore, requiring an audit in only one member state seems to be the only realistic solution.

A label that certifies the taxpayer's behaviour in only one member state can be attached to products that can be marketed freely across the internal market, thanks to the free circulation of goods and services. In order not to be misleading, a label should therefore indicate clearly in which member state(s) it has been awarded.

Taxpayers being active in several member states will often have the choice in which member state they apply for a label. It should probably be a condition for obtaining the label that a company be liable to corporate income tax in that country.

Assuming that a taxpayer label will be based on common criteria across the EU, there are two possibilities:

- (1) The label will set minimum requirements, so that there may be member states having stricter statutory requirements than required by the label; in this case, a taxpayer could only obtain the label if he also complied with his stricter national rules;
- (2) The label will set requirements going further than the respective requirements in each member state.

In the first case, where a member state's statutory rules go beyond the common standard, all its taxpayers will be eligible for the label, although they do not go beyond what is legally required, which may be considered misleading and will reduce the relevance of the label in this member state.

In the second case, the requirements for obtaining the label may become very hard to meet, and may have to change frequently, every time a member state increases its national requirements beyond the common standard. Companies which do not adapt their behaviour to each of these changes will lose the label. This may negatively affect its acceptance.

Conclusions:

From the above considerations we conclude that

- A taxpayer label should not be based on complex criteria that require an assessment of the tax liability.
- It should not refer to fairness, but could well refer to transparency.
- Compliance with the law should be a condition for granting the label, but will not be sufficient in itself.
- There should be a materiality rule for marginal instances of non-compliance.
- A taxpayer label should not be awarded by public bodies but by private operators who can demonstrate independence from the audited company and its tax return preparers.
- If a label is awarded by public bodies, there will have to be a legal remedy against its refusal.
- If a label is based on complex criteria, there should be a qualification requirement for the persons who carry out the audit.
- A taxpayer label awarded at national level should clearly indicate the member state(s) where it has been awarded.

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