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Opinion Statement PAC 3/2016 and FC 9/2016 on the

draft Report on tax rulings and other measures similar in nature or effect (TAXE 2)

by the CFE Fiscal and Professional Affairs Committees

Based on a letter sent to the European Parliament´s TAXE 2 Committee in May 2016

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 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).

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Dick Barmentlo, Chairman of the CFE Professional Affairs Committee, Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at brusselsoffice@cfe-eutax.org.

Introduction

On 25 May 2016, the CFE has addressed the members of the European Parliament´s Special Committee on Tax Rulings and other Measures similar in Nature or Effect (TAXE 2), commenting on the draft report (2016/2038(INI))[1] by MEPs Jeppe Kofod and Michael Theurer.

The following Opinion Statement is based on these CFE comments.

The TAXE 2 Committee has adopted the draft report on 21 June 2016. The plenary vote is scheduled for 7 July 2016.

Detailed CFE comments

Possible drafting error

In paragraph 9, we suggest replacing the word “evasion” by “avoidance”:

9. *Welcomes the fact that the Commissioner for Competition, Margrethe Vestager, has categorised transfer pricing as a particular focus area for state aid cases, as it is reported to be a common tool used by MNEs for tax ~~evasion~~* ***avoidance*** *schemes such as inter-group loans;*

Reason:

This seems to be a drafting error. Evasion refers to illegal schemes, avoidance to legal schemes. Inter-group loans have been identified as one of the common tools in tax avoidance.

Whistleblowers

In paragraph 10, we suggest the following two insertions:

10. *Strongly emphasises that the work of whistleblowers is crucial for revealing scandals of tax evasion and avoidance, and that, therefore, protection for whistleblowers needs to be legally guaranteed and strengthened EU-wide; notes that the European Court of Human Rights and the Council of Europe have undertaken work on this issue; considers that courts and Member States should ensure the protection of legitimate business secrets while not hindering, hampering or stifling the capacity of whistleblowers and journalists to document and reveal illegal, wrongful and harmful practices where this is clearly and overwhelmingly in the public interest; [1]* ***whistleblowers should be protected if they firstly report suspected misconduct, wrongdoing, fraud or illegal activity to the relevant competent authority*** *[2]* ***or to the professional body of the professional suspected to be involved in such behaviour;*** *regrets that the Commission has no plans for prompt action on the matter;*

Reason:

The first insertion brings the wording in line with the Recommendation A7 of the EP´s Dodds/Niedermayer report of 16 December 2015, and with the TAXE 1 Report of 25 November 2015. We agree with these EP resolutions that reports should first be made to the competent authority, and not to the public, media or social networks.

[1] http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/2038(INI)&l=en

Given the confidentiality of tax information, quite often, it is -not appropriate to make such kind of information public and available to competitors. A whistle-blower may often not be in the position to judge whether the practices s/he considers disclosing are illegal and disclosure will be justified by a public interest. Notification to the competent authority would relieve the whistle-blower of this uncertainty and would allow the start of investigations if necessary.

The second suggestion would allow notification of the competent professional body, so that the latter can assess whether the behaviour constitutes a breach of its Code of Ethics.

Dispute resolution

We suggest adding a sentence to paragraph 11, as follows:

11. Notes that the Commission has launched a consultation on dispute settlement mechanisms to avoid double taxation; ***calls on the Commission to propose a dispute resolution mechanism for all cases of cross-border double taxation which provides for a binding outcome within an acceptable timeframe, and enables the taxpayer to join the proceedings;***

Reason:

We would welcome if the Parliament supported a Commission proposal capable of offering a real solution to cross-border double taxation cases.

As we have set out in our recent Opinion Statement FC 6/2016 on improving double tax dispute resolution mechanisms[2], the current system of mutual agreement proceedings has a number of flaws that prevent it from functioning effectively:

- It is not capable of reaching a binding solution within an acceptable time frame;
- it poses a serious cash flow risk to enterprises, as it does not provide for a deferral of payment of the tax due until the dispute resolution procedure has been completed, and it allows the imposition of penalties with respect to the issues disputed between the jurisdictions involved, forcing some enterprises into bankruptcy;
- When/If a solution is reached, these are often attained through a political deal, which may settle the case at issue, but does not give the taxpayer legal certainty concerning future transactions;
- the enterprise does not have the right to intervene in the proceedings and present its arguments.

We believe that the Commission should present an ambitious legislative proposal in summer 2016 to solve these problems. In the long run, we believe that an arbitration body should be set up by an international convention.

Blacklisted jurisdictions

Paragraph 14 deals with sanctions for blacklisted jurisdictions, and asks these sanctions to be extended to tax advisers i.e. "involved with those jurisdictions".

[2] http://www.cfe-eutax.org/node/5352

We suggest adding the following important clarification:

14. *Calls for a concrete Union regulatory framework for sanctions against the blacklisted non-cooperative jurisdictions, including, but not limited to, the possibility of reviewing and, in the last resort, suspending free trade agreements and prohibiting access to Union funds; calls for the sanctions also to apply to companies, banks, and accountancy and law firms, and to tax advisers proven to be involved with those jurisdictions,* ***while in no way limiting the right of individuals or corporates to seek professional advice or representation in taxation;***

Reason:

The wording of the draft is very vague and would also cover firms offering services unrelated to tax avoidance, tax evasion, fraud or offshore companies.

It should also be absolutely clear that any sanctions against blacklisted countries will not limit citizens´ or enterprises´ access to legal advice and defence, which is part of the fundamental right to a fair trial. Sanctioning all professionals that serve a citizen or enterprise residing or having relations with a blacklisted country would deprive these of their right to obtain legal/tax advice or representation.

EU-wide withholding tax

We suggest amending paragraph 16 as follows:

16. *Recommends* ***examining the possibility of*** *introducing an EU-wide withholding tax, in order to ensure that profits generated within the Union are taxed at least once before leaving it; notes that such a proposal should include a refund system to prevent double taxation;* ***stresses that such proposal would require a thorough impact assessment.***

Reason:

We would expect such withholding tax to have a significant impact on the competitiveness of EU enterprises, and believe that it should not be proposed without a thorough impact assessment, with the possibility of stakeholders to provide input.

Banks, tax advisers and intermediaries

The draft report calls on the Commission to come forward with an EU Code of Conduct for advisory services. We suggest amending the whole paragraph as follows:

23. ~~*Calls on the Commission to come forward with a Union Code of Conduct for all advisory services, including a Union incompatibility regime for tax advisers, in order to prevent them from advising both public and private sectors and to prevent other conflicts of interest;*~~ ***Notes that professional codes of conduct by professional bodies of tax advisers exist at national level; stresses that these codes should effectively prevent conflicts of interest;***

Reason:

While we agree that the prevention of conflicts of interest is central in tax advisers´ professional duties, we have set out in our comments on the TAXE 1 Report[3] that serving both the public and the private sector does not *per se* create a conflict of interest, and that rules to prevent conflicts of interest exist at national level.

Paragraph 24 suggests a clearer separation between audit and tax advisory activities.

First, there is an apparent drafting mistake in paragraph 24, where "Accounting Directive" would have to be replaced by "Audit Directive".

24. *Stresses the importance of clear separation between tax advising services and auditing services within accountancy firms; asks the Commission to study the possibility of revising the ~~Accounting~~* ***Audit*** *Directive and Regulation to this effect;*

Moreover, we fail to see that the suggested amendments of the Audit Directive and Regulation would impact on tax avoidance.

The Audit Regulation 537/2014 already provides for a separation of audit activity from tax advice having a "material effect" on the accounts of public interest entities to be audited (Art.5). Aggressive tax planning is always considered material (Recital 9). For immaterial tax advisory services and for non-public interest entities, we do not see evidence that this should significantly contribute to tax avoidance, and therefore question the need for a further separation of activities, which will deepen the fragmentation of the markets for audit and tax advisory services.

Paragraph 25 calls for sanctions for firms involved in certain behaviour with regard to taxation. We suggest rephrasing it as follows:

25. Stresses the need for concrete sanctions, including the possibility of revoking business licences for professionals and companies proved to be involved in ~~designing, advising on the use of, or utilising aggressive tax planning and evasion schemes~~ ***illegal tax practices****; requests that the Commission explore the feasibility of introducing proportional financial liability for tax advisers engaged in unlawful tax practices****, bearing in mind the fundamental right that nobody may be punished twice for the same criminal offence****;*

Reason:

The revocation of a business license is a very severe penalty. It may force firms to close and thereby affect employees. It should remain a measure of last resort and only be imposed for illegal activity. Aggressive tax planning may be undesirable, but is legal, until the legislator takes a decision to define the undesired behaviour and prohibit it.
Imposing a sanction on a legal activity would violate the recognised principle *nulla poena sine lege (certa)* (no punishment without a (clear) law), enshrined in Art.49 of the EU Charter of Fundamental Rights[4] (Art.7 of the European Charter of Human Rights).

As concerns the proportional financial liability, it must be clear that one criminal sanction may not be imposed on top of another. Art. 50 of the European Charter of Fundamental Rights contains the *Right not to be tried or punished twice in criminal proceedings for the same criminal offence*.
However, a criminal sanction may be imposed in addition to an administrative measure. The question

[3] http://www.cfe-eutax.org/node/5121
[4] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

whether a penalty is to be considered administrative or criminal in nature will depend on “*the legal classification of the offence under national law, […] the very nature of the offence, and […] the nature and degree of severity of the penalty that the person concerned is liable to incur.*”[5].

Global register of assets

If the European Parliament recommends introducing such register, we would suggest the following clarification:

45. Calls for a global assets register of all assets held by individuals, companies and all entities such as trusts and foundations, to which tax authorities would have full access; ***stresses however that the ability of a country to effectively protect the confidentiality of this data from unauthorised access and its adherence to human and fundamental rights must be a precondition for access to the register and any exchange of information;***

Reason:

It must be considered that access to ownership information interferes with a person´s right to privacy and exposes this information to the risk of being disclosed to non-authorised persons or leaked to the public. Where, as a result of this, information on a person´s holdings becomes available to criminals, this will constitute a danger to that person, his/her relatives or belongings. A serious risk exists where data is accessible to the administration of countries where corruption is prevalent, countries that have insufficient means to invest in data security, or countries that do not respect human or fundamental rights.
Those countries should not be able to access information from such register.

[5] Judgment of 26 February 2013 in case Åkerberg Fransson, C-617/10, link, paras 35-36.