CONFEDERATION FISCALE EUROPEENNE

Opinion Statement PAC 4/2016 on the

Regulation of cross-border professional services

supplementing the CFE response to the electronic consultation on the proposal to introduce a Services Passport and address regulatory barriers in the construction and business services sectors,

by the CFE Professional Affairs Committee

submitted to the European Commission in August 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, or Rudolf Reibel, CFE Tax Policy Manager, at brusselsoffice@cfe-eutax.org.

Introductory remarks

We would like to thank you for the possibility to provide input on the planned initiatives of the Commission in the area of the "Services Passport" and regulatory requirements[1].

Although the questions in that questionnaire have apparently been carefully worded, we do not believe that e-questionnaires are an appropriate consultation tool for complex matters such as professional regulation which cannot be broken down to multiple-choice questions. Accordingly, we expect that the statistical output will not represent the actual opinions of the respondents.

To allow you to receive a more nuanced feedback and to allow ourselves to make more general remarks on the approach taken, we have drafted the following Opinion Statement which also comments on aspects of the consultation opened on 27 May 2016 on *National Action Plans and proportionality in regulation*[2].

We wonder whether the proposed actions address the right issues with regard to professional mobility, as we note that key questions related to services provided over the internet have not been addressed.

We appreciate the Commission´s availability for discussion prior to and during this consultation. We would like to note however that we do not quite see that the focus of the planned initiative is on encouraging cross-border mobility of professional firms, in particular mid-size firms, as has been stated prior to the consultation. It appears that instead, the focus is on clearing the way for large companies from outside the profession to enter markets and offer professional services in countries where these activities are regulated.

Sectoral approach vs. horizontal approach

We question the approach of addressing only parts of the services sector (e.g. as the consultation paper states, "*accountings services at large*"). The distinction between services sectors can be difficult in practice. Indeed, definitions differ between member states, as a result of national legislation and market conditions. A sector-specific approach also often lacks flexibility where services evolve due to technical progress or evolution of the clients' needs. Services reform should use a horizontal approach, like in the EU Services Directive. Tax services may to some extent and in some countries overlap with legal services or "accounting services at large".

A distinction in regulation that might be considered is between services provided to consumers and to businesses, as the justification of restrictions would be different. It should however be noted that the majority of tax advisers supply services to both groups, and different regulation bears a risk of market fragmentation which again limits competition and would go against the Commission´s stated objectives.

Legal treatment of professional services provided over the internet

Physical cross-border activity in tax advice does not take place frequently, and we do not expect it to become more relevant in the future, as cross-border services will increasingly be provided over the internet. A decisive question is which rules member states may apply to cross-border professional

[1] http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8796.
[2] http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8827.

services provided online. This has not been properly answered by the CJEU in its judgment in the case *X-Steuerberatungsgesellschaft* (C-342/14)[3]:

According to our understanding, it is not fully clear whether member states may require that tax firms from other member states which provide cross-border tax services (e.g. submit tax returns) over the internet be owned, controlled or managed by qualified tax advisers. The reason is that it is not clear whether Art. 16 (1) of the EU Services Directive 2006/123/EC, which only allows a limited number of grounds to justify national restrictions, applies to such services.
Art.16 (1) does not apply where requirements reserve an activity to a particular profession (Art.17 no.6 of the Services Directive). If control and management of a firm is considered such "activity", and Art. 16 (1) does not apply, Art.56 TFEU would apply and allow restrictions to be based on a larger number of grounds of justification, including consumer protection and the prevention of tax evasion[4]. Hence, it would be easier for member states to maintain requirements that limit ownership, control or management to qualified persons.
Prima facie, one would assume that "activity" in Art. 17 no.6 relates to the professional activity itself and not to the exercise of control or the management of a firm[5]. However, the judgment in *X-Steuerberatungsgesellschaft* suggests differently[6]. A clarification through EU legislation would be welcome.

The CFE has not yet taken a common position on how cross-border professional services provided online should be legally considered.

One may argue that it would be inconsistent to treat cross-border online professional services more restrictively than temporary physical cross-border services, as the professional does not provide his/her services on the territory of the host state.

However, we recognise member states´ interest in ensuring that a person who submits tax returns holds a proper qualification and is supervised by a professional body, as not only the protection of the client, but also state revenue depends on the proper exercise of the profession. We suggest that professional services provided online should at least be subject to the same rules as temporary physical services, meaning that member states may require notification. Such treatment seems to be accepted by the CJEU[7].

We would also like to point out that it is relatively easy to circumvent national requirements, e.g. on professional indemnity insurance, through arrangements in which the internet portal is situated in another member state, but the person providing the service is situated in the same member state as the client (as may have been the case in *X-Steuerberatungsgesellschaft*). We understand that such services would not benefit from Art.16 Services Directive, but these arrangements are difficult to identify in practice.

Legal treatment of branches and agencies

With the emergence of cross-border internet services, the relevance of physical mobility, including the possibility of opening branches and agencies, is decreasing. Moreover, in interviews we have

[3] Judgment of 17 December 2015, http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-342/14&td=ALL
[4] Judgment in case C-342/14, para 53.
[5] Opinion of the Dutch government in case C-342/14, quoted in the Opinion of Advocate-General Cruz Villalón, para 31.
[6] Judgment in case C-342/14, para 37.
[7] Judgment in case C-342/14, para 56.

carried out with several mid-size tax firms that advise businesses in their cross-border dealings, these have confirmed to us that their interest in opening branches and agencies in other countries is very limited, and that they prefer making use of networks of cooperation partners, for reasons unrelated to regulation. Compared to the issues outlined above, i.e. clarifying the legal treatment of cross-border online advice, facilitating the opening of branches and agencies seems less urgent and a rather traditional approach.

Apart from this policy consideration, we do not consider that branches or agencies should obtain a status which by definition is different from establishment in the sense of Art.49 TFEU and related case law. Branches and agencies that satisfy the conditions for permanence defined by the CJEU integrate themselves into the host member state´s economy. They would in most cases be considered "permanent establishments" in tax law, triggering taxation in the host member state. A rule that would allow service providers not to be considered established in the sense of Art.49 TFEU unless they set up a legal entity in the other member state would seem like an invitation to bypass national criteria.

Ownership and control

A number of member states limit ownership, control or management of tax or accounting firms to qualified professionals[8]. The CJEU has accepted the reasoning that this can be justified to prevent influence on the independence of the professional (*Apothekerkammer Saarland*, C-171/07 for pharmacies in Germany[9]). Linking ownership to membership in a profession also provides for a very dissuasive sanction: if a professional, due to a severe violation of professional duties, is excluded from the exercise of the profession, s/he is also excluded from owning the firm. While for an individual, this would mean the end of a professional career, a corporate owner could restructure and continue to operate. We therefore recognise that there are reasons to link ownership and control to membership in the profession, and we believe that the EU should accept if member states uphold such requirements, within the limits of proportionality.

If some degree of harmonisation of requirements related to ownership, control or management is proposed, it might be considered that member states should accept that control by members of a profession is assumed where professionals hold at least 50% of the voting rights. In other words: where members of the profession hold at least 50% of the voting rights in a firm in a member state, this would satisfy any requirements of other member states related to ownership, control or management. This would allow a firm to open establishments across the EU with no more than one change to its voting rights structure.

A common rule on control would also have to consider which professionals of other member states are to be considered equivalent to members of the domestic profession. A decision will have to be taken on an individual basis, but the level of qualification, professional independence and the existence of a code of conduct that provides for effective sanctions in case of breaches will have to play a role. To facilitate this in practice, there could be a list of organisations whose members can be assumed to be equivalent. If the Commission should decide to propose such measure, the CFE would be pleased to offer its assistance in defining the criteria.

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[8] CFE European Professional Affairs Handbook for Tax Advisers, 2013: http://www.cfe-eutax.org/node/4732

[9] Judgment of 19 May 2009, http://curia.europa.eu/juris/document/document.jsf?text=&docid=78515&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=916473

Insurance requirements

On insurance requirements, we have previously commented[10] that these do not constitute a problem in practice. We urge the Commission not to impose solutions which are more complicated than the problem.

In the interest of legal certainty, we would welcome a clarification in Art.23 of the Services Directive on whether professional indemnity insurance (PII) may be required for temporary cross-border mobility. Such clarification should also be clear as to the treatment of services provided online. It is probably justified to require PII for all tax services rendered to consumers.

Suggestion for facilitation of cross-border tax services

We would like to suggest the following practical improvement for cross-border activity of tax advisers: Art.204 of the VAT Directive 2006/112/EC provides that member states may require taxable persons not established in the EU to appoint a tax representative. It would remove a real practical obstacle if a VAT representative in one member state could be appointed for the whole of the EU.

National Action Plans and an analytical framework for measuring proportionality of qualification requirements

The following remarks relate to the European Commission´s public consultation on *National Action Plans and proportionality in regulation* (see footnote 2).

The Commission has proposed to introduce a common analytical framework that member states will have to apply when assessing the proportionality of qualification requirements for professional services[11]. The European Commission as the "guardian of the Treaties" should ensure that no requirements that infringe EU law are maintained and should take member states violating EU rules to Court. To this end, it is indeed important that the Commission has a clear picture of existing requirements.

Within the limits of EU law however, we would like to stress that qualification requirements are a matter of national competence and national policy decisions should be respected. Where member states consider qualification requirements useful and proportionate, they will present justifications, and the Commission should accept the fact that also policy decisions based on sound evidence will necessarily contain an element of appreciation, and that this appreciation may differ from the Commission´s. We are concerned that the Commission is not only proposing a certain methodology, but is indeed trying to impose its views on member states. If the Commission considers harmonisation or deregulation feasible, it would be more straightforward and transparent to propose legislative action to harmonise requirements.

We are also concerned that the introduction of an analytical framework as a formal requirement, especially through legislation, would bind European Commission and member states` resources in

[10] CFE Opinion Statement PAC 3/2013 of August 2013: http://www.cfe-eutax.org/node/3145
[11] Communication COM(2015)550 of 28 October 2015: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1469797892495&uri=CELEX:52015DC0550.

disputes over formalities in member states´ legislative memoranda, triggering “wars of experts”, instead of addressing the real issue of infringements of fundamental freedoms.