AOTCA Asia Oceania Tax Consultants´ Association

CFE CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 4/2016

on the OECD BEPS Final Recommendations

of 5 October 2015

Prepared by the CFE Fiscal Committee and AOTCA

Submitted to the OECD in April 2016

AOTCA (Asia-Oceania Tax Consultants´ Association) was founded in 1992 by 10 tax professionals' bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.

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).

Introductory remark

Since 2014, the CFE and AOTCA have released 17 Opinion Statements on BEPS Actions (seven as joint Opinion Statements and ten as CFE Opinion Statements).
This Opinion Statement contains CFE´s and AOTCA´s key messages on all 15 BEPS Actions. It is being released together with six new Opinion Statements (FC 4a - 4f/2016) on the Final Recommendations on specific BEPS Actions (Actions 1, 4, 5, 8-10, 12 and 14), all to be found on the CFE website. The Statements issued today should not replace but integrate the previous Opinion Statements.

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

Summary

BEPS Actions	CFE/AOTCA Contributions/Actions	Main Comments/Remarks
Action 1	- CFE Opinion Statement FC 7/2014 on the Tax Challenges of the Digital Economy [submitted in April/2014] - CFE Opinion Statement FC 17/2014, Follow-up, [submitted in December/2014] http://www.cfe-eutax.org/node/3671 - CFE/AOTCA Opinion Statement FC 4a/2016, Final Recommendations [submitted in April 2016], http://www.cfe-eutax.org/node/5136	CFE and AOTCA welcome the framework agreed upon to address and evaluate potential options, "*based on the overarching tax principles of neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility and sustainability, in light of the proportionality of the changes in relation to the tax challenges they are intended to address in the context of the existing international tax framework*" (Executive Summary, OECD, 2014, p. 18). We agree with the conclusion that it is not possible to ring-fence the digital economy. While it is clear that there should not be a separate set of rules that would solely apply to enterprises considered to be part of "*the digital economy*", digital economy aspects will have to be taken into account in the necessary general overhaul of the international tax treaty framework. Further remarks: - In our opinion, the final 2015 Report resulted less ambitious than expected. - We are concerned with unilateral actions in this field: e.g., certain countries have taken into consideration the possibility of withholding taxes on e-transactions. - The Report on Action 1 leaves Countries with too much room for making decisions (at their own discretion) - The proposals at issue are sure to create double and/or multiple taxation, unless a rather strong and clear consensus be reached as to how taxation of e-business profits are to be applied. Such unilateral actions should be avoided.
Action 2	- CFE Opinion Statement FC 9/2014, hybrid mismatch arrangements [submitted in May 2014] - CFE Opinion Statement FC 4/2015, Follow-up [submitted in February/2015] http://www.cfe-eutax.org/node/3676	CFE and AOTCA remain of the view that the ideal solution would be common, internationally agreed concepts of debt and equity. We are also concerned about EU Treaty freedoms as the majority of OECD/G20 countries are EU Member States and the success of any OECD solution to solve BEPS caused by hybrid mismatches depends, to a great extent, on the compatibility of such a solution with EU fundamental freedoms. Further remarks: - CFE and AOTCA are concerned with the intricacy of rules, as proposed. It is bound to generate, in our view, innumerable compliance issues and further difficulties. - Such circumstance may also be expected to further complicate taxing rights allocation between/among the

		relevant jurisdictions, thereby also increasing the risk of double taxation. - Compliance burden is also expected to increase. - Effective monitoring during the implementation phase will be essential.
Action 3	CFE/AOTCA Opinion Statement FC 8/2015 on strengthening controlled foreign company rules [submitted in May 2015] http://www.cfe-eutax.org/node/4741	The encompassing nature of the OECD's minimum standard proposals for CFCs is clearly indicative of the various and intrinsic difficulties in reaching consensus positions on the most basic objectives of the rules, where variances between/among the various governments visibly emerge on whether such regulations should be addressing issues related to either profit shifting from the parent company, or rather to foreign-to-foreign abuse. We need explicit agreement on underlying principles, so as to consent reaching clear, proportionate, and practical solutions. Further remarks: - CFE and AOTCA are concerned about the possible interaction of BEPS Action 4 (interest deductions and other financial payments) with Action 3 and the double taxation issues that can arise if, on the one hand, interest is considered not deductible with the paying company while, on the other hand, it is included in the CFC income of the shareholders in the CFC.
Action 4	- CFE Opinion Statement FC 5/2015 on interest deductions and other financial payments [submitted in February 2015] http://www.cfe-eutax.org/node/4175 - CFE/AOTCA Opinion Statement FC 4b/2016, Final Recommendations [submitted in April 2016], http://www.cfe-eutax.org/node/5136	As a preliminary remark on this action point we would like to express our concern about the impact this action point may have as it may influence the way companies make investments and how they finance them. This action point might result in hindering future investments and have a negative impact on the future economic development. While we understand that multinational enterprises might be tempted to exploit differences in the tax systems of countries worldwide, establishing a limit on the deduction of interest payments may not be the best solution to counter these problems that arise in the first place from the different treatment most countries apply to the remuneration of equity and the remuneration of debt. Further remarks: - CFE and AOTCA are concerned that OECD proposals under examination will be probably reducing interest deductions for a great number of non-aggressive taxpayers. - Lack of support for the arm's length principle under Action 4 also undercuts sound commercial reasons for intercompany debt. - We regret that the final Report does not give any

		indications as to how the interest limitation rule will/should interact with the transfer pricing rules. - As to withholding taxes, the Report states in Chapter 11 that the rules to limit interest deductions should have no impact on the withholding tax rules, nor should the ability to claim credit for withholding tax on interest be affected by the introduction of the fixed ratio rule and group ratio rule. This only means that the status quo is maintained while in the meantime, extra limitations on interest deductions will create extra layers of double taxation. - The best practice approach which has been chosen is based on a fixed ratio rule which limits entity's net interest deductions to a fixed percentage of its profit measured by applying the EBITDA within a certain corridor (between 10 and 30 %). All the other rules that are recommended in the report (i.e., *de minimis* threshold, group ratio rule, carry-forward/back, targeted special rules and specific rules for the banking and insurance sectors) are optional for countries. The latter confirms our concern that the implementation of the rule will be substantially different in every country, making taxation rules even more difficult and complex. - We agree that, if any rule should be adopted, such rule should apply to the entity, net of any interest expense after offsetting interest income. Application of a rule to the entity's gross interest expense is not acceptable. As stated in the CFE Opinion Statements on BEPS Action 2, we remain of the view that the ideal solution would be common, internationally agreed concepts of debt and equity. The solution proposed in § 36 that consists of a non-exhaustive list of interest payments and payments economically equivalent to interest is not an optimal solution and is bound to give rise to different interpretations/applications of the rule in different countries. - We agree that a review of the rule by 2020 is absolutely essential to make sure that the rule does indeed create a better and fairer tax system. We also agree on the transitional measures a country should adopt when introducing the new rule. We appreciate also the paragraphs on the interaction of the best practice approach with hybrid mismatches (Action 2) and CFC rules (Action 3). We believe that in the review of the best practice approach by 2020, the interaction with these and other action points should be further developed and refined.
Action 5	- CFE/AOTCA Opinion Statement FC 4c/2016 on harmful tax practices, transparency and substance [submitted in April 2016], http://www.cfe-eutax.org/node/5136	CFE and AOTCA support the Forum's activities on Harmful Tax Practices in order to guarantee that tax competition continue being connected to the taxation of effective and substantial economic activities and may go on catalyzing old and new enterprises. In our view, gaps existing in the various national tax systems may actually generate unforeseen and unintentional "openings" for arbitrage which is an issue to be effectively dealt with; on the other hand, we are also

		convinced that some purposeful differences within national tax systems, based on an adequate policy rationale, may even produce constructive effects on the worldwide economic landscape, which would – in turn – enhance economic development. We welcome the agreement reached on the "modified nexus approach" at EU as well as at OECD level that ensures an overall balance of businesses´ interests in obtaining a tax benefit as a reward for their R&D efforts, tax administrations´ interest/concerns in granting a preferential treatment only to R&D that has been actually carried out in their country, and other countries´ interest, in maintaining fair tax competition for profits from IP rights. In their services to business clients, tax advisers are concerned with the effort that will be required to produce consistent documentation in order to justify the application of a specific IP regime. We welcome and support the decision of treating the nexus ratio as a rebuttable presumption, giving businesses the possibility to substantiate that further income should be permitted to benefit from the IP regime. We welcome the acknowledged importance of confidentiality. Confidentiality is one of taxpayers' greatest concerns, especially when cross-border information is shared. We welcome the two-step approach requiring a country to strictly exchange the full text of the ruling/APA if requested. We fully agree to the limitation to use exchanged information for tax purposes only, even if national law were to allow the use of tax information for other purposes as well (para 140).
Action 6	CFE Opinion Statement FC 5-2014 on Tax Treaty Abuse [submitted in April 2014] CFE/AOTCA Opinion Statement FC 2/2015, Follow-up [submitted in January 2015] CFE/AOTCA Opinion Statement FC 11/2015 on the second discussion draft, [submitted in June/2015] http://www.cfe-eutax.org/node/4743	The objective of BEPS Action 6 is the prevention of treaty benefits under inappropriate circumstances. It is felt however that the proposals put forward may be disproportionate to the objective intended and may create a situation of double taxation even if the primary intention had not been treaty abuse. More importantly, the subjective nature of certain proposals and the lack of certainty in the accompanying commentary create scope for uncertainty in their application. There are concerns that some of the changes proposed to date could have a disproportionate impact on businesses in smaller economies, with smaller capital markets, which are naturally more likely to seek capital and finance abroad. <u>Further remarks:</u> - CFE and AOTCA are concerned that structures in which no treaty shopping is involved may be inadvertently

		caught by broad rules. - As to the new minimum treaty standards proposals, these are bound to create a considerable taxpayers' compliance burden (in particular, if some countries will adopt LOB and PPT rules), and might bring into scope lawful structures that would be perfectly entitled to treaty benefits. - The proposals are too broad and there is a risk of jeopardizing any utility or advantages afforded by treaty networks in fostering trade and enhancing economic growth. - Broad non-application of treaty benefits might also generate considerable withholding tax burdens.
Action 7	CFE/AOTCA Opinion Statement FC 1/2015 on artificial avoidance of PE Status [submitted in January 2015] CFE/AOTCA Opinion Statement FC 10/2015 on the revised Discussion Draft [submitted in June 2015] http://www.cfe-eutax.org/node/4744	Although being perfectly aware that the PE (permanent establishment) framework leaves some room for improvement, we are concerned that by means of the suggested broadening of the PE concept, we risk creating unnecessary burdens, further complexity for both taxpayers and Tax Authorities, with the additional risk of creating more double-taxation. We are particularly concerned about the possible increase in the use of subjective tests (included in all of the options suggested within the Discussion Draft), which would not contribute to the above-mentioned desired certainty; what should be favoured, instead, is the use of agreed legal terms and objective criteria. Finally, effective dispute resolution mechanisms should be ensured. We support the use of mandatory binding arbitration. Further remarks: - CFE and AOTCA stress that having clear-cut principles or consensus on the interpretation of standards included in the newly proposed commentary is crucial, so as to avoid further disputes and issues that cannot be easily settled. - Further guidance is welcome on the attribution of profits to a PE (regrettably, this is not due before end 2016; in other words, at some later time in which the Tax Authorities will have already started including OECD proposals in their practices). - Further consideration and guidance is needed to clarify the "dependent agent" PE concept only in such cases where individuals "play the principal role" in contractual negotiation. - More exhaustive and well-defined guidance and definitions are required to better focus on the BEPS activities proposals and to streamline implementation from a practical standpoint.
Actions 8 - 10	CFE/AOTCA Opinion Statement FC 4d/2016 on Transfer Pricing, [submitted in April 2016], http://www.cfe-	- CFE and AOTCA support the work carried out by the OECD within the Transfer Pricing area and welcomes OECD's decision to continue endorsing the Arm's Length Principle. - We support the need to update and improve the current

	eutax.org/node/5136	Transfer Pricing framework in order to ensure that Transfer Pricing outcomes are aligned with value creation. - We supported the need to update international Transfer Pricing tax rules in particular, in connection with intangibles. - In our view, further clarification and examples should be provided on the level of control and performance of crucial value-creating functions related to the development, maintenance, protection and exploitation of intangibles that will be required to calculate the price according to the ALP. - We fear an increase on compliance burden, disputes and double taxation in connection with the fact that OECD proposals are bound to further intensify the difficulty of relying on third-party comparables, promoting thus – albeit indirectly – the application of the profit split method, as well as the use of subjective and rather complex criteria for the purpose of characterizing transactions and allocating risks and returns (which includes the lessening of the contract's role and the separate entity criterion). - CFE suggested the introduction of safe-harbors for special transactions, in order to somehow reduce the burden and any uncertainty for both sides. - We welcome the clarification on the role of contracts. We are, however, concerned with regard to the practical implementation of such complex analysis and with the requirements and the criteria that Tax Authorities will apply to perform such analysis. - We welcome the guidance provided on risk, although due to its complexity, we foresees further difficulties in its practical implementation by both, companies and Tax Authorities. - We welcome the progress made in the area of Cost Contribution Arrangements and the clarifications provided (i.e., the elective regime for Cost Contribution Arrangements (CCAs)). However, more work is still needed in this area to ensure that a significant number of countries implement such recommendations; otherwise, the adoption of the elective regime only by some countries could result in further compliance burdens for companies that would have to comply with different requirements set by countries that chose not to implement this regime. - We urge the OECD to provide further guidance on profit-split methods – to avoid an escalation in double taxation and disputes (at least until such guidance is released). - We also expect further difficulties on the implementation of these recommendations by Developing Countries, what could also increase the risk of disputes in connection with transfer pricing.
Action 11	CFE/AOTCA comments	The stringent politically-driven BEPS timetable did not allow to effect a comprehensive economic analysis of the abuses set forth in the Action Plan, including the significance and the compass of the roles played by "tax

		competition" and "double non-taxation". The discussion draft on Action 11 recognizes that there are actual difficulties in making a clear distinction between BEPS activities and the effects that true and proper incentives may have on a given economy. We share the Report's conclusion that "*More information about BEPS will be needed to monitor the effects of the BEPS program in the future, since BEPS is a global problem and individual country tax administrations have the best data. Better data and tools for analyzing BEPS are critical to separating the effects of BEPS from real economic activity and non-BEPS tax preferences*".
Action 12	- CFE/AOTCA Opinion Statement FC 7/2015 and PAC 1/2015 on mandatory disclosure rules [submitted in April/2015] http://www.cfe-eutax.org/node/4730 - CFE/AOTCA Opinion Statement FC 4e/2016, Final Recommendations [submitted in April 2016], http://www.cfe-eutax.org/node/5136	The Discussion Draft sets out the key principles that should underpin the design of a mandatory disclosure regime (MDR) and options for the modular design of an MDR. It also includes a discussion of international tax schemes and how these could be covered by an MDR. According to the Discussion Draft, an MDR should: • be clear and easy to understand, • balance additional compliance costs to taxpayers with the benefits obtained by the Tax Authority, • be effective in achieving the intended policy objectives and accurately identify relevant schemes, and • result in effective use of the information collected. [Please see: http://www.cfe-eutax.org/node/4730]. Part I of this Statement contains comments relating specifically to the chapters of the Discussion Draft. We felt the need not to limit our response to the questions of the Discussion Draft but also give our views on the recommendations made and on aspects that should be included in a final document. Our comments relating on these further aspects are in Part II of this Statement and they take into account the experience of our member bodies which operate in countries that have MDRs in place. <u>Further remarks:</u> - Action 12 recommendations will also be requiring further and considerable resources so as to ensure an alignment with regulations that are innovative and complex. - We recommend that the reporting obligation should only rest with one party and an MDR should not impose any obligation on both, the promoter and the taxpayer in connection with the same disclosure, since this would lead to a superfluous compliance burden. We agree that the primary disclosure should rest with the promoter. A dual reporting regime is likely to give rise to significantly greater costs for the tax authority, taxpayers and promoters. The consideration that, if both the promoter and the taxpayer were required to report both sets of information they would complement each other and be checked against one another (as mentioned in para. 73 of the Final Report) is not in our opinion convincing, as in

		practice, the information provided by the taxpayer will generally be prepared by the promoter as well. - We acknowledge the changes included in the final report relating to hallmarks of arrangements to be reported: - We support the clarification that confidentiality hallmarks should not apply where a scheme is publicly known, even if the agreement contains a confidentiality clause (para. 111). - We also support the remark that unusually high fees are not per se premium fees, as they may be based on the skills or reputation of a given adviser, the size of the transaction, the urgency of the matter, the location of the offices etc. (para. 112). - Nevertheless, we still have reserves towards hypothetical hallmarks, as they pose a legal certainty concern. There is a risk that when assessing what a client and a promoter would have agreed, a given tax administration may reach conclusions that are completely different from the actual practice of promoters, since the assessment will be made by a tax official who usually lacks practical experience on promoter pricing policies, market practices and engagement letters. - As far as Confidentiality of client information is concerned, CFE and AOTCA are of the view that information about clients should only have to be revealed where this is necessary for MDR purposes. We do not see any necessity for obliging advisers or promoters to submit client lists that include clients who may not have used reportable schemes. In some countries, even the names of clients are covered by legal privilege. - We welcome the OECD's decision in its final Report to refrain from advising/recommending countries to introduce mandatory reporting regimes, and from suggesting any minimum standard in this area. In many countries, client information in the hands of their tax advisers enjoys strict protection under legal privilege rules and we believe that these rules which serve taxpayer´s fundamental rights to privacy and a fair trial should be respected. - We are is pleased to note that the OECD has duly considered the issue regarding International schemes with reference to the fact that neither every entity of an MNE, nor every adviser involved in its tax affairs has a sufficient knowledge of the MNE´s arrangements to be able to identify reportable schemes and deliver the necessary information. - Cooperative compliance is an imperative element to achieve the envisaged objectives in the above scenario.
Action 13	CFE Opinion Statement FC 2/2014, Transfer Pricing documentation and country by country reporting [submitted in March 2014] CFE Opinion Statement FC	CFE and AOTCA welcome the decision reached in order to prevent the Country by Country Report (hereinafter, "CbCR") from going public, as well as the balanced commitment reached on the specific content of the document on "*(…) tax administration information needs, concerns about inappropriate use of the information, and the compliance costs and burdens imposed on business*."

	16/2014, Follow-up [submitted in December 2014] http://www.cfe-eutax.org/node/3571	(OECD Report, p. 10). We are mostly pleased with the commitment expressed by all of the 44 countries on the crucial importance of ensuring an effective implementation of the new reporting standards and reporting rules among countries, in order to avoid discrepancies and further disputes. CFE and AOTCA stress how important transparency is for tax administrations and tax compliance by taxpayers. Any action within the CbCR area should be carried out by taking into account the right balance between the usefulness of data to the tax administrations for risk assessment purposes, and the compliance burden on taxpayers, while ensuring that specific information be kept confidential. Further remarks: - We are concerned with the significant increase of the compliance burden on taxpayers in connection with the proposals of Action 13. - We welcome the acknowledgment on how important it is to protect the confidentiality of commercially sensitive information. Such protection should be applicable to the three mainstays related to transfer pricing documentation. - In our view, monitoring will be crucial to ensure that jurisdictions fully adhere to proper confidentiality criteria and standards, while guaranteeing that OECD proposals be consistently implemented. Such monitoring could be carried out through a peer review mechanism. - In our view, having standardized transfer pricing documentation rules implemented across the various countries, would contribute to reducing compliance costs for companies. This measure would most assuredly enhance the existent framework.
Action 14	- CFE/AOTCA Opinion Statement FC 3/2015 on dispute resolution [submitted in January 2015] http://www.cfe-eutax.org/node/4095 - CFE/AOTCA Opinion Statement FC 4f/2016, Final Recommendations [submitted in April 2016], http://www.cfe-eutax.org/node/5136	The current BEPS Action 14 is a unique opportunity to improve it and make some progress. But such mechanism will only be successful if it actually succeeds in facilitating final and binding decisions to be reached within an acceptable time frame. Establishing a mandatory dispute resolution mechanism would be, in our view, crucial to prevent economic or juridical double taxation. In practical terms, we suggest as a possible solution, to help improving the current framework and to enhance taxpayer's position while disputes are pending. We appreciate that the OECD Report specifically acknowledges some of the problems currently existing with MAP procedures. Nevertheless, we are of the opinion that the proposed changes will not fully guarantee removal of existing problems. Even if the recommendations are followed, the initiative in solving the disputes will remain primarily with the States represented by their competent authorities. Taxpayers' role is currently rather limited, and their involvement in the procedure should be further improved. The scope of the proposal should be expanded, so as to

		ensure the desired certainty and effectiveness. As the OECD Report (par. 36) states, the work on BEPS may lead to more stringent standards to be adopted and competent authorities will be called upon to develop common interpretations of the new tax treaty and transfer pricing rules. In other words, more disputes involving the interpretation and application of treaties may be expected. <u>Further remarks:</u> - We stress the importance of both, improving best practices related to MAPs and of implementing an effective monitoring system. - We support the idea of setting up a permanent arbitration tribunal for international tax disputes that could not only facilitate the arbitration process but may provide support in a pre-arbitration phase as well. In addition, we believe that the above would also help to develop a consistent interpretation of treaty provisions, increase the predictability of the results and finally contribute to decrease the number of treaty-related disputes. - In our view, focusing and improving transparency and relationship building between taxpayers and Tax Authorities (cooperative compliance) is of the utmost importance. - We welcome the minimum standards released to ensure progress on dispute resolution as well as on the commitment expressed by a large group of countries to move quickly towards mandatory/ binding arbitration.
Action 15	CFE Opinion Statement FC 15/2014 on a multilateral instrument to modify bilateral tax treaties [submitted in December/2014] http://www.cfe-eutax.org/node/4087	CFE and AOTCA agree with the necessity to develop a multilateral legal instrument to enable amendments to the international tax treaty framework in a quick, consistent, and coordinated way. We also agree to the idea that a multilateral instrument would amend but not replace existing tax treaties, leaving thus the bilateral nature of the tax treaty framework intact. A multilateral instrument would compel governments to treat such jurisdictions that will be participating therein, on an equal footing, making it more difficult for large economies to impose conditions on weaker counterparts. There will also be benefits for the tax adviser profession, as a multilateral instrument would help harmonising technical tax language and indirectly also technical tax matters, thus facilitating tax advisers' cross-border activities. Differing national tax laws are the main reason why the current professional landscape for tax advisers is highly fragmented. This would also benefit businesses, which would more easily find a qualified tax professional to accompany them with cross-border activities. <u>Further remarks:</u>

		- We were concerned with the ambitious timeline set within the BEPS Project on Action 15. The success of a multilateral agreement will, of course, depend on the number of signatory countries, and experience seems to indicate that countries have always favored bilateral agreements rather than implementation of multilateral agreements – CFE and AOTCA are pleased to acknowledge that a significant amount of countries have already adhered to such initiative. - Both, the OECD and the European Commission should pay close attention to the compatibility of a multilateral agreement with EU law, in particular with the fundamental freedoms of the EU, in order to prevent the highly undesirable situation that EU countries would be obliged to withdraw from a multilateral agreement concluded in violation of EU law. If compatibility issues are not clear, and the European Commission decides to request a legal opinion from the European Court of Justice, both, OECD and EU Member States should consider waiting for such opinion before proceeding with the signing of the multilateral agreement.