Opinion Statements FC 4a-4f/2016

on the OECD final Recommendations on

BEPS Actions 1, 4, 5, 8-10, 12 and 14

of 5 October 2015

Prepared by the CFE Fiscal Committee and AOTCA

Submitted to the OECD and the EU institutions 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 (18 EU and 16 OECD member states) 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 remarks

1. Previous CFE and AOTCA engagement in the BEPS consultation process

The CFE and AOTCA have constantly followed the BEPS Action Plan by submitting 17 Opinion Statements on the following BEPS Actions (Statements marked with an asterisk (*) are joint CFE/AOTCA Opinion Statements; all other are CFE Opinion Statements):

- Action 1: Tax challenges of the digital economy (link)
    - First statement
    - Update
    - Related: Two new elements of the International VAT/GST Guidelines (link)
- Action 2: Hybrid mismatch arrangements (link)
    - First statement
    - Update
- Action 3: Controlled foreign company rules* (link)
- Action 4: Interest deductions and other financial payments (link)
- Action 6: Tax treaty abuse / Treaty benefits in inappropriate circumstances (link)
    - First statement
    - First update*
    - Second update*
- Action 7: Artificial avoidance of permanent establishment status (link)
    - First statement*
    - First update*
- Action 12: Mandatory disclosure rules* (link)
- Action 13: Transfer pricing documentation and country by country reporting (link)
    - First statement
    - Update
- Action 14: Dispute resolution mechanisms* (link)
- Action 15: A multilateral instrument to modify bilateral tax treaties (link)

2. CFE and AOTCA Statements on the final BEPS Recommendations

The CFE and AOTCA have intensively discussed the final BEPS Recommendations issued on 5 October 2015[1] and are issuing the following Statements today:

Overall Statement:

- FC 4/2016 on the final OECD BEPS Recommendations

Specific Statements on selected BEPS Actions:

- FC 4a/2016 on Tax challenges of the digital economy (Action 1): final BEPS Recommendations
- FC 4b/2016 on Interest deductions and other financial payments (Action 4): final BEPS Recommendations

[1] http://www.oecd.org/ctp/beps-actions.htm

- FC 4c/2016 on Harmful tax practices, transparency and substance (Action 5): final BEPS Recommendations
- FC 4d/2016 on Transfer pricing and value creation (Action 8-10): final BEPS Recommendations
- FC 4e/2016 on Mandatory disclosure rules (Action 12): final BEPS Recommendations
- FC 4f/2016 on Dispute resolution mechanisms (Action 14): final BEPS Recommendations

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´s and AOTCA´s comments. For further information, please contact Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

3. BEPS implementation

We suggest that apart from the monitoring of the recommended BEPS measures, the OECD should maintain a public list of unilateral measures to counter BEPS in national laws, EU law or tax treaties, departing from the Recommendations and thus endangering the overall consistency of BEPS implementation. We will also monitor such measures and will report our observations to the OECD, hoping that this will facilitate the OECD´s work.

CFE and AOTCA Opinion Statement FC 4a/2016 on Digital economy taxation (Action 1): Final BEPS Recommendations

The CFE and AOTCA welcome the OECD´s conclusion that solutions to BEPS in the digital economy should not be taken the form of specific measures designed for the digital economy, but should be taken in the context of measures that apply to all sectors, such as the (re-)definition of permanent establishment, ideally adopted by multilateral instrument, changes to transfer pricing guidance and CFC rules. We agree that the outcome of the implementation of the proposed BEPS measures and VAT/GST guidelines should be awaited before proposing sector-specific measures. We fully agree with the OECD that "the digital economy is increasingly becoming the economy itself" and cannot and should not be ring-fenced.

The final Recommendation on Action 1 states that "*countries could, however, introduce any of these three options* [i.e. significant economic presence as a new nexus, withholding tax on digital transactions, or an equalisation levy] *in their domestic laws as additional safeguards against BEPS*". It is clear that tax sovereignty allows countries to do so, while respecting their obligations under international and supranational law. We would nevertheless have welcomed a statement advising governments from refraining from such actions, which could, in the lack of any coordination and in combination with BEPS measures adopted, lead to multiple taxation of the same income.

In our view, none of the solutions aiming specifically at the digital economy that have been presented so far, neither the attempt to create a concept of "significant economic presence", nor the considerations to attribute income to such presence or to impose withholding taxes or an "equalisation duty" is convincing. Apart from the practical challenges they pose, all would lead to a different treatment of income depending on whether the company has a physical presence in the customers´ country or not. This would open new possibilities for tax mitigation and encourage arrangements that are not driven by economic efficiency.

However, we recognise a distortion of competition between companies having a physical presence that are taxed on their domestic income from digital sales and companies not having such presence which are not taxed on such income in their country of residence (including countries that grant long-term tax deferrals). These distortions cannot, in our opinion, be solved by the adopted recommendations alone.

We therefore agree that the OECD should continue monitoring the issue and consider alternative solutions different from those already presented and report back in 2020.

CFE and AOTCA Opinion Statement FC 4b/2016 on Interest deductions and other financial payments (Action 4): final BEPS Recommendations

CFE has commented on the Discussion Draft on BEPS Action 4 in its Opinion Statement FC 5/2015 of February 2015[2]. We have included these comments to the extent we still consider them relevant, with necessary adaptions. Comments in blue specifically relate to new aspects, not included in the OECD Discussion Draft or our previous Opinion Statement.

General remarks

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 (MNEs) might be tempted to exploit differences in the tax systems of countries all over the world, the imposition of a limit on the deduction of interest payments may not be the best solution to counter these problems that arise in first place from the different treatment most countries apply to the remuneration of equity and the remuneration of debt.

Where dividends as remuneration of equity are, in general, a non-deductible item, interest that remunerates debt financing will in general be tax-deductible. Most countries apply already certain rules to limit the deduction of interest. Installing a more general rule will only be beneficial if it is applied worldwide (in all countries) in the same way. However, this is unlikely to happen for two reasons: Firstly, in the final report on this action point, the proposed best practice (fixed ratio rule) and the (optional) accompanying rules leaves a lot of room for local implementation that might differ between countries, so even countries aiming at a uniform solution would find this hard to achieve. Secondly, it can be expected that some countries will, as before, adapt their policies in order to remain (as) attractive (as possible) for foreign investors.

We still regret that the report does not envisage other solutions like to install a tax system where the effects of financial income/costs are neutral for the calculation of corporate income tax, or where the corporate tax treatment of the remuneration of equity or debt is not or not substantially different.
We would like to stress that financing with equity or with debt is also treated very differently from a legal point of view. These differences will also have an impact on the decisions companies make when choosing how to finance their investments.

Finally we also fear that the imposition of the rules to limit the deduction of interests will lead to situations where not all third party interest cost will be tax deductible.

Existing approaches to tackle base erosion and profit shifting involving interest

[2] http://www.cfe-eutax.org/node/4175

The report contains in its introduction also a brief description of the existing rules that are used to limit interest deductions, and suggests that countries may continue to apply those rules alongside the best practice approach.
We feel that the existing arm's length principle should have been better integrated in the design of the best practice. The same goes for withholding taxes. They are part of the actual tax landscape and cannot be ignored when establishing new rules. Although we agree that in certain cases (like in the EU with the Interest & Royalties Directive) the withholding tax will be reduced to zero, this is only to avoid, as much as possible, double taxation. Double taxation arises because in most countries, the withholding tax paid in the source state is only partially reduced by a tax credit. The tax credit will only be given to the amount of tax on net income whereas the withholding tax is applied on gross income.

In our opinion, it is not appropriate to keep transfer pricing and withholding taxes, which by themselves already cause a lot of concern for the taxpayer, out of the discussion. We regret that the final report does not give an indication on 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 deduction will create extra layers of double taxation.

Chapter 1: Recommendation of a best practice approach

The best practice approach which has been chosen is based around a fixed ratio rule which limits entity's net interest deductions to a fixed percentage of its profit measured using 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 the countries.
This confirms our concerns that the implementation of the rule will be substantially different in every country, making taxation rules even more difficult and complex and leaving the countries the opportunity to adapt its policy and attract investors.

Chapter 2: Interest and payments economically equivalent to interest

CFE and AOTCA agree that, if any rule should be installed, that rule should apply to the entity net 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 (hybrid mismatch arrangements)[3], 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 a good solution and will give rise to different interpretations/applications of the rule in different countries.

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[3] http://www.cfe-eutax.org/node/3676

As such, foreign exchange gains and losses, guarantee fees and arrangement fees should not be considered as interest or economically equivalent to interest for these purposes.

Chapter 3: Who a best practice approach should apply to

It is absolutely necessary that the rules foresee a small entity exception, as the complications of a fixed ratio rule that would apply to a SME business would be overwhelming. The rules surrounding the carry-forward or back of excess interest are extremely complicated and would be unjustifiable for an SME.We regret that the report chooses the way of the monetary threshold and does not really give an indication how high this threshold should be.
Most probably, this way, the threshold will be different in every country. Although the report suggests that countries should review the size of the threshold periodically, we think that most countries are not likely to review the monetary threshold and update it to reflect change in the economic environment. In practice, we see that monetary thresholds stay in place over a very long time without any review (except lowering of thresholds, where this generates more tax income). We believe that a size threshold would have been a more objective criterion and is easier to be set in all countries at the same level. Size thresholds already exist and are used for instance in accounting law at EU level.
We regret that the report leaves the threshold optional for every country and that it favors a monetary threshold.
Finally, we regret that our suggestion to limit the application of the rule in the first ten years to multinational enterprises that operate on a truly global scale has not been followed. Applying the rule to every company that has cross border activity, be it only with a permanent establishment in one other country, seems like using a sledgehammer to crack a nut.

Chapter 6: Fixed ratio rule

Chapter 6 describes in more detail the operation and the setting of the benchmark for a fixed ratio rule.
Concerning the calculation of the EBITDA starting from the taxable income from the entity the aim is to exclude exempt income like dividends and foreign earnings that are tax-exempt. We should remain attentive to avoid double taxation when establishing the rules. In general, we remark that the consequences of the report can go far beyond the limitation of interest in situations of base erosion but will impact normal business operations as well.

The benchmark fixed ratio is set within a corridor of 10 % to 30 % based on financial data provided. We agree that this benchmark should be revised within a short period. 2020 is therefore a valid time range.

The descriptions of the factors that can assist countries in setting a fixed ratio are rather disappointing. Some of them just refer to the impact which accompanying rules might have on the fixed ratio and in fact are based on a circular reasoning. Countries` high interest rates can of course affect the fixed ratio but in general, the interest rate of a multinational group is more affected by its economic power and performance than by the interest rate of a specific country. Apart from the suggestion that a country could adapt the fixed ratio for entities that are part of a large group, other factors do not take into account the economic rationale and wellbeing of an international group.

Chapter 7: Group ratio rule

The introduction of a group ratio rule will be further studied in detail in 2016. If the group ratio rule can help to eliminate double taxation and to achieve a fairer system, countries should be encouraged to introduce this rule together with the fixed ratio rule.
Special attention should be given to the interaction of loss-making entities on the operation of the group ratio rule.

Chapter 8: Addressing volatility and double taxation

As said under the general remarks, CFE and AOTCA remain concerned about the (risk of) double taxation that will occur when rules to limit interest deductibility are installed.

Although the avoidance of double taxation is considered to be a principle when designing international rules, the proposed solution for the avoidance of double taxation by allowing the carry-forward or carry-back of disallowed interest or the carry-forward of unused interest capacity into future periods does not avoid double taxation as such. It only softens or reduces the double taxation by allowing a possible future deduction. Carry-back solutions being normally very limited in time will in most cases also only provide a limited solution.
Within the best practices, these rules and the rule to challenge volatility by using average EBITDA are only optional. As a result, countries that do not include these rules will establish double taxation as a rule.
Rules on carry-forward or -back of excess interest are exceedingly complicated if they follow loss carry-forward/back regimes. It seems natural for taxing jurisdictions to want to avoid excess interest trading schemes but the complications that set in by doing so will be enormously expensive to comply with. If such rules are contemplated they should take account of the actual loss to revenue of such schemes and be justifiable on an objective basis.

The suggestion to limit the carry-forward in time is unacceptable from a taxpayer point of view. From practice, in several countries were interest limitation rules were introduced, it is apparent that a lot of companies that struggle with the limitation of interest deduction and that are in a stress position during a certain time will never be able to use the carry-forward of interest in future assessment years and as such the double taxation becomes permanent.
Finally, we should try to avoid that companies in a loss position are obliged to pay taxes. The use of average EBITDA might help to avoid this but is surely not a solution for all situations.

Chapter 10: Applying the best practice approach to banking and insurance groups

CFE and AOTCA agree that separate rules are needed for banking and insurance companies. The study on this will only be completed in 2016.

In general, other sectors or companies might need an adapted approach as sometimes suggested in the report. Therefor a more in-depth study should be carried out in the coming years and should be part of the 2020 review of the best practice rule.

Chapter 11: Implementing the best practice approach

As said earlier, CFE and AOTCA agree that a review of the rule by 2020 is a must to make sure that the rule creates 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 elaborated and refined.

CFE and AOTCA Opinion Statement FC 4c/2016 on Harmful tax practices (Action 5): final BEPS Recommendations

Substantial activity requirement

IP regimes:

CFE and AOTCA 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 administration´s interests/concerns in granting a preferential treatment only to R&D activities that have been actually carried out in their country, and other countries´ interest, in maintaining fair tax competition for profits from IP rights.

The Minimum Standards document released indicates that "*The nexus approach uses expenditure as a proxy for activity and builds on the principle that, because IP regimes are designed to encourage R&D activities and to foster growth and employment, a substantial activity requirement should ensure that taxpayers benefiting from these regimes did in fact engage in such activities and did incur actual expenditures on such activities*[4]" We support and agree with the use of expenses as a proxy for activities, since this avoids complicated documentation of actual R&D activities carried out, and allows the use of data already available to the business..

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.

Taking into consideration that R&D activities often may not be structured on an IP-asset-by-IP-asset basis, we support the OECD's acknowledgement that it may then be deemed consistent with the nexus approach to track and trace products.

We therefore share and support the possibility to track and trace certain products or product groups rather than specific IP rights. As the Recommendations rightfully observe, by the time an R&D effort is undertaken, it is often related to the creation of a certain product while it may not yet be clear in which IP rights it will result. It is our understanding that businesses should be able to opt on whether tracking and tracing products or IP rights is more appropriate, as well as explaining the opportunity/reasons for such decision.

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.

It is our understanding that Countries' internal guidance should specify qualifying expenditures, which should include those expenses borne in connection with achievement and enforcement of the legal protection of an IP right.

Preferential regimes other than IP regimes:

The Recommendations distinguish between different types of preferential regimes, acknowledging that there cannot be a single definition of substantial activity. We welcome the examples provided and agree that a case-by-case assessment seems to be the only viable approach.

[4] OECD Report, Action 5, p. 9, Oct. 2015

Exchange of information on tax rulings

Similar to the upcoming amendment of EU Directive No. 2011/16/EU, the Recommendations contain a requirement for spontaneous mandatory exchange of a defined set of information on tax rulings and APAs between the issuing country and countries that may be affected by the ruling. Upon request, these countries may receive the full text of the rulings/APAs.

<u>Information already included in transfer pricing documentation</u>

The Recommendations (para. 90b) mention that rulings covered by the information exchange mechanism will also have to be reported in both, the Local and Master File for transfer pricing documentation. What the OECD considers a "useful cross-check" is in fact an unnecessary doubling of a reporting and compliance burden.

<u>Confidentiality</u>

We welcome the acknowledged importance of confidentiality.

Confidentiality is one of taxpayers' greatest concerns, especially when cross-border information is shared. Complete security of information is an illusion. It is a fact that data leakages occur, due to technical failure or negligent or deliberate acts of individuals. Therefore, the information shared should be limited to what is absolutely necessary. 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).

The Recommendations expressly provide that countries "*may suspend or limit the scope of the exchange if appropriate safeguards are not in place or there has been a breach in confidentiality and they are not satisfied that the situation has been appropriately resolved*" (para. 138). Although this is worth mentioning, we believe that it does not go far enough: If a recipient country cannot guarantee confidentiality, the reporting country should be <u>obliged</u> to limit or suspend the information exchange.

There should also be an arbitral body that decides on disputes or questions that arise between countries. A Competent Authority Procedure is not sufficient to ensure the protection of confidentiality.

<u>Binding nature of rulings</u>

We welcome the suggested best practices on rulings (para. 141).

We agree that rulings should be binding on the tax authority, as the provision of legal certainty is their *raison d´être*. This however is not duly reflected in Letter g) which states that rulings should (only) be binding "…, *provided that the applicable legislation and administrative procedures and the factual information on which the ruling is based do not change after the ruling has been granted*".

It is clear that in those cases where the factual situation on which a ruling is based changes significantly and permanently, the ruling will become obsolete. The same applies if legislation (including secondary legislation, decree-laws) changes, since a ruling cannot confirm a treatment that does not comply with the law. The latter should probably include Supreme Court decisions on the application or interpretation of the laws on which the ruling is based. Notwithstanding the above, grandfathering or transitional arrangements should be considered. Tax authorities should also consider escalated service to ruling applicants affected by changes of the law, to enable them to make the necessary adjustments.

In contrast, a change of views of the administration, administrative practices or administrative regulations, which are internal rules of the administration, does not have a direct effect on the taxpayer. It will therefore neither affect the validity of a ruling or APA, nor allow the tax administration to revoke it, such would be contrary to the binding nature of rulings. Tax authorities are free to issue rulings with an "expiry date".

In the same vein, Letter d) states that *"[r]ulings should be subject to revision, revocation or cancellation, […] if there is a relevant and significant change […] in the validity of the assumptions made"*.

It should be clear that a mere change on interpretation of the law by tax authorities does not justify a revocation of a ruling.

<u>Publication of general tax rulings</u>

We are not against disclosing to the public rulings of a general nature that do not raise confidentiality concerns, as this might contribute to legal certainty by allowing taxpayers to anticipate tax authorities´ decision.

Transparent taxpayers – transparent States

We believe that transparency should work both ways and that taxpayers also deserve transparency from the side of Governments. We would very much welcome a clear OECD statement in this regard and suggest the following measures to enhance transparency of state's action on preferential regimes and tax rulings/APAs.

1. <u>Taxpayers should know what has been exchanged</u>

Taxpayers should receive a copy of the set of information exchanged, and be informed on the request of rulings (full text) by any Member State. Knowing in advance the information already received by another country will facilitate communication with its Tax Authorities and will allow taxpayers to indicate any errors in the exchanged information.

2. <u>Countries should not have the right to keep a ruling/APA confidential</u>

Countries should not be allowed to restrict taxpayers from forwarding the ruling or APA obtained to other parties, in particular to foreign group's companies. There are examples (e.g., Luxembourg) where this is often not permitted. We do not see any legitimate interest of countries in keeping their decisions confidential, apart from taxpayer's protection.

3. <u>Consider automatic exchange of information on tax law amendments</u>

There should be a mandatory exchange mechanism for amendments to tax legislation among countries engaging in the exchange of rulings/APAs and the OECD. Such mutual notification would allow the OECD and other countries to monitor countries´ compliance with agreed OECD principles, and to identify potentially harmful tax competition at an early stage. This information should be published. Improving taxpayers´ information on tax rules in other Member States would facilitate compliance and investment decisions. It could also facilitate cross-border tax advisory services by smaller tax firms that do not operate in an international network.

Where an amendment of tax law concerns the validity of a ruling on which information has been exchanged between countries, the other country (the country having issued the ruling or the country/ies having received the information) and the OECD should be informed of this amendment, as well as the rulee.

CFE and AOTCA Opinion Statement 4d/2016 on Transfer pricing (Actions 8-10): final BEPS Recommendations

Brief comments

CFE and AOTCA support the work carried out by the OECD in the field of transfer pricing and welcome the OECD decision to continue endorsing the Arm's Length Principle.

In addition, CFE and AOTCA support the need to update and improve the current transfer pricing framework in order to ensure that transfer pricing outcomes are aligned with value creation.

Notwithstanding the above, CFE and AOTCA fear an increase in 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.

Furthermore, CFE and AOTCA welcome the guidance provided by the OECD on risk, although due to its complexity, we foresee further difficulties in its practical implementation by both companies and tax authorities.

In addition, we urges the OECD to provide further guidance on profit-split methods – to avoid an escalation in double taxation and dispute (at least until such guidance is released).

1. TP and contractual arrangements

CFE and AOTCA welcome the clarification on the role of contracts.

As provided in the OECD Summaries (page 28), "*To achieve this objective, the revised guidance requires careful delineation of the actual transaction between the associated enterprises by analysing the contractual relations between the parties in combination with the conduct of the parties. The conduct will supplement or replace the contractual arrangements if the contracts are incomplete or are not supported by the conduct. In combination with the proper application of pricing methods in a way that prevents the allocation of profits to locations where no contributions are made to these profits, this will lead to the allocation of profits to the enterprises that conduct the corresponding business activities. In circumstances where the transaction between associated enterprises lacks commercial rationality, the guidance continues to authorise the disregarding of the arrangement for transfer pricing purposes*".

As such, the Report recommends the analysis of the contractual arrangements in combination with an analysis of the effective conduct of the parties. The company must be able to demonstrate, through a careful and comparable analysis, the commercial rationale behind the transactions, ensure that the attribution of profits reflects the contractual risks that are taken, regardless of the terms agreed upon in the contractual arrangements concluded by the parties. Only in such cases in which existent contractual terms agreed between the parties do not reflect the commercial arrangements, there is the risk of re-characterization by tax authorities.

CFE and AOTCA are concerned with the practical implementation of such complex analysis and with the requirements and the criteria that tax authorities will apply to perform such analysis.

Multinationals and advisers will be reliant on the experience obtained from the reporting of the actual compliance activities undertaken by tax authorities. It is essential that the transfer pricing actions should be regularly reported and documented (subject to confidentiality issues) so the professional community (and the community at large) have confidence in the regulation of such activities.

2. Intangibles

CFE and AOTCA welcome the improvements carried out in the intangibles' area.

We welcome the inclusion of a definition of intangible asset for transfer pricing purposes within the OECD Guidelines, and the examples provided.

For the sake of clarity, 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 Arm´s Length Principle.

In addition, the Report provides further clarification on hard-to-value intangibles. We welcome the OECD statement that limits the application of ex post outcomes by tax authorities as a proof of the appropriateness of the *ex-ante* price valuation to those cases in which taxpayers cannot prove that the uncertainty was foreseen and properly measured and reflected in the transfer pricing method adopted by the company.

This new guidance on hard-to value intangibles will require detailed valuation techniques, and will definitely imply further compliance for companies.

3. Cost contribution arrangements

CFE and AOTCA welcome the progress made in this area 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 burden for companies that would have to comply with different requirements set by countries that do not implement this regime.

4. Risk allocation

CFE and AOTCA welcome the risk analysis' framework provided in the Report (including the six steps). We are, however, concerned with the fact that the Report does not provide much guidance on the practical implementation of such model by both taxpayers and tax authorities. It is our view that appropriate guidelines could help preventing inevitable disputes between taxpayers and tax authorities. We are also concerned with a potential increase of costs in connection with the need to integrate or outsource the risk analysis and risk-taking function.

5. TP and developing countries

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.

CFE and AOTCA Opinion Statement 4e/2016 on Mandatory disclosure rules (Action 12): final BEPS Recommendations

CFE and AOTCA welcome the OECD's decision in its final Report to refrain from advising/recommending 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 the BEPS project should respect these rules that serve taxpayer´s fundamental rights to privacy and a fair trial[5].

Who should report:

We recommend that the reporting obligation should only rest with one party and an MDR should not impose an 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. Where the promoter discloses, the taxpayer should only be required to mention the MDR reference number, where applicable. A dual reporting regime is likely to give rise to significantly greater costs for Tax Authorities, taxpayers and promoters. The consideration that, if both the promoter and the taxpayer were required to report both information sets would complement each other and be checked against one another (as mentioned in para. 73) is not convincing, as in practice, the information provided by the taxpayer will generally be prepared by the promoter as well.

What should be reported: Hallmarks

CFE and AOTCA 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 entirely different from promoters' actual practice, since the assessment will be made by a tax official who usually lacks practical experience on promoter pricing policies, market practices and engagement letters.

Confidentiality of client information:

- 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

[5] More information on legal privilege for tax advisers in Europe can be found in our *European Professional Affairs Handbook for Tax Advisers*, Part I, Chapter 6, and the corresponding Country Sheets in Part II: http://www.cfe-eutax.org/sites/default/files/CFE%20European%20Professional%20Affairs%20Handbook%20for%20Tax%20Advisers_2nd%20edition_2013.pdf.

schemes. In some countries, even the names of clients are covered by legal privilege. Moreover, such action will lead governments to inefficient use of scarce resources.

Self-incrimination:

- In the Recommendations, this point has been rightfully added. Self-incrimination has been identified as a reason of concern where the promoter himself could be criminally liable for promoting or assisting/participating in an avoidance scheme (para. 179 and Annex B).
- However, we strongly disagree with the reasoning included in the Recommendations that "*there should not be an issue with self-incrimination where a promoter is obliged to disclose instead of a taxpayer*" (para. 179 and Annex B). This concern cannot be avoided by requiring the promoter to report. It is one of the very reasons for privilege that the principle of self-incrimination cannot be circumvented by asking somebody else to report.
- The final paragraph of Annex B states that where a reportable transaction leads to criminal charges, this should constitute a reasonable excuse for non-disclosure. Although the Discussion Draft suggested that the burden of proof for the latter should be on the taxpayer, the final Recommendations did not include such provision. We welcome this deletion, as in practice, the distinction between (legal) tax avoidance and (illegal) tax evasion may be difficult to draw, and taxpayer and tax authorities may have different views. There could be cases in which a taxpayer may have implemented a scheme in good faith, assuming it was/is within the law, and later learns that the tax administration considers such scheme to be illegal.

International schemes:

- We are pleased to note that the OECD has duly considered the issue regarding international schemes with reference to the fact that neither does every entity of an MNE, nor every adviser involved in its tax affairs have sufficient knowledge of an MNE´s arrangements to be able to identify reportable schemes and deliver the necessary information:

  - The Recommendations suggest limiting disclosure obligations to the cases where the taxpayer could reasonably have been expected to be aware of the cross-border outcome under the arrangement (previous version provided: where the taxpayer was a party to the arrangement or the outcome arises within the same controlled group). We welcome the flexibility included in the new threshold. Such inclusion entails that an MDR should not require a person to gather more information than what could have been expected under an ordinary commercial due diligence (paras. 249-250).

  - Disclosure obligation on a "material adviser": The Recommendations clarify that advisers or intermediaries who are unaware of the cross-border outcome, or of the transaction that triggers the disclosure rule, should be excluded from any disclosure obligation (para. 253).

  - We welcome another improvement: the inclusion that reference may be made to data already disclosed, e.g., for transfer pricing documentation purposes (para. 247).

  - Where (part of) the information to be disclosed is held offshore or subject to confidentiality or other restrictions, we welcome the deletion from the Final Report that the person who has to make the disclosure should identify the persons that are believed to hold the information.

According to the Recommendations, the person making the disclosure should certify that a request for such information has been issued to that party (para. 275).

CFE and AOTCA Opinion Statement 4f/2016 on Making dispute resolution mechanisms more effective (Action 14): final BEPS Recommendations

The minimum standard reached in Action 14: 2015 Final Report correctly names the main problematic areas of MAP procedures and specifies that it is aimed to developing the rules that should ensure timely, effective and efficient resolution of treaty–related disputes. Notwithstanding the above, taking into account the experience with similar approach adopted in the past (e.g. MEMAP), we fear that the proposed measures will not secure the removal of the existing problems in a satisfactory manner as they are based on declaration of good faith by the countries. In other words, the countries would still be able to avoid the achievement of final resolution of treaty –related disputes arguing that they are insisting on their position since they believe, in good faith, it is correct. We doubt whether periodical review and publication of statistics would be a sufficient motivator to accelerate the MAP, in particular, in sensitive and complex cases.

CFE and AOTCA believe that proper dispute resolution mechanism of treaty–related disputes is the key issue for functioning of whole mechanism of avoiding of double taxation. But such mechanism will only be successful if it is able to facilitate the final and binding decisions within an acceptable time frame.

Having said that, we highly appreciate and welcome the commitment of a group of states stated in Section II of ACTION 14: 2015 Final Report to adopt and implement mandatory binding arbitration as a way to resolve disputes that otherwise prevent the resolution of cases through the mutual agreement procedure. Taking into account the fact that together these countries are involved in more than 90 percent of outstanding MAP cases (as at the end of 2013), this should help to reach effective dispute resolution in substantive part of treaty–related disputes.

As indicated in previous opinions (FC 15/2014 dated 19 December 2014, CFE/AOTCA Opinion Statement FC 3/2015 on making dispute resolution mechanisms more effective (BEPS Action 14)), CFE and AOTCA believe that the introduction of a dispute resolution mechanism through a multilateral agreement would be the proper approach that will significantly contribute to the achievement of efficient dispute resolution. Such mechanism, if accepted by sufficient number of countries, providing for the mandatory and binding arbitration will ensure unified, effective and immediately applicable mechanism and, in addition, will enable to properly address the resolution of multijurisdictional international tax disputes the occurrence of which substantially increased in recent years.

Moreover, CFE and AOTCA support the idea of setting-up a permanent arbitration court specializing in international tax disputes. Should the arbitration be facilitated under auspices of such a court, this would not only improve the arbitration process but also provide the support to the parties in pre-arbitration phase or help developing the standardized interpretation of treaty provisions, increase the predictability of the results and finally decrease the number of treaty-related disputes.

If such mandatory binding MAP arbitration provisions are developed as part of the negotiation of the multilateral instrument envisaged by Action 15 the BEPS Action Plan, it remains only to hope that also the countries not involved in this commitment will reconsider their approach and will join this initiative once the multilateral instrument is finalised.