CFE tax advisers europe

OPINION STATEMENT

Opinion Statement PAC 1/2023 on the European Parliament Report on Lessons Learned from the Pandora Papers and Other Revelations

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Philippe Vanclooster, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

1. Introduction

CFE Tax Advisers Europe values the continued efforts and contribution of the European Parliament, in particular the Subcommittee on Tax Matters (FISC) and the Committee of Economic and Monetary Affairs (ECON) in promoting better transparency, accountability and integrity of our tax systems.

CFE has contributed to the public debate and the expert hearings organised by the European Parliament in exploring ways in which tax professionals can contribute to these goals as well as to strengthen the integrity and robustness of the fiscal systems for the benefit of the European economy, society, its citizens and taxpayers.

We will continue to support the EU institutions in these important endeavours. In this spirit, we wish to provide remarks on the findings of the report, hoping these may be of assistance to the MEPs and the Parliament in their deliberations.

2. Specific Remarks for Consideration of the ECON Committee and the MEPs Related to the Draft Report on the Pandora Papers & Other Revelations

Calls for Calls for cooling off period for 'revolving door' phenomenon with respect to tax authorities /official functions and big firms

CFE Tax Advisers Europe agrees that there are possible ongoing issues with the 'revolving door' phenomenon between public authorities (EU and national) and services firms/ businesses where damage to the reputation of tax professionals is being done by individuals who do not respect the ethical considerations and integrity of such positions. This can also be damaging for the trust in the European/ public institutions where staff are moving from the public sector to the firms and potentially advising a client related to a case they possibly handled or oversaw in a position as a public authority official.

There is also the issue of the perception of the public about the integrity of the firms and the institutions. CFE welcomes the European Parliament focus on the need to address this problem. We are supportive of measures which balance the freedom of working at a workplace of one's choosing, whilst maintaining rules that prevent conflict of interests.

We also call on the European Parliament to consider proposing amendments with rules on returning to the tax authority after being in a private sector firm. Rules preventing conflict of interests for tax professionals when going back to tax authorities should likewise be considered. CFE also notes that introducing a strict 'cooling off' rule might not be the best way to deal with this problem, rather **we advocate for introduction of ethical rules that govern the behaviour of professionals. More generally, the problem is not limited to revolving doors in tax area - most**

glaring examples recently have been with competition and trade lawyers, hence one ought to establish a system that is 'profession' neutral.

We agree with the 3rd suggestion that the EU should be "*safeguarding high standards of integrity, honesty and responsibility among public officials in the EU; calls on the Member States to ensure that they have measures and systems in place requiring public officials to declare any outside activities, employment, investments, assets and substantial gifts or benefits which may give rise to a conflict of interest with respect to their functions as public officials; highlights the importance of having systems in place to report and verify this information and independently assess conflicts of interest when they arise*".

Conflict of Interest where a Firm is Advising Corporate and Public Authorities

Point 7: *"Calls on the Commission and the Member States to recognise and address the risks of conflicts of interest stemming from the provision of legal advice, tax advice and auditing services when advising both corporate clients and public authorities; reiterates its call on the Commission to propose measures to clearly separate accountancy firms from financial or tax service providers as well as all advisory services."*

We point out that there is already a regulation regarding statutory audit of public-interest entities preventing the rendering of conflicting other services by the auditors network.[1] A standard as suggested above could well be impractical and too severe. CFE points to the integrity approach as discussed above. From a professional perspective, we support appropriate safeguards, and these should be implemented without market disruption. Professional bodies already require professional advisers to comply with a Code of Ethics, and effective implementation of ethical requirements of the profession provide an effective safeguard against such practices.

Code of Conduct on Business Taxation: Scope

"Calls for the scope of the Code of Conduct Group on Business Taxation to be expanded, in particular to include preferential personal income or capital tax regimes, or personal income and wealth tax regimes that could lead to significant distortions in the single market; considers that this could enable the scope of the Code of Conduct Group to capture regimes aimed at attracting high net worth and high levels of income not created in the Member State proposing the tax regime."

CFE agrees with this expansion, in particular regarding the recent decision of the Council of the EU to modify the listing criteria, in particular the scope of the tax measures covered.[2] As agreed by the Council, the Code of Conduct for Business Taxation will cover not only preferential tax measures but also tax features of general application (both legislation and administrative practices) which may affect the location of business activity in the EU.

[1] Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC Text with EEA relevance

[2] Council of the EU, Press release of 8 November 2022: Finance ministers agree to strengthen the code of conduct used to identify and curb harmful tax measures of member states, https://www.consilium.europa.eu/en/press/press-releases/2022/11/08/taxation-finance-ministers-agree-to-strengthen-the-code-of-conduct-used-to-identify-and-curb-harmful-tax-measures-of-member-states/

We are concerned however that issues of legal certainty and compatibility with primary EU law may arise, given recent ECJ judgments in the fiscal State aid cases which provide Member states with a lot of scope for the introduction and maintenance of preferential taxation regimes involving practices of a sufficiently general nature in their design or application.[3]

Misuse of Shell Entities

The draft states that the Parliament *"Welcomes the Commission proposal for a Council directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU; calls on the Council to swiftly adopt the proposal once Parliament has submitted its opinion"*.

CFE Tax Advisers Europe welcomes the work of the European Commission and the European Parliament in seeking to eradicate tax evasion throughout the EU, the aim of which CFE has always fully supported.[4]

In seeking to support the EU in this objective, CFE wishes to highlight the potential issues in practice raised by the proposed Unshell Directive, noting that the application of the existing anti-avoidance measures within the EU has become very complex in recent years. While CFE embraces the objectives expressed by the Unshell proposal, it has concerns about the way this draft directive intends to achieve these objectives and doubts whether these objectives will actually be achieved. This opinion statement elaborates these concerns and proposes alternative solutions that would, in the view of CFE, be more proportionate and suitable to achieve these objectives and ensure compliance with primary EU law.

The original draft of the Unshell Directive seems to overlook the effect of transfer pricing and CFC rules, which already deal with the very issues that it is purporting to address. Indeed, the past few years have seen the implementation of a trove of EU and broader international measures designed to counteract certain perceived abusive practices. These include the Multi-Lateral Instrument ('MLI'), limiting access to treaty benefits (PPT), EU Mandatory Reporting (via DAC 6), as well as two EU anti-tax avoidance directives ('ATAD'), comprising rules on CFCs, interest deductibility, anti-hybrid arrangements, exit taxes and general anti-avoidance. The effectiveness of these rules is yet to be fully seen. In the opinion of CFE, the proposed directive seems to assume that abusive situations persist, without having allowed these measures sufficient time to prove their relevance.

In response to targeting the misuse, CFE suggest a different approach in respect of addressing the outstanding issues raised by shell entities:

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[3] Court of Justice of the EU, Judgment (Grand Chamber) in Joined Cases C-885/19 P and C-898/19 P Fiat Chrysler Finance Europe and Ireland v Commission of 8 November 2022; General Court of the EU, Judgment in Cases T-778/16, Ireland v Commission, and T-892/16, Apple Sales International and Apple Operations Europe v Commission of 15 July 2020

[4] Opinion Statement FC2/2022 on the EU Proposal on Fighting the Use of Shell Entities and Arrangements for Tax Purposes (Unshell Proposal), https://taxadviserseurope.org/new_ahgency/wp-content/uploads/2022/04/CFE-Opinion-Statement-on-EU-Commission-Unshell-Directive-ATAD3_FINAL.pdf

- Introduce another iteration of the DAC by way of enhancing transparency between member states and taxpayers, limiting the proposed directive to exchange of information (i.e. by removing the proposed articles 11 and 12);
- Create a list of Member states that have introduced the Principal Purpose Test (PPT) in their respective double tax treaties;
- Invite the European Commission to use the powers conferred on it by Article 258 of the Treaty on the Functioning of the EU to enforce the compliance by Member States with their obligation to prevent the avoidance of EU legislation (i.e. ATAD) and to do so in a manner that is compliant with primary EU law and settled ECJ case-law.

3. Further Remarks Regarding Aggressive Tax Planning & CFE's Ethical Bar on Professional Judgment in Tax Planning

As set out in our paper 'Professional Judgment in Tax Planning'[5], CFE seeks to promote the highest standards among tax professionals. We recall that attitudes and practices with regard to tax planning have changed very considerably in the recent past. Regulators, businesses, advisers and academics all acknowledge that many tax-planning arrangements which were common 25 years or so ago would generally be considered abusive by today's standards. This is to say that they involved manipulation and artificiality in the design of transactions, structures and arrangements beyond the substantive operations of the businesses and the lives of the individuals concerned, which were nevertheless considered acceptable as long as "the letter of the law" was respected. It is important to stress that individuals and businesses decided on their tax strategies, in the final instance, on the basis of their risk appetite – and they still do so today. But 25 years ago there was a very different perspective on what is abusive and therefore high risk – or, put simply in another way, what is acceptable. The question "If it is legal, is it acceptable?" did not present itself as it does today.

As is widely known, arrangements which today are regarded as abusive were put in place for individuals and corporates, especially those with sufficient scale for cross-border arrangements, who exploited so called loopholes in a national tax system or across multiple tax systems. They took advantage of gaps and mismatches in terminologies for the purpose of reducing tax liability: for example, double deductions, where the same loss is deducted in both the state of source and the state of residence; and double non-taxation, where income is not taxed in the state of source and is exempt in the state of residence. Tax planning would focus on delivering savings to clients through the use of legal vehicles and financial transactions specifically established to exploit these technicalities.

The involvement of tax advisers was shaped by both permissive regulations and governments and overall attitudes in economic life as to what was generally acceptable. The context of such tax planning was also formed by the limited or non-existent transfer of information between governments and the fact that countries did not legislate to address mismatches. Societal

[5] CFE Tax Advisers Europe, "Professional Judgment in Tax Planning – An Ethics Quality Bar for All Tax Advisers", June 2021: https://taxadviserseurope.org/project/professional-judgment-in-tax-planning-an-ethics-quality-bar-for-all-tax-advisers/

expectations with respect to the ethics of tax advice were largely non-existent, given low awareness of the functioning of tax systems and, perhaps most importantly, of the overall consequences with respect to national finances.

CFE acknowledges the change in attitudes and practices which has been driven by policy-makers since the 1990s. It has been achieved via cumulative steps at international level, particularly through the OECD and then through EU and national measures. They were undoubtedly bolstered by the need to respond to the 2008 financial crisis and its aftermath, which introduced austerity for many. Policymakers were prompted by a dual concern: the revenue lost to national treasuries from such tax planning and the growing concerns among electorates about accountability for fair and equal treatment of taxpayers and the "societal contract" that exists between companies, their employees and the public services they avail of.

CFE believes that it is possible to make a substantive contribution to addressing the problem of abusive tax arrangements by setting a quality bar for ethical judgment in tax advice for all tax advisers. The focus of the quality bar is on the qualitative reflections of tax advisers when exercising their professional judgment. Taking into consideration the many differences in national contexts across Europe in relation to the roles and responsibilities of tax advisers, as well as the tax and legal systems and national cultures in which they operate, achieving a single, Europe-wide code or piece of professional guidance on ethical judgment in the provision of tax advice could be difficult to achieve.

However, the concept of a quality bar would be sufficiently agile as well as practically adaptable to make a real impact across different environments and over time. CFE believes that a quality bar could help to ensure that ethics is appropriately considered in the exercise of professional judgment. Specifically, it can assist in relation to the question "If it is legal, is it acceptable?" by ensuring that the exercise of professional judgment is steered against advice which is abusive within legal parameters. CFE envisages that this steering can be achieved via tax advisers' asking themselves the following five key questions when preparing and providing advice to clients – on the basis that the advisers respond to the answers generated by the questions appropriately. The key questions will be particularly relevant in situations where client expectations of tax planning denote an enhanced risk of potentially abusive arrangements[6].

Setting an Ethics Quality Bar for Professional Judgment in Relation to Tax Planning:
Five Key Questions for Tax Advisers to Reflect on When Preparing and Providing Advice

1. Is there a genuine economic purpose for the tax planning apart from achieving a tax benefit, either now or in the future?
2. Are the arrangements artificial or manipulated in a form-over-substance approach to achieve a tax benefit?

[6] See for instance IESBA, Proposed Revisions to the Ethics Code addressing tax planning and related services respond to public interest concerns about tax avoidance and the role played by consultants, including professional tax advisers, in light of revelations in recent years such as the Paradise and Pandora Papers. The proposals strengthen the ethical expectations for professional accountants in business and in public practice when performing tax planning activities for employing organizations or providing tax planning services to clients, respectively: https://www.ethicsboard.org/publications/proposed-revisions-code-addressing-tax-planning-and-related-services-0

3. Is the tax planning based on interpretations of applicable international and national tax law which are likely to be considered credible by the courts and informed stakeholders?
4. Would the arrangement be implemented if the relevant tax authority had a full overview of every aspect of the planning?
5. Are there any other potential reasons why the tax planning could be perceived by policymakers and the general public as abusive?

CFE underlines that only a holistic approach and proactive initiatives to raise the ethical bar for all advisers would serve societal and stakeholder expectations well. Partial initiatives or those addressed solely at a single part of the tax advisory market, without sufficient consideration of the unaffiliated advisers and their firms, in particular, would undermine policy goals and wider expectations. It is against this background that this paper and the quality bar seek to promote ethical professional judgment by all tax advisers across Europe and globally where this impacts taxes due in Europe.

4. Conclusion

CFE hopes these observations are helpful and remain available to discuss the Statement with all relevant stakeholders and institutions.