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Opinion Statement FC 02/2017

**Response to Consultation on
the OECD BEPS Action 6 Public Discussion Draft on non-CIV
examples**

Prepared by the CFE Fiscal Committee

Submitted to the OECD on 2 February 2017

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).

We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Stella Raventós Chairwoman of the CFE Fiscal Committee, or Mary Dineen Fiscal Officer at CFE, at brusselsoffice@cfe-eutax.org.

1 Introduction

This Opinion Statement by the CFE Fiscal Committee relates to the OECD public discussion draft “BEPS Action 6 Discussion Draft on non-CIV examples (hereinafter the “Discussion Draft”), released for public consultation on 6 January 2017. We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Ms. Stella Raventós, Chairwoman of the CFE Fiscal Committee or Mary Dineen, Fiscal Officer of the CFE, at brusselsoffice@cfe-eutax.org.

2 General remarks

The Discussion Draft includes three draft examples with regard to the treaty entitlement of non-CIV Funds when applying the principle purpose test (hereinafter “PPT”) as described in the BEPS Action 6 final report.

The CFE welcomes that the OECD is seeking practical solutions for the issue of non-CIV funds claiming treaty protection for income from investments made through special purpose companies and intermediary investment vehicles. The CFE recognizes the inherent difficulties when applying the PPT in cases whereby the selection of a jurisdiction to locate the aforementioned entities is influenced by the potential tax consequences of the selection, including the possibility to claim treaty protection. It is particularly difficult to determine whether obtaining the benefit of a tax treaty has been one of the principal purposes for which a structure has been set up or a transaction is structured. The CFE supports the approach of including examples in paragraph 14 of the Commentary on the PPT to clarify this rule for non-CIV funds.

However, this approach is not without potential pitfalls. Firstly, it raises the question whether the example can be relied upon if the circumstances of a particular case are not completely identical to the circumstances described in the relevant example. Secondly, the examples given may describe facts of a particular situation (maybe taken from real life examples) which may not necessarily be relevant or decisive. Finally, there is a risk that, in order to make the examples not too “open-ended” and prone to “abuse”, the examples contain caveats that are one-sided in that they fail to mention that there may be other, positive, circumstances that may justify the granting of tax treaty benefits. The comments below on the three draft examples given by the Discussion Draft address these issues.

3 Comments on the Discussion Draft Examples

3.1 Comments on the regional investment platform example

The CFE has the following comments on the regional investment platform example:

- (i) Firstly, it is unclear what the reference in the first sentence of the regional investment platform example to “Fund” being an “institutional investor” implies. The CFE recommends that this reference should be deleted.
- (ii) Secondly, the example states that the Fund is subject to regulation in State T, the State in which it is resident. The CFE has two comments in this regard: (i) as a general rule, it is not the fund itself which is regulated, but rather it is the fund manager, and (ii) there are many funds that have been established under the laws of one jurisdiction and are managed by a manager located in another jurisdiction. In addition, funds may be organized under the laws of, and be a tax resident of, a jurisdiction that has not entered into a tax treaty with the state in which the investment is made. The CFE recommends that the OECD confirms (i) whether the manager of a Fund and/or the Fund itself is

regulated (or in which jurisdiction), and (ii) the fact that the jurisdiction in which the Fund is located did not enter into a tax treaty as referred to above, is irrelevant for the purposes of reaching the conclusion made in this example.

- (iii) Thirdly, the implicit caveat in the last sentence of the description of this example (*“in the absence of other facts or circumstances showing that RCo’s investment is part of an arrangement or relates to another transaction undertaken for a principal purpose of obtaining the benefit of the Convention...”*) is drafted in a one-sided way. Therefore, the CFE recommends that the example also specifically clarifies that there may be other facts and circumstances than those described that have driven the decision to establish the regional investment platform in State R and that may justify the conclusion that it would not be reasonable to deny the benefits of the relevant tax treaty.

3.2 Comments on the securitisation company example

The CFE has the following comments on the securitisation company example:

- (i) Firstly CFE recommends to delete the phrase, *“Investors’ decisions to invest in RCo are not driven by any particular investment made by RCo”* as the presentation of this fact contradicts other facts of this example, in particular the fact that *“ RCo,... was established by a bank which sold to Rco a portfolio of loans owed by debtors located in a number of jurisdictions.”* .One may assume that it is because of this selection of loans that the Investors make the investment. Therefore, CFE fails to see how the Investor’s decision to invest in RCo will **not** be driven by the any “particular investment” made by RCo.
- (ii) Secondly, the same comment made under the regional investment platform example under point (iii) applies in relation to the securitisation company example.

3.3 Comments on the immovable property non-CIV fund example

The CFE has the following comments on the immovable property non-CIV fund example:

- (iii) Firstly, the CFE recommends that it be confirmed that the conclusion reached in the last paragraph would not differ if the Real Estate Fund was not fiscally transparent as indicated.
- (iv) Secondly, the CFE recommends that it be confirmed that the conclusion reached in the last paragraph would not differ if the investors were unable to claim treaty protection in cases whereby they had made the investment directly. See also our comments on the regional investment platform under point (ii).
- (v) Thirdly, the same comment made under the regional investment platform example under point (iii) applies to the immovable property non-CIV fund example.