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ON

TAX CERTAINTY

Prepared by the CFE Fiscal Committee

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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 27 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).

If the reader has any queries please contact Mr. Piergiorgio Valente and Ms. Stella Raventós-Calvo, CFE representatives to the EU Platform for Tax Good Governance or Ms. Mary Dineen, Advisor to the Fiscal Committee of the CFE at mdineen@cfe-eutax.org

1. Introduction

In a time of immense change in the international tax environment, CFE believes that tax certainty must become a priority of policy makers. Whilst CFE appreciates the importance of measures to tackle aggressive tax avoidance schemes and base erosion and profit shifting (BEPS), it believes that the balance of legislation must be redressed to promote certainty for taxpayers and business and consequently the economic growth.

CFE welcomes the increased focus on tax uncertainty and its harmful consequences. The OECD and European Commission have recently published the following reports on this subject:

- The OECD /IMF Report on Tax Certainty presented to the G20 in March 2017 (The “OECD /IMF Report”)¹
- The European Commission Taxation Paper entitled ‘*Tax Uncertainty: Economic Evidence and Policy Responses*’² (The “Taxation Paper”)³

Whilst CFE welcomes these reports it also urges that tangible action follows.

The importance of tax certainty is best explained through an analysis of the implications of tax uncertainty and conversely, the benefits of tax certainty.

2. Implications of Uncertainty

Tax uncertainty undermines all taxpayers’ freedom and is a global concern and issue for all taxpayers; it results in a lack of confidence of one’s tax obligations meaning taxpayers are not in a position to make informed decisions of the consequence of their investments, business decisions and the risks related to them.

Tax uncertainty jeopardises prospective growth, effectively discouraging investment, innovation and entrepreneurship and the economy as a whole. From the initial investment stage and throughout the commercial process tax uncertainty can undermine the progression and have negative impact on business. For example, businesses face the dilemma of how best to deal with an adverse tax assessment caused by unclear law or unclear interpretation of the law; whilst the business has the right to challenge the assessment, huge uncertainty exists for the taxpayer in the considerable interim period until the challenge is concluded. During this time the company will have to assess whether to declare the tax assessment as a contingency in its accounts, and will be unable to utilise the amount of the assessment for other business purposes, thereby impeding the ability to carry on its business and risking reputational damage should the assessment be public. As highlighted in the Taxation Paper, tax uncertainty particularly impacts SMEs as they do not have the resources to deal with the

¹ [OECD / IMF Report to G20 Ministers on Tax Certainty March 2017](#)

² European Commission Taxation Working Paper 67 of 2017, ‘[Tax Uncertainty: Economic Evidence & Policy Responses](#)’.

³ Taxation Papers are written by the staff of the European Commission’s Directorate-General for Taxation and Customs Union, or by experts working in association with them. Taxation Papers are intended to increase awareness of the work being done by the staff and to seek comments and suggestions for further analyses. These papers often represent preliminary work, circulated to encourage discussion and comment – the views expressed are those of the authors and not of the European Commission.

aforementioned implications of tax uncertainty⁴. Therefore, very often companies are unfairly forced to accept an increasing level of tax injustice by not appealing erroneous tax assessments, especially in those jurisdictions where effective damages would not be paid to restore the taxpayer's position.

3. Benefits of Certainty

The CFE strongly believes that legal certainty in the EU and worldwide will benefit all stakeholders for the following reasons:

- Taxpayers will be more informed of their tax obligations and will incur less compliance costs to fulfil them;
- It will decrease the risk of tax disputes for all stakeholders resulting in:
 - Businesses being able to employ more resources for productive activities;
 - Tax authorities having more resources to fight against real tax fraud instead of having to combat erroneous but understandable misinterpretation of the law
 - Consumers benefitting from more efficient production costs and subsequently less expensive goods and services on the market.

In our view, achieving increased tax certainty should be founded on simple, clear, and coherent rules throughout the EU. This approach is in line with the finding in the Taxation Paper that *“At the domestic level, the key aspects to consider are the simplification of tax rules and tax compliance and the features of process generating the tax law”*⁵. Simple and clear rules leave less margin for ambiguous interpretations and consequently for disputes. In addition, within the EU coordinated Member States' rules prevent mismatches among national legislations.

4. Achieving A Balance Between Tax Certainty and Reforms

An efficient tax system demands a delicate balance between ensuring certainty on the laws and their application but also updating legislation to keep abreast with societal and economic developments. However, if the balance is not reached, frequent and extensive amendments to the law do not allow for the establishment of general practices and will lead to tax uncertainty and undermine the tax system as a whole.

In our view, and in line with the results of the Taxation Paper, the achievement of a desired balance is based on two main pillars:

- Clarity of rules / uniformity of laws;
- No retrospective legislation and limited retroactive tax legislation.

4.1 Clarity of laws

Legislation should set clear general principles, which seek to prevent double interpretations and/or manipulation of the rules by taxpayers/tax administrations. General Anti Avoidance Rules (GAARs)

⁴ *Ibid* at page 3.

⁵ European Commission Taxation Working Paper 67 of 2017, '[Tax Uncertainty: Economic Evidence & Policy Responses](#)' at page 24

cause particular problems in this regard. The introduction of GAARs can lead to much tax uncertainty, particularly when the tax authorities seek to apply them to existing situations. The interaction between GAARs and Specific Anti Avoidance Rules (SAARs) can also lead to confusion and tax uncertainty. Different definitions of concepts in different EU directives also leads to uncertainty for taxpayers and should be avoided.

4.2 Retrospective / retroactive legislation

A slight difference exists between retroactive and retrospective legislation but the distinction is crucial and must be highlighted. Retrospective legislation operates on subject matter taking place prior to the enactment (e.g. penalising conduct that was lawful when it occurred) whereas retroactive legislation operates prospectively to change the law in relation to subject matter which was until that point in time legal.

The CFE completely opposes retrospective legislation and believes retroactive legislation should only be allowed in very limited circumstances and, if used, should allow for sufficient grandfathering periods for the taxpayer to be given time to comply with the new laws. In the UK, for example, the Government has introduced a protocol in the event there is a change in the law outside a normal fiscal event (i.e. a measure not announced at the time of the Budget) and in such circumstances whereby the change takes immediate effect (i.e. from the time of the announcement and before the legislation is enacted). A change that takes effect from a date earlier than the date of announcement will be wholly exceptional. The details of this protocol are fully explained in Appendix B at the end of the first report of the Tax Professionals' Forum⁶.

In other Member States, whilst retrospective legislation is completely illegal, in terms of changes to the law having retroactive effect it is considered good practice to allow what is known as a "grandfathering" period to allow taxpayers who organised their affairs in line with previous law time to adjust their affairs to make them compatible with new law. CFE endorses measures such as early publication and grandfathering periods.

5. Good Practices to Address The Issues on Tax Uncertainty

Given that urgent solutions are required to address the problem of tax uncertainty, the following are some suggestions of best practices that could increase tax certainty.

In the course of identifying proper solutions, reference may be made to the EU Guidelines for a Model Taxpayer Charter and the Model Taxpayer Charter.⁷ The latter constitutes an initiative of 3 international tax professional organisations, CFE, AOTCA and STEP. It was compiled in 2013 and was updated in 2016, to take into account the developments in the meantime. The compilation of the Model followed an extensive survey on the status of taxpayers' protection in 41 jurisdictions. It reflects the views of its authors-organisations on how to ensure taxpayers' position in the system, stimulate their trust, boost compliance and form sustainable tax systems. Amongst others, the Model includes provisions on taxpayers' fundamental right to tax certainty.

⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204925/taxprofessionalforum_061211.pdf

⁷ CFE, AOTCA, STEP, *A Model Taxpayer Charter*, 2016 (second edition), available at: <http://www.cfe-eutax.org/sites/default/files/Model%20Taxpayer%20Charter%2C%20preliminary%20report%2C%20text.pdf>

Building on the results of the survey for the compilation of the Model and drawing inspiration from the principles reflected therein, we hereby suggest the following best practices to enhance certainty in taxation within the Single Market.

5.1 Establishment of high standards for the drafting of tax legislation

Tax laws should be clear and simple. At EU and international level, coordination should be pursued in order to avoid mismatches and loopholes that create opportunities for double interpretations.

The established standards should also provide for best practices within the legislative process. In particular all stakeholders should be given the opportunity to meaningfully engage with legislators prior to the implementation of legislation. Stakeholder consultations prior to the enactment of legislation is a very positive feature of the legislative process in some Member States⁸. It is essential that such consultation is meaningful and comments and recommendations are taken into consideration, otherwise the legitimacy of the process is undermined.

5.2 Consolidation of Taxpayers' Rights

Taxpayers' rights should be clarified and established in binding legal instruments at Member State and EU level⁹. Such instruments may provide an objective point of reference for all stakeholders and increase certainty on the functioning of the tax system. We recommend that such instruments should be effective and applied by tax administrations, taxpayers and the courts.

In this respect, although we welcome the Commission's initiative to issue Guidelines for a Model for a European Taxpayers' Code, we stress that it does not make any reference to the effect to be given to taxpayers' codes.

5.3 Dispute Resolution

The establishment of fair and effective procedures for the resolution of tax disputes is a vital element of every sustainable tax system that ensures tax certainty for taxpayers.

In this regard, we welcome the newly adopted EU Double Tax Dispute Resolution Directive and we urge for its further enhancement.

In respect of enhancement, we propose that:

- I. the scope of the Directive be extended to indirect taxes, cases where double taxation is highly likely to occur as well as to taxes "similar/identical" to the ones explicitly falling under the Directive's scope;
- II. the scope of the Directive be extended to cover cases involving bilateral/multilateral rejection of a double taxation complaint;
- III. issues arising in connection with the interaction between domestic and cross-border proceedings are addressed.

⁸ U.K. Paper entitled '*Making better Law*' includes recommendations on how best to improve the consultation process as part of the legislative process published January 2017

⁹ The necessity for such instruments to be legally binding is greater in civil law jurisdictions than in common law jurisdictions, where soft law is more likely to be adhered to by authorities and therefore effective.

5.4 Advance Certainty – Prevention of Disputes

Advance Pricing Agreements (APAs) are an effective tool for the prevention of tax-related disputes, especially with respect to transfer pricing issues. They provide the taxpayer with advance knowledge of the tax treatment of particular transactions and therefore allow certainty for taxpayers in planning for the future and also prevent the risk of subsequent disputes.

CFE recommends the adoption of an EU directive to clearly outline the framework of APAs and also rulings generally within the EU.

All Member States should be required to establish simple and effective procedures for the conclusion of APAs. Coordination of national procedures would benefit investment by simplifying the rules applicable in the Single Market. In addition, simple and effective procedures should be available for the conclusion of bilateral and multilateral APAs.

5.5 Cooperation at All Levels

Cooperative relations amongst all stakeholders in the field of taxation would increase tax certainty.

In this respect, CFE understands cooperation to be that between:

- Taxpayers and tax administrations; and
- Amongst tax jurisdictions for the establishment of coordinated tax rules at international level.

As regards the former, the potential of cooperative compliance was outlined by the OECD in 2008 in a *'Study Into the Role of Tax Intermediaries'*¹⁰. It was then verified 5 years later in the OECD's Report *'Cooperative Compliance: A Framework'*¹¹ drawing on the experience of 24 countries having introduced cooperative compliance regimes. Most recently, the OECD / IMF Report endorsed cooperative compliance on the basis that *"cooperative compliance programs, could reduce uncertainty for low risk companies, assist tax administrations to better focus their resources and promote a culture of greater trust"*¹².

As regards the latter, common understanding of the fundamental principles of taxation at EU/worldwide level or at least minimum coordination of national rules to prevent loopholes would cut on one of the most important sources of tax uncertainty.

¹⁰ OECD, *Study Into The Role of Tax Intermediaries*, 2008, available at:

<http://www.oecd.org/tax/administration/studyintotheroleoftaxintermediaries.htm>

¹¹ OECD, *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-operative Compliance*, 2013, available at: <http://www.oecd.org/tax/administration/co-operative-compliance.htm>

¹² [OECD / IMF Report to G20 Ministers on Tax Certainty March 2017](#) at page 21