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Opinion Statement FC 6/2013 of the CFE

on country-by-country reporting of tax information by large companies,

in the context of the review of Directive 2011/34/EU on annual financial statements, consolidated financial statements and related reports of certain types of undertakings, COM(2013)207

Prepared by the CFE Fiscal Committee

Submitted to the European institutions

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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 33 professional organisations from 25 European countries (21 EU Member States) with 180,000 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) and member in the European Commission´s Platform for Tax Good Governance[1].

On 16 April 2013, the European Commission proposed an amendment of Directives 78/660/EEC and 83/349/EEC (now Directive 2013/34/EU) with a view to introducing a requirement for certain large companies and groups to disclose certain non-financial and diversity information, COM(2013)207.

Encouraged by the conclusions of the European Council of 22 May 2013 and by statements of the European Commission, a number of MEPs have proposed amendments to the Commission´s proposal, extending this disclosure to tax information on a country-by-country basis. While some MEPs have proposed publication of the overall amount of taxes paid[2], other amendments demand the publication of strategies how to ensure that a fair share of tax is paid in the right place and aggressive tax avoidance is averted[3]; one proposal contains the publication of detailed information on tax arrangements[4].

The CFE will limit its statement to the proposed publication of tax information.

The five main points of CFE are the following, which will be explained in detail below:

- **Fairness has to be in the law**
- **Publication of the amount of tax paid will cause prejudice, not transparency**
- **Publication of detailed tax information by an individual undertaking will create damage to business**
- **Tax authorities need the relevant information**
- **EU and OECD action should go hand in hand**

It is fundamental to keep in mind the disctinction between disclosure to tax authorities and publication of tax information.

1. Fairness has to be in the law

There is no common concept of a „fair share“ [5] of tax to be paid. However, there is the amount legally due determined by legislation and case-law, including its methods of interpretation and

[1] http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/platform/index_en.htm
[2] amendment proposals 47, 176, 178, 186, 203 (the latter referring to all companies).
[3] amendment proposals 65, 66, 99.
[4] amendment proposal 189.
[5] amendment proposals 65, 66.

including rules against abuse and circumvention. If the amount legally due is not perceived as fair, the law has to be changed via the legislative process. This can be done through well-designed subject to tax clauses or anti-avoidance rules. The European Commission has made an effort to achieve this by issuing its Recommendation on Aggressive Tax Planning[6] and its proposal on a revision of the Parent-Subsidiary Directive[7], on which CFE will comment separately.

Irrespective of the merits general anti-avoidance rules (GAAR) may or may not have, we are surprised by amendment proposal 99 which suggests that Member States should introduce GAARs in line with the Commission´s Recommendation. We have strong doubts as to the compatibility of such recital with Article 115 TFEU. The introduction of anti-avoidance rules concerns direct tax law and cannot be undertaken through the ordinary legislative procedure. Such amendment would violate the EU Member States´ legislative rights.

2. Publication of the amount of tax paid will create prejudice, not transparency

The publication of the taxes paid by an undertaking on country by country basis will not provide sufficient information to assess whether an undertaking has paid the amount of taxes legally due, but at most a vague feeling. If the aim of the disclosure is to generate trust[8], this will not be achieved. Therefore, such obligation would not be suitable to achieve its goals.

Without knowing the exact nature of the profits, the business models used and the tax provisions applied, information on the tax paid is more likely to give rise to prejudice, making undertakings vulnerable to reputational damage. Information is a weapon. It should be kept in mind that not all parties seeking to „name and shame“ undertakings are operating for the benefit of society. Rogue businesses or persons acting on behalf of these may intentionally misinterpret data and arouse suspicions to damage competitors. Even well-intentioned persons lacking the information to interpret the data published will draw wrong conclusions, blaming compliant operators while overlooking clever avoiders.

3. Publication of detailed tax information by an individual undertaking will cause damage to business

According to amendment proposal 189, the corporate governance statement in the management report should contain, among other information, the following:

> *(ca) In order to assess the proportionality of tax reduction methods employed by an undertaking, a description of the undertaking's tax planning arrangements should be specified which at least include:*
> *(i) aggressive tax planning arrangements including the general substance of advice received;*
> *(ii) transfer pricing arrangements and whether the transfer prices have been agreed by the revenue authorities in each of the countries concerned;*
> *(iii) permanent establishment decisions and a list of countries where the undertaking trades without having a permanent establishment;*

[6] Recommendation C(2012)8806 of 6 December 2012.
[7] COM(2013)814 of 25 November 2013.
[8] as stated in amendment proposals 47, 81.

(iv) base erosion methods via interest deduction, royalties and other financial payments, including where brands are developed, where they are paid for by subsidiaries and whether they are owned by the parent company in their main operating base or if not, where domiciled for tax purposes;

(v) where research and development takes place and how this is recovered from subsidiaries.

This would force an undertaking to publish highly sensitive information on its value chain. These are business secrets whose publication will be harmful for the undertaking and will be a massive disincentive to innovation.

Such move by the EU legislator would be even more surprising, as the European Commission has just presented a legislative proposal[9] providing for better protection of know-how and business information.

The obligation to disclose detailed tax information would go far beyond what is necessary to ensure that the amount of tax legally due is paid and would therefore be disproportionate, including a risk of damaging/negatively affecting the competitiveness of EU undertakings vis-à-vis third countries.

Moreover, it is unclear in what cases tax planning structures are deemed to be aggressive and what „the general substance of advice received" means.

4. Tax authorities need the relevant information

Whether the amount of tax legally due has been paid can and shall be assessed by tax authorities, which must be in the possession of all relevant data. If necessary, this may require imposing obligations on taxpayers to report additional information. It should be noted that many Member States already have statutory requirements for information sharing with tax authorities. Thanks to the Directive 2011/16/EU on Administrative Cooperation in Taxation, tax authorities can request and exchange relevant data. The OECD is currently working on a format for automatic exchange of information at G20 level[10], trying to extend this concept further to the steadily growing number of (currently 63) signatories to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters[11].

Also the OECD BEPS (base erosion and profit shifting) Action Plan (Actions 11-13) refers to disclosure of certain information to tax authorities, not publication.

Unlike public opinion, tax authorities are obliged to respect the confidentiality of information and to treat taxpayers equally and, unlike public opinion, the tax authorities have the legal tools to enforce tax laws. This is why information on tax payments shall –only- have to be reported to tax authorities.

5. EU and OECD action should go hand in hand

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[9] COM(2013) 813 final of 28 November 2013.

[10] http://www.oecd.org/tax/exchange-of-tax-information/oecd-calls-on-g20-finance-ministers-to-support-next-steps-in-clampdown-on-tax-avoidance.htm

[11] http://www.oecd.org/ctp/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm

The OECD is currently preparing a standardised country-by-country reporting template for multinational companies[12]. A public consultation on this took place on 12/13 November 2013. According to the BEPS Action Plan[13], Action 13, the OECD plans to finish its work on this subject by September 2014.

Most multinational undertakings operate not only within the EU but also in other OECD countries. A common reporting template would significantly facilitate compliance for them, as only one set of relevant country-by-country data would have to be levied. The work of the EU and OECD should be guided by this consideration, not by the prestige of being the first to adopt a reporting framework. Any EU approach will have a greater chance of being accepted at international level if it is aligned with the OECD activities.

We understand the conclusion from the European Council of 22 May 2013[14] to examine the current Directive proposal with a view to ensuring country-by-country reporting of tax information.

We believe that country-by-country reporting of tax information should be considered once a common EU/OECD template is agreed upon. This is why we favour the proposed amendment 40 by the rapporteur MEP Raffaele Baldassarre to include this task in the review clause in Art.48 of the Directive.

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[12] As rightfully mentioned in amendment proposal 82 by Mr MEP Sajjad Karim; Memorandum of 3 October 2013: http://www.oecd.org/ctp/transfer-pricing/memorandum-transfer-pricing-documentation-and-country-by-country-reporting.pdf .
[13] Published on 19 July 2013, http://www.oecd.org/ctp/BEPSActionPlan.pdf
[14] See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/137197.pdf, point 10 (i).