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Opinion Statement of the CFE

on the proposed Directive

on the fight against fraud to the EU's financial interests

by means of criminal law

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Prepared by the CFE Fiscal Committee

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CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 24 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.
CFE is registered in the EU Transparency Register (no. 3543183647-05).

On 11 July 2012, the European Commission has proposed a Directive on the fight against fraud to the European Union's financial interests by means of criminal law (COM(2012)363 final). In its Explanatory Memorandum, the Commission sets out that for crimes affecting the EU budget, the level of protection and deterrence differs between Member States due to diverging definitions and sanctions in national criminal laws. Apart from fraud, this relates to offences like corruption, money laundering and obstruction of public procurement procedures. The proposed Directive seeks to establish an effective protection and a uniform level of deterrence by providing definitions and minimum sanctions for fraud and other offences that may have repercussions on the EU budget. As a part of the VAT raised by Member States flows into the EU´s own resources, the Directive would affect criminal offences related to VAT.

1 The CFE understands the Commission's concerns about ensuring that the taxes that fund it are collected. However, in so far as it relates to the collection of taxes, the CFE has considerable concerns about the proposed draft Directive on the fight against fraud. In particular the Explanatory Memorandum does not suggest that any consideration has been given to the important contributions that civil penalties and settlement agreements can make in effectively penalising taxpayers for fraud and ensuring that taxes are recovered in a cost effective manner. The CFE observes that:

(i) civil penalties and settlement agreements can prove to be a relatively expeditious, cheap and cost effective ways of penalising defaulting taxpayers. In particular, a compound settlement may enable significant monetary penalties to be imposed without the costs of protracted litigation;

(ii) it may also be much easier for tax authorities to impose civil penalties than criminal penalties. For example, in the United Kingdom the authorities can either seek civil penalties or they can alternatively launch a criminal prosecution in the criminal courts. Unlike criminal penalties, the civil penalties can be imposed by agreement. If the taxpayer decides to contest the imposition of civil penalties, the detailed rules of criminal evidence do not apply. Civil penalties can also be imposed if HM Revenue & Customs proves its case on the "balance of probabilities", as opposed to the much more onerous "proof beyond reasonable doubt", which applies to proceedings in the criminal courts. These differences, together with the absence of a jury trial, make the civil penalties regime relatively cheap. The differences in the rules may also make it much easier for HM Revenue & Customs to impose a civil penalty than a criminal penalty. However, especially in more serious cases, it always remains open to HM Revenue & Customs to institute criminal proceedings, so the deterrent effect of such proceedings is retained.

The Explanatory Memorandum indicates that the Commission consulted with criminal academics and the Taxpayers' Association of Europe. However, it is not clear that any attempt has been made to specifically consult with tax professionals or the bodies that represent them, including the CFE, or for that matter the tax administrations of Member States. The CFE is therefore concerned that the valuable contributions that settlement agreements and the ability to impose civil penalties can make to the cost effective collection of taxes and penalisation of taxpayers has been overlooked.

2 In so far as they relate to tax frauds, the Commission's proposals in the CFE's view do not accord with the principles of subsidiarity and proportionality. It is possible that different considerations may apply to other frauds and this Statement is just directed at tax frauds. For the reasons outlined below, this in particular applies to the proposals for minimum penalties. We entirely accept that Member States have diverging rules. However, this is an inevitable consequence of the principle of subsidiarity. While it is clearly appropriate that frauds relating to taxes that fund the European Union should be penalised in the same manner as other tax frauds, it is more difficult to see any justification for them being penalised in a more draconian manner or for that matter in a less harsh manner, which may presumably equally be a consequence of the Directive. In this regard we consider that it is important to emphasise that the Member States all have an incentive in ensuring that the optimum amount of VAT is collected. With the possible exception of problems caused by time limits and conceivably a need for rules governing maximum penalties if these are patently too small in some Member States, the Explanatory Memorandum also does not set out any reasons for believing that they are failing to do this diligently. For example at least some Member States have found that "amnesties" under which a taxpayer pays tax due plus an agreed monetary penalty may be a particularly effective way of collecting tax from defaulters and penalising them. Such amnesties would be inconsistent with the proposed Directive. For this reason and the reasons outlined below, we are concerned that the proposed Directive may well hinder the effective penalising of defaults. Especially since the same bodies will presumably remain responsible for seeking penalties, we also do not consider that it is very likely that the proposed Directive will make any significant difference to the levels of compliance.

3 In so far as the proposed Directive is intended to harmonise the laws of Member States, the CFE also considers that problems are likely to arise in harmonising the criminal law because concepts such as "intent", "attempt" and "inciting, aiding and abetting" are likely to have different meanings under each Member State's national laws.

4 The CFE considers that it is entirely appropriate that sentences of imprisonment should be available as a maximum penalty in cases of serious tax fraud. Indeed the draft Directive may be open to objection that it will in some States reduce the maximum penalties that can be imposed so that frauds relating to the European Union are penalised less severely than other tax frauds. However, the CFE has significant reservations about the proposals for minimum penalties. It considers that the proposals for minimum penalties are open to objection on the following grounds:

(i) by their very nature having minimum penalties may result in disproportionate penalties being imposed because it prevents full account being taken of the circumstances of the given case. In this regard it is to be observed that it is not entirely clear what is meant by "an advantage or damage" of at least € 100,000 or € 30,000 in article 8 of the draft

Directive. For example in some cases a taxpayer may dishonestly, because of temporary cash flow problems, seek to delay paying tax. It is not entirely clear if the € 100,000 and € 30,000 thresholds will automatically be breached in such cases where the payments delayed exceed € 100,000 and € 30,000. If such cases are intended to be covered, there is clearly a radical difference between them and seeking to permanently avoid paying tax all together. It is in this regard interesting to observe that the United Kingdom has on occasions introduced minimum civil penalties. These have on occasions been successfully challenged on the basis that the penalties are disproportionate and therefore contrary to EU law and the European Convention on Human Rights. The Courts have also applied strained constructions in order to prevent what they consider to be unreasonable results;

(ii) the minimum sentence by itself will not result in a consistent penalty if different Member States are allowed to have different rules for parole, so that the length of time spent by prisoners in different member states varies for that reason;

(iii) the imposition of disproportionate penalties may make a Court less likely to convict. This may be particularly true in a common law jurisdiction such as the United Kingdom that has jury trials, where the issue of guilt or innocence in criminal proceedings is determined by 12 members of the public acting as a jury on guidance from a judge. It is also important to observe that a criminal penalty of imprisonment can only be imposed in the United Kingdom by a criminal court. Unlike the Tax Tribunals which can impose tax penalties, a criminal conviction can only be satisfied by proof "beyond reasonable doubt" while the Tax Tribunal acts on the lower "balance of probabilities". All the procedural and evidential safeguards relating to criminal proceedings apply to criminal proceedings but not all of them apply to penalty proceedings in the Tax Tribunal;

(iv) minimum penalties will not by themselves act as much of a deterrent in practice if the enforcement agencies take no steps to find suspects and then to prosecute them. Prosecuting agencies may be discouraged from prosecuting suspects if the imposition of disproportionate criminal penalties is likely to result in an acquittal. Particularly in cases where there are evidential difficulties, the costs of a prosecution may also discourage prosecuting authorities from taking any action. If the consequences of the Directive are to significantly increase the costs that Member States are required to incur in order to enforce the law, both because of the increased costs in securing a prosecution and because of the subsequent costs of imprisonment, these costs may in themselves discourage Member States from taking any enforcement action. This is particularly true if the primary beneficiary of any enforcement action is the European Union rather than the Member State in question. Since the policy will prevent quick settlements, there may also be issues as to whether the prosecuting authorities have the personnel needed to prosecute all offenders. This may be another reason why the Directive is counterproductive because the increased burdens that it places on prosecuting authorities, who can no longer reach quick settlements, means that the authorities do not have the resources to implement it properly;

(v) having a minimum penalty makes it very unlikely that anyone will admit to having committed an offence, when it is possible that they may make an admission if the

consequence of doing so is a reduced monetary penalty, for example as a result of a fiscal amnesty offered to taxpayers as an incentive to admit offences;

(vi) having a minimum penalty of imprisonment is likely to significantly increase the costs of taking proceedings since:

(a) it is less likely that taxpayers will admit to having committed an offence if there is a mandatory penalty of imprisonment;

(b) under the current systems in some member states an agreed monetary penalty may be paid without the need to institute any proceedings. However, a sentence of imprisonment requires a hearing;

(c) prosecutions in a criminal court are much more expensive than concluding a negotiated settlement with a taxpayer under which he agrees to pay any tax due together with a monetary penalty or alternatively conducting proceedings in specialist tax tribunals, where the burden of proof may be lower and the procedural safeguards less significant: note in this regard the comments about the Tax Tribunals in the United Kingdom at paragraph (iii) above. The minimum penalty of imprisonment will also reduce any incentives on taxpayers to cooperate with the prosecuting authorities which in turn will increase costs;

(d) if a prosecution is successful, the state will have to pay the costs of imprisonment, which are not insignificant.

For all these reasons the CFE has serious concerns that the proposed minimum penalties may not only result in disproportionate penalties but may also be counterproductive.

5 The CFE also has concerns with article 12 of the proposed Directive, and the way in which the proposed time limits can be interrupted and extended, is inconsistent with legal certainty. It considers that a longer fixed period may be preferable.

6 For the reasons outlined above the CFE has considerable reservations about the proposals. However, the CFE can see one issue where there is a case for harmonisation. This would be a removal of criminal penalties for conduct that results in no loss of VAT. For example the Italian tax authorities impose penalties on suppliers who wrongly classify transactions as a transfer of part of an undertaking. However, any error may not result in any loss of VAT because the purchaser would be entitled to recover any VAT charged as input tax had it been charged. The CFE considers that it is wrong for criminal penalties to be imposed on such circumstances.