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Opinion Statement of the CFE

on the proposal for a 4th Anti Money Laundering Directive

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Prepared by the CFE Professional Affairs Committee

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CONFEDERATION FISCALE EUROPEENNE

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.
CFE is registered in the EU Transparency Register (no. 3543183647-05).

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1. The CFE fully supports the fight against corruption and money laundering and feels that the Anti Money Laundering (AML) Directives have raised the awareness of the issue of money laundering substantially. Therefore the CFE endorses the principles of the proposal for a 4th AML Directive, but would like to make the following comments.

Responsibility of the state

2. As a general rule, the fight against crime is a responsibility of the state. In specific cases, like foreseen in the AML Directive, certain responsibilities may be imposed on private individuals and companies (obliged entities). This should however not release the state and its entities from their responsibilities.
   We see a risk that the inclusion of state entities in the list of obliged entities would substantially increase administrative effort for citizens and enterprises in sectors not yet affected by AML obligations. We also acknowledge that the measures which state entities are expected to take to fight money laundering may differ from the duties of the obliged entities. Nevertheless, in many instances, a reporting obligation of state entities of indications of money laundering would increase the chances of detection. Where the state detects suspicious transactions, it should be obliged to report. CFE suggests adding a paragraph (3) in Art. 32 stating that
   "The obligation referred to in paragraph 1, lit.(a) and (b), shall also apply to state entities, in particular state entities involved in the transfer of real estate and tax authorities."

Risk-based approach

3. The CFE fully supports the risk-based approach but is worried about the proportionality of AML rules, given that most tax advisers are small practitioners. We also notice that Member States tend to gold-plate the rules. This is partially because the FATF expects in its country reviews, somewhat contradictory, that the risk based approach is laid down in specific rules.

4. We support the requirement in Art. 7 for Member States to assess their own money laundering risk and to make this assessment available for obliged entities. These risk assessments should be updated on a timely basis, otherwise they risk losing their efficiency.

5. Art. 8 (2) requires that the obliged entities´ own risk assessments be made available to the competent authorities and self-regulatory bodies. According to our understanding, this would mean that, in the interest of reduction of administrative effort for all parties involved, the risk

assessments must only be made available on request of the authorities or self-regulatory bodies. We would very much welcome such clarification in Art. 8 (2).

Customer Due Diligence (CDD)

6. We clearly see a need for CDD but would like to warn against exaggerated expectations and stress that all CDD requirements for obliged entities must remain proportionate to the obliged entities´ capacity and resources to carry out CDD. Identification and verification of clients cause the bulk of the administrative burden for the obliged entities but in the tax advisers´ practice, it is not through these processes that indications for money laundering are identified but through the insight in the past transactions of the clients.
   Therefore, based on our experience, it is fair to say that if there was only a reporting obligation and no verification obligation except in high risk situations, probably the amount and quality of the reports would remain the same.

7. We understand that the reasoning behind the amendment of the provisions on CDD was that national implementations of the current Directive have been criticised by the FATF for being too prescriptive. The CFE is enthusiastic about the flexibility which the Draft gives especially in simplified CDD, but fears that without clearer recitals supporting and explaining this, national laws will not be changed accordingly and competent authorities and professional bodies will continue to apply the criteria in the Annexes as prescriptive rules rather than as a guidance for responsible assessment in the individual case, fearing that FATF would consider more flexibility as a step back.
8. Without questioning the new risk-sensitive approach, we see room for further simplification if areas could be identified in Annex II where simplified CDD will in any case be accepted. In our view, this applies to
   - listed companies (Annex II, paragraph 1, lit. a),
   - public administrations and enterprises (Annex II, paragraph 1, lit. b), and
   - entities subject to the regulation of financial services.

9. Concerning Art. 15 dealing with specific simplified CDD guidelines, it appears reasonable that the European Supervisory Authorities provide guidance only for financial institutions, leaving specific guidance for tax advisers and other professions to their respective professional bodies many of which have due diligence guidelines already in place and who have the necessary experience to take into account the specificities of the professional tasks and the perspective of small practices.

10. Concerning Art. 12 (4), CFE supports the exemption of tax advisers and certain other professions from the prohibition to continue acting for the client and the duty to consider a report to the FIU (Financial Intelligence Unit), in circumstances where professional privilege applies. As we will set out more in detail in paragraphs 20-24, this exemption is necessary to guarantee the client´s fundamental right to effective legal defence and a fair trial. It should be considered extending this exemption on *administrative* proceedings.

Beneficial ownership information

11. The proposal demands that the beneficial owner is identified and that reasonable measures are taken to verify his identity (Art. 11 (1) lit.a). Without cooperation of the customer, this can hardly be achieved. Therefore, we welcome that Art. 29 obliges Member States to ensure that corporate or legal entities established in their territory hold, update and make available this information to obliged entities.

12. The Commission is aware that there may still be cases where the customer will not be able to obtain information on the beneficial owner, namely where the customer or the beneficial owner resides outside the EU in a country which is not transparent. EU law cannot oblige third countries to give local management the power to obtain beneficial ownership information. We believe however that the AML Directive should work towards the availability of beneficial ownership information also in non-EU countries, an aim that should also be pursued by the European Union, the Member States and the FATF. We therefore suggest to extend the obligation to hold, update and make available beneficial ownership information to the customers of obliged entities (whether established in the EU or not). A possible wording of Art. 29 (1) could be:

    "*Member States shall ensure that corporate or legal entities established within their territory* ***and corporate or legal entities which are customers of obliged entities*** *obtain and hold adequate, accurate and current information on their beneficial ownership.*"

13. The CFE would not support the idea of obliging Member States and companies to make such information available in public registers. Firstly, it is questionable whether such business information must be publically available. The main issue however is that registers can hardly provide up-to-date information and would not relieve the obliged entity from verifying the information, because the CDD duties rest with the obliged entity. Rather than help substantially in the identification of beneficial owners, public registers would create costs for the taxpayer.

14. Neither should obliged entities be required to consult business registers run by private operators; this would produce costs for the obliged entity and cannot provide certainty on the beneficial owner either. The most reliable and up-to-date source of the information is the customer himself.

Politically exposed persons (PEPs)

15. From a systematic viewpoint, we would like to point out that Art. 18 and 19 are drafted in an incomplete and confusing manner:
    Firstly, the obligation to have appropriate risk-based procedures in place to determine whether a customer or its beneficial owner is a PEP (Art. 18 lit.a and 19 lit.a of the proposal) would logically have to be included in Art.11, as it already applies before the PEP status is established.

16. More importantly, the first half sentences of Art. 18 and of Art. 19 only include the case that the customer himself, but not the case that its beneficial owner is a PEP. This possibility should be

added in Art.18 and 19.

17. Checking whether the client or the beneficial owner is a politically exposed person (PEP) can in practice be difficult or even impossible for an obliged entity. For EU situations, the CFE would welcome an obligation of companies established in the EU to hold information regarding the PEP status of their beneficial owners and representatives and to make this information available to obliged entities, like Art. 29 of the proposal provides for beneficial owners.

18. In many non-EU countries, language or cultural barriers or a lack of press coverage prevents information on PEPs from being readily available. Where the source of the wealth of a beneficial owner and the source of funds that are involved in the transaction should be established, even in the home country of a tax adviser this can be very difficult; in countries lacking an established and stable democratic tradition, it may be impossible to judge whether the source of a client´s or beneficial owner´s wealth should be considered acceptable or not.

19. For this reason, the measures which Member States expect the obliged entities to undertake to find out about the PEP status of a non-EU client or beneficial owner and to establish the source of their wealth and funds involved must remain proportionate to the capacities of the obliged entity and the availability of the information. This should explicitly be stated in Art. 18.

Reporting obligation and exemptions

20. CFE welcomes that Art. 33 (2) aims for a uniform exemption from the reporting obligation throughout the EU.

    Firstly, as the European Court of Human Rights[1] has recently emphasised, the fundamental rights to privacy (Art. 8 ECHR) and to a fair trial (Art. 6 ECHR) include the possibility to ask for professional legal assistance, which would be undermined if these professionals were obliged to report to the state information they obtain in the course of giving this advice or representing the client. We believe that a fundamental human right can only be applied in a uniform way across the EU and there cannot be an option for Member States whether to grant it or not.

21. We also welcome that this fundamental right shall apply irrespectively of whether the advice or representation is provided by a lawyer or a tax adviser (to the extent that tax advisers are, by national laws, entitled to provide these services). For the client´s protection, it is essential that the activities of giving advice and representation are protected irrespectively of whether the professional who provides them is a lawyer or another qualified professional, as clarified in Recital 8 of the proposal. This right shall serve the client and not a particular profession.

22. We would like to add that already today, the majority of Member States grant the exemption from the reporting obligation also for tax advisers in the abovementioned situations: Of 19 EU Member

[1] Judgment of 6 December 2012 in case Michaud v. France, application no. 12323/11, para 117-119; (link).

States surveyed[2], the exemption exists in 13 countries[3] while 6 Member States do not provide for such exemption[4].

23. For a taxpayer involved in improper tax dealings, seeking help from a tax adviser to regularise his affairs is the first step into legality which he should be encouraged to take. Tax advisers in all Member States are obliged only to give advice that complies with the law. Some Member States have stricter professional duties. The benefit of the exemption applies in particular in Member States which have tax amnesty regimes for voluntary disclosure of tax evasion: Our Irish member organisation has reported that their revenue authorities have a very favourable view of a generous application of the reporting exemption.

24. We would like to point out, however, that the case of "*defending or representing* [the] *client in, or concerning, judicial proceedings*" in Art. 33 (2) has been worded in a way that may exclude legal privilege if a case is pursued by the administration rather than by a court. In a number of countries, tax authorities decide in the individual case whether a case shall be pursued by judicial or administrative procedures. This does not change the client´s need for effective legal protection. Consequently, the Interpretative Note to FATF Recommendation 23[5] expressly states that this protection normally covers also administrative proceedings. We do not see why the EU should defer from the agreed FATF standards, to the detriment of the taxpayer´s procedural rights and therefore would welcome such an addition to Art. 33 (2).

Prohibition of disclosure

25. Art. 38 prevents obliged entities from disclosing to the customer or any third persons the fact that indications for money laundering have been reported. Paragraph 4 clarifies that this does not hinder disclosure within the same network of professionals. We welcome that this clarification has been maintained but feel that the proposed definition of network might exclude most international tax firms. Indeed, such firms are not generally subject to common ownership, management or compliance control.

Record-keeping

26. Art. 40 of the proposal would oblige tax advisers and other professionals to respond "fully" to the FIUs or authorities whether they maintain or have maintained during the previous five years a business relationship with specified natural or legal persons and on the nature of that relationship. To date, this only applies to credit and financial institutions.

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[2] CFE European Professional Affairs Handbook for Tax Advisers, 2nd edition 2013, pp.32 f. From 9 Member States, no data could be obtained.

[3] Austria, Belgium, Croatia, Czech Republic, France, Germany, Ireland, Malta, Netherlands, Poland, Portugal, Spain, United Kingdom.

[4] Finland, Greece, Italy, Latvia, Romania, Slovakia.

[5] FATF Recommendations of Februrary 2012 (link), see page 82.

27. Such extension would contravene the principle confirmed by the European Court of Human Rights´s *Michaud* judgment (see footnote 1) and expressed in Art. 33 (2) of the proposal that the rights to privacy and to a fair trial include the principle that communication between a legal counsel or representative in judicial proceedings and his client is protected from the state. This includes the information that a certain person has obtained legal advice from the professional in a certain matter. Consequently, national laws and professional rules oblige tax advisers not to disclose to the state or any other person the identity of their clients or the reasons for the engagement. In many countries, such disclosure would be a criminal offence.

28. Therefore, to protect the client´s right to a fair trial, a clause should be added clarifying that Art. 40 should not apply to the professions listed in Art.2 (3) lit. a) and b).

Ownership and control of certain obliged entities

29. Art. 44 (3) contains a new obligation of Member States to *"ensure that competent authorities take the necessary measures to prevent criminals or their associates from holding or being the beneficial owner of a significant or controlling interest, or holding a management function in* [the] *obliged entities* [listed in Art.2 No.1 (3) lit. a, b, d and e]*."*, in other words, that they become, own or control any of the professionals charged with AML duties.

30. We see Art. 44 (3) as an example of gold-plating by the European Commission which would unnecessarily create administrative structures in Member States where the tax profession is not regulated by the state but by professional bodies with voluntary membership[6]: FATF Recommendation 28 (b) which has been the basis of Art. 44 (3) does not require the creation of "competent authorities", in other words, state administration, but expressly states that supervision may be carried out by self-regulatory bodies for their members. Therefore, if included at all, Art. 44 (3) should be worded "[…] *competent authorities* ***or self-regulatory bodies*** […]".

31. Given the vague wording of Art. 44 (3), we see the risk that Member States will introduce most diverging forms of control, creating obstacles to cross-border investments in our sector.
We would like to point out that a number of Member States[7] regulate ownership and/or control of tax firms to prevent any influence on the professional activity that would go against the interest of the client or the proper administration of the (tax) law. The European Commission has repeatedly called for the abolition of such ownership and control requirements[8], criticising not only their existence but also the diversity of such rules. It is surprising that the same Directorate-General,

[6] These are, at least, Finland, Ireland, Italy, Latvia, Malta, the Netherlands, Spain and the United Kingdom ; source: CFE European Professional Affairs Handbook for Tax Advisers, 2013.
[7] These are, at least, Austria, Belgium, Croatia, France, Germany, Greece, Luxembourg, Poland, Portugal, Romania and Slovakia; source: CFE European Professional Affairs Handbook for Tax Advisers, 2013.
[8] As e.g. in the "Communication […] on the implementation of the Services Directive. A partnership for new growth in services 2012-2015", COM(2012)26 of 8 June 2012.

Internal Market and Services, proposes the introduction of new controls, even if having a different policy objective in mind.

Sanctions

32. CFE recognises that when imposing obligations, there is a need to provide for sanctions as an effective deterrent. We fully agree with Art 55 (2) of the proposal which states, in line with FATF Recommendation 35, that sanctions must be effective, dissuasive and proportionate.

33. Going even further, Art.56 (2) contains a catalogue of sanctions which competent authorities should be able to impose on obliged entities. We are very concerned about the proportionate application of these sanctions, especially on small firms, as Art.56 contains no limitation whatsoever. We are of the opinion that some very severe sanctions, like e.g. the withdrawal of a professional authorisation (Art.56 (2) lit.c), should only be imposed in cases of serious or repeated breaches of professional duties.

34. We would therefore suggest that Art.56 (1) 1st sentence be worded: "*This Article shall at least apply to situations where obliged entities demonstrate **serious and** systematic failings in relation to the requirements of the following Articles: […]*"
    Art.56 (2) lit.c should be worded "*in case of an obliged entity subject to an authorisation **and in case of repeated and serious failings**, withdrawal of the authorisation;*".

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