CONFEDERATION FISCALE EUROPEENNE

Second Opinion Statement of the CFE (PAC 1/2014)

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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This Opinion Statement is a follow-up to our Opinion Statement of April 2013 on the European Commission´s proposal[1], relating specifically to the European Parliament´s ECON/LIBE Committee amendment proposals. The CFE fully supports the fight against corruption and money laundering and therefore endorses the principles of the proposal for a 4th AML Directive, and in light of that would like to make the following comments.

The AML Directive as a tool to fight aggressive tax practices? (amendments 112, 113, 115, 161, 236, 334, 414)

The CFE observes that some amendments aim at making the AML Directive an instrument against tax structures that are legal and within the boundaries of the tax law but considered by tax authorities as aggressive.

The CFE is of the opinion that by definition money laundering can only occur with the proceeds of serious crimes. Aggressive tax planning or tax avoidance is by definition legal and should not be covered by this directive. By the same reasoning we have no objection to labelling tax evasion as a serious crime. By definition this means evading a legitimate tax liability by illegal means.

Technically, we fail to see how a clear and workable definition of a concept as vague and changeable as 'aggressiveness' could be drafted. Given the rightfully severe penalties provided for non-compliance with the AML Directive´s due diligence, reporting and record-keeping duties (Art. 56), we have serious concerns that seeking to establish an extension of the Directive to aggressive tax planning would not only violate the recognised principle „nulla poene sine lege (certa)" (no punishment without a (clear) law), enshrined in Art.49 of the EU Charter of Fundamental Rights (Art.7 of the European Charter of Human Rights), but also seek to achieve a change to tax law without proper scrutiny or debate. Moreover the inclusion of such a vague requirement would seriously weaken the whole intent and operation of the AML system.

The CFE therefore believes that amendments 112, 161, 236, 334 and 414 should not be adopted.

We do not see a legal basis for including in the AML Directive a statement that member states should adopt General Anti Avoidance Rules (GAAR). Unlike the AML Directive, the introduction of GAAR would

[1] http://www.cfe-eutax.org/node/3132

be tax legislation which cannot be adopted in the ordinary legislative procedure but requires unanimity in the EU Council.

For this reason, amendment 115 should not be adopted.

We note that amendment 113 contains a statement supporting public disclosure of certain financial information by large companies. This is dealt with by the "Accounting Directive" 2013/34/EU which is currently under review[2]. As the legislative procedure in that dossier is still ongoing, there is an imminent risk of incoherence of EU legislation should the AML Directive contain a statement contradicting what might, in the end, be stated in the Accounting Directive.

To prevent the adoption of contradictory legislation, amendment 113 should not be adopted.

Presumption of innocence and data protection (amendments 22 and 34, 77, 84)

The CFE strongly supports the inclusion of the presumption of innocence in Recital 46 by the two rapporteurs. We are also pleased to note that due account has been taken of data protection concerns ***and therefore support amendments 22, 34, 77 and 84.***

Risk-based approach (amendment 43)

As has been set out more in detail in our first Opinion Statement on the AML proposal, the CFE fully supports the risk-based approach but is worried about the proportionality of AML rules, given that a large amount of tax advisers are small practitioners.

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 reducing 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) ***and therefore support amendment 43.***

Simplified Customer Due Diligence (CDD) (amendments 330 and 331)

These amendments suggest that obliged entities should identify and verify the customer and the beneficial owner (according to Art.11 (1) a) and b)) before determining whether simplified CDD may be applied (Art.13). This would in practice amount to the abolition of the concept of simplified CDD.

Therefore, we do not support amendments 330 and 331.

Proportionality of CDD measures (amendments 46, 47, 52)

[2] EP reference 2013/0110(COD), see also CFE Opinion Statement FC 6/2013 on country-by-country reporting of tax information by large companies of December 2013.

Whilst welcoming the flexibility which the Commission´s proposal gives especially in simplified CDD, we stress that CDD requirements must remain proportionate to the capacity and resources of the entity required to comply.

The fight against crime is a fundamental responsibility of the state. Shifting part of this responsibility to private individuals and companies must remain proportionate. It follows from this that an individual or company cannot be expected to guarantee obtaining specific information, and can only be obliged to exert reasonable efforts when taking "*all necessary measures to understand the ownership and control structure of the customer*" (amendment 46, to Art.11 (1) b)). The same concern applies for amendment 52 to Art.16 (2).

Another example of disproportionate involvement is amendment 47 to Art.11 (1) d), which would force obliged entities to monitor, in all cases, the source of clients´ funds, even in normal due diligence, even where there is no indication for money laundering.

We urge the European Parliament to maintain the reasonableness and necessity criteria and not to adopt amendments 46, 47 and 52.

Definition of beneficial owner and public registers containing beneficial ownership information (amendments 6, 7, 46, 60, 62 – 64, 117-123, 125-126, 143, 311, 211, 213-215, 219-221, 358 – 377, 380, 382, 386-389, 391-394)

The introduction of public registers containing beneficial ownership information (in Art.29), as proposed in various amendments, does not seem workable:

Firstly, the proposal does not address the issue that management may not have the legal means to find out who the company´s ultimate beneficial owner (UBO) is, if the UBO´s residence is outside the EU. Therefore these amendments propose an obligation to comply with neither these companies nor the public registers have any legal ability or wherewithal.

If public registers are demanded, they could only be helpful in practice if obliged entities would be allowed to rely on them; otherwise, consulting the registers would merely create an additional administrative burden. It seems however that neither the Commission nor any MEP proposes this.

It must be considered that the publication of ownership information interferes with a person´s right to privacy. Publication of shareholders´ names will inevitably make the information of a person´s holdings available to criminals and can constitute a danger to that person, his/her relatives or belongings.

Lastly, it should not be forgotten that public registers create costs and bind resources of administrations (many of which face severe budget restrains), to the detriment of the taxpayer.

Therefore, the CFE does not support public beneficial ownership registers.

Instead of public registers, the CFE has proposed an obligation for the entities to make up to date information regarding their shareholders and UBO's available to the obliged entities, see our first Opinion Statement, points 11-12.

As to the definition of "beneficial owner" (Art.3 (5) of the Commission proposal), the presumption proposed by the Commission that direct or indirect shareholding of 25%+1 should give evidence of ownership or control is flawed. Direct shareholding, even above a threshold of 25%+1, gives no indication as to ownership of control where an indirect shareholder exists; see the word "ultimately" in the first sentence of Art.3 (5). ***We therefore support amendment 211, suggesting deletion of this criterion.***

Even if the presumption was maintained that a particular percentage of (direct or indirect) shareholding would imply ultimate ownership or control, this can hardly apply to shareholdings of not more than 25%. Such low levels of shareholding generally do not grant rights or influence that can be considered ownership or control; exceptional cases are already covered by Art.3 (5) (a) (ii). Some proposals aim at setting the threshold even lower (amendments 213-215, 220-221). This would not only result in more administrative costs for all customers and obliged entities and expose more persons to the risks of publication of their assets; it would also distract from the relevant information, thus hindering effective AML.

As to the inclusion of management in the list of beneficial owners (amendment 219), it is already common practice in due diligence to look at the management of a company, an essential part of a company´s visible persona, which is a company´s visible side. The reason for knowing the UBO is to find out if someone may be pulling the strings "behind the curtain".

Therefore, the CFE does not support the amendments 213-215 and 219-221.

Politically exposed persons (amendments 225-227)

The PEP definition should not include commercially high-ranking persons. The reason for distinction between PEPs and any other persons is that political, state administration, military or judicial persons are vested with sovereign powers and/or can decide on public spending, a power that other persons, even if commercially high-ranking, do not have. The particular risk of bribery and misappropriation of public funds only lies with the former group. Identifying a Politically Exposes Person as a UBO or client is a warning that there may be a case of abuse of power. This does not apply to commercially high ranking persons. ***Therefore, we do not support amendments 225 and 226.***

Reporting obligation and exemptions

The CFE welcomes that Art. 33 (2) aims at a uniform exemption from the reporting obligation throughout the EU. The possibility to ask for professional legal assistance is part of the fundamental rights to privacy (Art. 8 ECHR) and to a fair trial (Art. 6 ECHR). This 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 can be no option for Member States whether to grant it or not. We

greatly appreciate that none of the proposed amendments aim at doing away with this exemption, which is also contained in the FATF Recommendations.

Definition of network (amendment 73)

Art. 38 prevents obliged entities from disclosing to the customer or any third persons the fact that suspicions of 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 definition of network proposed by the European Commission might exclude most international tax firms, as these are not generally subject to common ownership, management or compliance control.
Therefore, we support the proposed rephrasing of the definition of "network" in Art.38 (4) ((2)) (amendment 73).

Record-keeping (amendments 76 and 440/443)

We support amendment 76 which clarifies the beginning of the record retention period for obliged entities (Art.39) and therefore is a real improvement for practitioners.

Deletion of information acquired is cumbersome, considering that the information is contained in several places (e.g. database back ups, hard copy dossiers which are filed). To prevent duplication of screenings for deletion, the period for deletion should be aligned with national legal requirements for keeping files, even if the national retention periods do not come from to anti money laundering legislation. The retention period should therefore not be as short as two years (as suggested in amendments 440, 443). Also a case-by-case assessment (amendment 440, 443) is not workable, as the simplification element of Art.39 would be completely lost. ***Therefore, we do not support amendments 440 and 443.***

Self-regulatory bodies (amendments 26, 80)

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 becoming, owning or controlling any of the professionals charged with AML duties.

We have suggested that Art. 44 (3) should also mention, next to competent authorities, self-regulatory bodies, to reflect the situation that some professions (like tax advisers), in some member states, are not regulated by the state but by professional bodies with voluntary membership. Such amendment should prevent the unnecessary creation of administrative structures in these Member States.

We are pleased to note that the rapporteurs have taken this suggestion on board (amendment 80) but stress that the proposed definition of "self-regulatory bodies" in Art.3 (1) 4a) (amendment 26) is too narrow, as it would exclude professional bodies with voluntary membership which establish obligations and rules (only) for their members. The FATF definition of self-regulatory body[3] does not contain such limitation.

[3] FATF Recommendations of February 2012 (link), see page 121.

We therefore suggest the following wording of Art.3 (1) 4a):

"(4a) "self-regulatory body" means a body that has power, ~~recognised by national law~~, to establish the obligations and rules governing a certain profession or a certain field of economic activity, which must be complied with by natural or legal persons in that profession or field who are its members;".

Publication of sanctions (amendments 506, 508)

The CFE calls for a proportionate use by any publication of the name of a person responsible for a breach of AML duties. This includes the possibility of member states to consider anonymous publication where publication would cause a disproportionate damage to the parties involved or jeopardise the stability of financial markets. All state sanctioning must consider proportionality! We are very concerned that some amendments aim at deleting this fundamental principle of the law from Art.57.

We therefore consider that amendments 506 and 508 should not be adopted.

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