CONFEDERATION FISCALE EUROPEENNE

CFE comments on the draft *Report on tax rulings and other measures similar in nature or effect* by the European Parliament´s TAXE Special Committee

Introduction

The following comments relate to the draft *Report on tax rulings and other measures similar in nature or effect* (2015/2066(INI)), co-authored by MEPs Elisa Ferreira and Michael Theurer and published in July 2015. While CFE does not agree to all statements on tax policy in the draft Report and will comment on a number of them separately in due course, we are pleased to note that the two rapporteurs have been striving to produce a balanced report. We will limit our comments below to statements specifically concerning tax advisers.

The draft Report identifies a conflict of interest in large tax firms that advise multinationals on the one hand and government on the other, and doubts whether this conflict can be solved by corporate codes of conduct. As a solution, it "*calls on the Commission to come forward with proposals for guidelines for the tax advising service industry and for the setting-up of an EU incompatibility regime for advisors in tax matters [...], in order to ensure that conflicts of interest between services to the public and private sector are avoided.*" The draft Report also "*requests that the Commission assess the possibility of introducing sanctions for firms implementing or promoting tax dodging and aggressive tax planning, in particular with regard to access to funding from the EU budget and any advisory role in EU institutions.*" Lastly, the draft Report contains criticism on the presence of representatives from "Big Four" firms in European Commission advisory bodies.

CFE comments:

Preventing conflicts of interest in advising government or EU institutions

It is a fact that international tax expertise is often found in tax firms. Any rules should not have the effect of limiting governments or the European institutions in their choice of the most competent experts. For governments, it is important to be advised by active practitioners in the tax field who, next to academic knowledge, can provide hands-on experience.

Preventing conflicts of interest is vital for a tax adviser´s clients, irrespective of whether these clients are individuals, enterprises or public bodies. Rules on the prevention of conflicts of interest exist at national level, either in national laws or in codes of conduct of professional bodies[1]. These bodies are independent from professional firms and are able to impose sanctions on their members for non-compliance with professional duties. Moreover, tax advisers who are members of a CFE member body must comply with the CFE Guidelines *Professional Qualifications and Ethics of Tax Advisers in Europe*[2] which stipulate that tax advisers should always maintain their moral, intellectual and

[1] More information on professional rules for tax advisers in European countries on conflicts of interest can be found in the CFE European Professional Affairs Handbook for Tax Advisers, 2nd edition 2013 (link).

[2] http://www.cfe-eutax.org/sites/default/files/Professional%20Code_20042012.pdf

professional independence in the settlement of conflicting interests. Thus, corporate codes of conduct are not the only means to prevent conflicts of interest.

Where a conflict of interest between one client (e.g., a government) and another client arises, professional rules oblige a tax adviser to inform both clients, seek the consent of both clients before continuing, or to lay down the mandate.

However, it would be overly simplistic to conclude that one tax firm may not advise taxpayers and government at the same time. The situation that a firm serves clients with different interest, e.g. two competing companies, is common practice in law and tax firms. It depends on the specifics of the case whether conflict of interest is a concern.

A firm should not represent different interests in the same case, so that the completion of an assignment for one client would compromise the fulfilment of the assignment for another client. Accordingly, it would not be possible that a tax adviser consults a tax authority on a specific case in which s/he represents another client.

This is different where a tax adviser or firm advises government on tax policy, while at the same time advising a client on the application of the law in a particular case. Advising the government on existing loopholes does not limit a tax adviser´s possibility of advising a client on the remaining ways to optimise their tax expenses. The calculation of the tax adviser´s fees is negotiated with the client and generally includes a package price or agreed hourly rates (In Germany, legal fee rules have to be respected as well), but is not proportional to the tax saved by their client. Accordingly, there is no incentive for tax advisers to give bad advice to government, to preserve avoidance opportunities.

Apart from the above considerations, the expected behaviour of the tax adviser in case of conflicts of interest could be included in the engagement letter on which the advice to government is based. If the Commission should decide to give guidance to governments in this regard, the CFE would be pleased to assist in this process. The setting-up of an EU incompatibility regime would however risk reducing governments´ flexibility and access to qualified advice and interfere with national rules on conflicts of interest.

Exclusion of representatives of tax professional firms from EU advisory bodies

We believe that to be effective, EU advisory bodies should be set up on the basis of competence, and that they should include stakeholders who represent different interests. From the tax adviser community, this can be tax firms or tax professional bodies. It is worrying that some stakeholders have tried to force members who are or have been working for tax firms out of the European Commission´s Platform for Tax Good Governance (which has been rejected by the Commission). We see the same tendency in paragraphs 33 and 112 of the draft TAXE report. To ensure a transparent process, stakeholders represented in EU advisory bodies should recognise and adhere to the principles of the EU Transparency Register.

“Naming and shaming”

We believe that the European Parliament should not engage in "naming and shaming" of particular enterprises without providing evidence. A reference the "Big Four" is equivalent to naming four networks, namely Deloitte, EY, KPMG and PWC. A reference to "large accounting firms" would be more appropriate.

Retroactive sanctions and legal certainty

Any sanctions, e.g. the exclusion from EU funding or tenders, require that the behaviour expected from a tax adviser be properly defined. While there is a concept of abuse of law, or, in some countries, general anti-avoidance rules, there is no clear and recognised definition of "tax dodging" or "aggressive tax planning" (paragraph 112). Moreover, sanctions should not be imposed on the basis of suspicion but of conviction.

Where criminal sanctions are concerned, not to be punished for behaviour which was not clearly prohibited by the time it was committed is a fundamental right.

If the European Parliament wishes to maintain paragraphs 24, 33 and 110-112, we would suggest the following changes:

24. Stresses the crucial role of ~~the four~~ big~~gest~~ accounting firms ~~(the 'Big Four')~~ in the design and marketing of rulings and tax avoidance schemes exploiting mismatches between national legislations; stresses that those firms, which seem to derive a considerable amount of their revenue from tax services, to dominate most Member States' auditing markets and to prevail in the global tax advising services, constitute a narrow oligopoly;~~ draws attention to the conflict of interest resulting from the juxtaposition, within the same firms, of tax advice and consulting activities intended, on the one hand, for tax administrations and, on the other, for MNCs' tax planning services, which exploit the weaknesses of national tax laws; questions the effectiveness of any corporate code of conduct in tackling this issue~~; acknowledges that enforceable codes of conduct by tax and accountancy professional bodies which contain rules on the prevention of conflicts of interest exist at national level; underlines the fact that tax rulings have become, in the EU and worldwide, a common business practice, not only to obtain legal certainty or advantageous tax deals, but also in cases where legislative provisions do not allow any room for interpretation;

33. Notes also the efforts made through the creation of the Platform for Tax Good Governance, which brings around the same table various stakeholders with the aim of creating consensus around the issue of tax avoidance, in particular in an international context, and the Joint Transfer Pricing Forum, which issues a number of guidelines on the technical issues surrounding transfer pricing; stresses that, to date, these bodies have contributed to making limited corrections to the corporate tax framework;~~ strongly deplores the fact that the Joint Transfer Pricing Forum is composed, in particular, of representatives from the Big Four accountancy firms, which contribute to the work on guidelines of transfer pricing while, at the same time, advising corporations on how to avoid taxes through the use of transfer pricing;~~ stresses that EU

advisory bodies should be set up on the basis of competence, and that they should contain stakeholders who represent different interests.

110. Points to the ~~problematic~~ juxtaposition, within the same firms, of tax advice, auditing and consulting activities intended to service tax administrations on the one hand, and provide tax planning services for MNCs on the other, exploiting the weaknesses of national tax laws;

111. Calls on the Commission to come forward with ~~proposals for guidelines for the tax advising service industry and for the setting-up of an EU incompatibility regime for advisors in tax matters and, as appropriate, for banks~~ guidance on the inclusion of appropriate clauses in engagement letters with tax advisers and other professionals, in order to ensure that conflicts of interest between services to the public and private sectors are avoided; calls on the Commission to launch an inquiry in order to assess the state of concentration in the sector;

112. Requests that the Commission assess the possibility of introducing sanctions for firms ~~implementing or promoting tax dodging and aggressive tax planning~~that have been proven to engage in illegal activity, in particular with regard to access to funding from the EU budget and ~~any advisory role in~~ contracts with EU institutions;

We would like to thank you for considering our suggestions and remain available for any discussion on the suggested amendments, the draft TAXE Report and tax policy in general.

CFE, 18 August 2015