CFE observations on corporate social responsibility in taxation

Asthe leading European federation of tax advisers, representing 26 national tax adviser organisations from 21 European countries with more than 200,000 individual members, the CFE would like to share its observations on corporate social responsibility (CSR) with regard to taxation, in view of a possible adoption of CSR recommendations or guidelines at EU level.

In the following, CSR will be used in the sense that it necessarily includes compliance with the law, but also additional voluntary commitments for the good of society. We will refer to the latter as "voluntary CSR".

We will deal with the topic along four main aspects:

I. What does "corporate social responsibility" mean in taxation?
II. How should a corporate tax strategy be adopted?
III. How should a corporate tax strategy be communicated to stakeholders?
IV. Responsibility of tax administration

I. What does "corporate social responsibility" mean in taxation?

Compliance with the "spirit of the law"

CFE believes that multinationals should be forward-looking and open to respond to stakeholder demands for a responsible tax strategy irrespective of whether this is required by law. Still, we stress that taxpayers should be free to adopt any strategy that is within the boundaries of the law. It is in the responsibility of the legislator to draft the law in a way that it can be understood and interpreted by taxpayers, advisers and courts in a foreseeable manner.

In compliance with the law, the distinction is often made between the "letter of the law" and the "spirit of the law".

The OECD 2011 Guidelines for Multinationals state that "*complying with the spirit of the law means discerning and following the intention of the legislature*"[1], by taking "*reasonable steps to determine the intention of the legislature and interpret[s] those tax rules consistent with that intention in the light of the statutory language and relevant, contemporaneous legislative history*"[2].

We fully support this definition, for various reasons:

On the one hand, it is clear that the letter of the law alone will often not suffice to determine the legislator´s intention, as the understanding of legal provisions requires interpretation, taking into account any interaction with other legal provisions, constitutional law, human rights and other higher-ranking laws, unwritten recognised principles as well as legislative history and case law.

On the other hand, the OECD Guidelines contain the important element that the efforts to discern the intention must remain "reasonable".

Importantly, the OECD Guidelines point out that complying with the spirit of the law "*does not require an enterprise to make payment in excess of the amount legally required pursuant to such*

[1] OECD Guidelines for Multinational Enterprises, 2011 edition http://www.oecd.org/daf/inv/mne/48004323.pdf, P.60, Chapter XI para 1.
[2] p. 60, Chapter XI para 100.

interpretation". Any "fair share" element needs to be distinguished from the question of compliance, and any guidance should be clear on this.

If the Commission should decide to issue any recommendations, it should clearly distinguish between, on the one hand, the intention of the legislator at the time of adoption, and on the other hand, opinions of tax administration, expressed in letters, public statements, circulars, administrative regulations or other communications. Only the former form part of the legislation, while the latter lack parliamentary approval. The opinion of government does not determine the spirit of the legislation.

CSR and (Aggressive) Tax Planning in the EU

In the Europe 2020 Strategy, the Commission made a commitment to renew the EU strategy to promote Corporate Social Responsibility.

Some developments and progresses were made but there are still key points to be considered whenever addressing CSR at EU level.

The European Commission defined in its Communication COM(2011)681 final, "*A renewed EU Strategy 2011-2014 for corporate social responsibility*" CSR as *"the responsibility of enterprisesfor their impacts on society*" (page 6)[3].

The Communication COM(2012)722 final "*An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion*"[4] also addresses CSR and tax planning providing that "*Aggressive tax planning could thus be considered contrary to the principles of Corporate Social Responsibility*"(page 6).

We also support the conclusions of the EU Parliament resolution of February 6, 2013 on Corporate Social Responsibility[5]which outline that "*any regulatory measures to be drawn up within a robust legal framework and in line with international standards, in order to avoid disparate national interpretations and any risk of competitive advantages or disadvantages emerging at regional, national or macro regional level"* and that business play a leading role *"which must be able to develop an approach tailored to their own specific situation; stresses the need for targeted measures and approaches for the development of CSR among SMEs*".

It is our view that clear criteria shall be issued in order to properly assess CSR by EU members states. Furthermore, in order to better understand whether corporate tax strategies put in place by corporations are in line with CSR standards we believe that further consideration should be given to:

- whether such standards should be decided at national level (by each MS) or centralised at EU Level in order to ensure consistency
- who should monitor compliance and respect of CSR
- whether CSR should be assessed in terms of single entity or in terms of the corporate group.

Voluntary CSR

Voluntary CSR in taxation may relate to

[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1467015759944&uri=CELEX:52011DC0681.
[4] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1467015931692&uri=CELEX:52012DC0722.
[5]http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0049+0+DOC+XML+V0//EN&language=EN

- the amount of taxes a company pays (e.g. by refraining from engaging in certain tax planning arrangements, making certain elections or deductions, or by committing to pay a certain tax rate as a minimum),
- transparency (e.g. by publishing country by country information, or tax rulings received), and
- cooperativeness vis-à-vis tax authorities (e.g. by entering into “cooperative compliance” or similar agreements).

Any recommendations on CSRin taxation should distinguish clearly between compliance with the law and additional voluntary CSR.

Labelling of voluntary CSR

Voluntary CSR could be certified by an independent operator, through a labelling system. The CFE has recently commented on the idea of an EU “Fair Taxpayer Label”[6], concluding that any label should not rely on “fair share” criteria, as these are extremely difficult to assess in a way that avoids misleading the public; transparency and cooperativeness seem more suitable criteria, although several issues remain.

Voluntary compliance versus de-facto penalties

Voluntary CSR should not be promoted by measures which amount to de-facto penalties for corporates who opt not to take part. This can be the case where the law contains guidance which is not legally binding in itself, but imposes burdensome requirements on businesses that do not comply with such guidance. This may be the case if a “comply or explain” approach is followed and the explanation requires a substantial involvement of paid workforce, or the disclosure of information that might harm the business. This is economically tantamount to a monetary penalty, and a business may be forced to “voluntarily” comply.

Cooperation and requests for information

From a responsible taxpayer, a certain degree of cooperation with tax authorities can be expected.

The 2011 edition of the OECD Guidelines for Multinational Enterprises states that a member of a multinational group should co-operate in providing information from outside their jurisdiction to tax authorities so that they can evaluate group relationships and determine the tax liability of the member of the MNE group in their jurisdiction.[7]

The OECD also outlines that the commitment of taxpayers to provide information in a timely basis to tax administration is conditioned to the relevance of such information from the point of view of the enforcement of applicable tax laws.

We believe that any statement on this regard by the Commission should reflect the different situation that exists today, especially within the EU:

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[6] http://www.cfe-eutax.org/node/5350
[7] p.61, Chapter XI para 103.

The OECD 2011 Guidelines were meant to apply also to third country situations in which instruments such as the EU Administrative Cooperation Directive do not exist, and reflect the situation of 2011, before effective means to exchange information between tax administrations were in force:

At EU level, Directive 2011/16 only entered into force after the OECD Guidelines were issued, and has since then been strengthened three times, by introducing the OECD/G20 Common Reporting Standard (in January 2015), by introducing the automatic exchange of information on tax rulings (in December 2015) and by introducing "BEPS 13" country-by-country information exchange (in May 2016).

At international level, the signing of the Multilateral Competent Authority Agreements on the Common Reporting Standard and on the "BEPS 13" country-by-country information exchange will substantially increase availability of information for tax administrations in the future.

While we encourage co-operative behaviour by businesses, we believe that it would be appropriate to include a statement that tax administration should primarily make use of existing information exchange mechanisms provided, in particular the Administrative Cooperation Directive and other agreements, to obtain information about taxpayers outside their jurisdiction.

Making cross-border administrative cooperation in tax a commonly used and taxpayer-friendly tool is a stated objective of the Commission.

II. (How) should a corporate tax strategy be adopted?

Involvement of the board

CFE recommends that large businesses have a tax strategy determining what stance and degree of "aggressiveness" the business intends to pursue. We recommend that the strategy is discussed and agreed atboard level. The board should be fully aware of the legal and reputational consequences of the behaviour it decides to adopt.

Where tax advisers are involved in the design of a corporate tax strategy or risk management strategy, they should make the board aware of these consequences. Beyond this, it should not be a tax adviser´s responsibility to dissuade the board or management from adopting an aggressive strategy, although a tax adviser may decide to refrain from giving further advice that is not in line with his/her ethical principles.

Furthermore, we fully agree with the OECD Guidelines that "*corporate boards should adopt risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated*"[8].

Liability of the board for tax compliance

Our Irish member organisation has pointed out that the Irish Companies Act 2014 requires Directors to include a statement in the Directors' Report which confirms that the company is in compliance with its tax obligations. Where the Director does not comply with these provisions they can receive a fine and/or prison sentence. In addition, Irish tax legislation can impose a fine and/or prison sentence on a Director in the most serious cases of tax default where they are deemed to have shown "reckless behaviour".

[8] p.60, Chapter XI. para 2.

To comply with their obligations, Directors in Ireland need to ensure that they fully understand the company's tax strategy and that they are aware of any potential risks. The latterwill also help addressing any tax-related questions raised by shareholders or the media. Directors should be able to answer the following key questions:

1. *Have you agreed an overall tax strategy that is aligned with business goals?*
2. *Have you defined your tax risk appetite?*
3. *Is your tax strategy underpinned by:*

   - A tax risk management framework?

   - A tax control framework to ensure that all taxes are paid and filed on time in all jurisdictions and that tax liabilities are properly provided for?
4. *Is your audit/risk committee properly focused on tax?*
5. *Do you have a tax communications strategy for both external stakeholders and staff?*
6. *Is your tax function adequately resourced with the right expertise?*
7. *Is tax risk included in the induction programme for new Board?*
8. *Are you BEPS ready; do you know:*

   - Where are the value drivers located – people, risks, substance?

   - Where are global profits located?

   - Do these match?
9. *Tax disputes*
   - *Are there any major areas of disagreement with a tax authority?*
   - *Are you satisfied with the way these disputes are being handled?*
   - *Have any potential tax liabilities been adequately provided for?*
   - *Have you considered the reputational issues?*
10. *Do you regularly review what your competitors and peers doing?*

If the Commission should recommend that Directors be held liable for compliance with the company´s tax obligations, it should be clear that a Director should be able to rely on the professional opinion of a qualified tax adviser or a lawyer who is bound by professional ethics, in other words: that the Director him/herself will not be held liable when following the advice of such professional.

III. Communicating a corporate taxation strategy

We expect that many large businesses will decide to give additional information of their own motion to explain their tax strategy, in particular where it is required that figures at country level are published, to prevent misinterpretation, which is in the company´s own interest.

Law may also oblige corporates to report on social responsibility and tax policy. However, it is difficult to define such reporting requirements in a way that ensures comparability, especially internationally, while at the same time keeping them sufficiently flexible and comprehensible: While the absence of common criteria and appropriate guidance may have the effect that the data reported by different companies will not be comparable, a detailed predefined format and comprehensive accompanying guidance would create large effort for the company and may still achieve the contrary of transparency, as it will require the provision of many irrelevant information and distract from the relevant elements.

IV. Responsibility of tax administration

We would strongly favour a statement that governments should also act responsibly towards businesses when administering their tax affairs, and that commitments by corporates to engage in CSR and good cooperation should be mirrored by commitments by governments to respect taxpayer rights and offer good service.

We would like to draw your attention to a Model Taxpayer Charter[9] which has been designed as a balanced document and an international benchmark of taxpayer rights and obligation and presented last year by the CFE and two organisations of tax advisers from other parts of the globe.

We would very much welcome if the European Commission reassumed its work to complete its project of an "EU Taxpayer Code"[10].

[9] www.taxpayercharter.com; hardcopy available at IBFD: www.ibfd.org/IBFD-Products/Towards-Greater-Fairness-Taxation-Model-Taxpayer-Charter

[10] Communication COM(2012)722 of 6 December 2012, "An Action Plan to strengthen the fight against tax fraud and tax evasion", para 17: http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf