

European Commission
DG for Taxation and Customs Union
Direct Tax Policy & Cooperation – Unit TAXUD/D2
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B-1049 Brussels

16 February 2017

TAXUD-UNIT-D2@ec.europa.eu

Dear Sirs,

Additional response to European Commission Public Consultation on 'Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes'

We are pleased to respond on behalf of European Union member firms of Deloitte Touche Tohmatsu Limited to the European Commission Public Consultation on 'Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes' and welcome the opportunity for debate on this topic. This letter is submitted to provide background context and additional comments to the replies submitted using the online questionnaire.

1. Existing and new legislation and initiatives

The EU has adopted legislation that has, or will when implemented, create many mechanisms and requirements allowing tax and other authorities to receive and exchange information regarding tax payers, such as the Anti-Money Laundering Directives, the Directive on Administrative Cooperation between tax authorities which will include automatic exchange of CBCR and information on cross-border tax rulings and advance pricing arrangements and the Anti-Tax Avoidance Directive. These measures and enhanced enforcement of existing provisions on spontaneous exchange of information related to possible cross-border tax avoidance or tax evasion should give tax authorities adequate means to fulfill their objectives.

We therefore question whether there is a need for EU level initiatives aimed at introducing requirements for tax payers or tax advisors or intermediaries to disclose tax schemes. If additional EU measures are however deemed necessary, and using a clearer definition of aggressive tax planning (see point 2 below), the EU could adopt the OECD standards on mandatory disclosure obligations, allowing member states to set rules taking into consideration the specific characteristics of their tax regime. A one-size-fits all EU-wide disclosure regime may even serve to create less of a level playing field throughout the EU, through failing to take into account national differences.

Appendix to response to European Commission public consultation 'Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes' – submitted on behalf of European Union member firms of Deloitte Touche Tohmatsu Limited. Please see www.deloitte.com/about for a description of the legal structure of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its member firms, each of which is a legally separate and independent entity.

2. Clarity regarding the definition of aggressive tax planning

The definition used in the online questionnaire, namely: "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability" is in our view far too wide a definition to be effective and would for instance capture all decisions with tax consequences a tax payer may make when potentially subject to two differing tax systems. This definition assumes a consistency between different countries' tax regimes which is not the case. We think that any disclosure system needs to operate with a range of hallmarks relevant to member states' individual tax systems, rather than seeking to define 'aggressive tax planning'.

If a definition of aggressive tax planning is to be used, in our view a workable definition of aggressive tax planning should respect the rule of law and encourage legal certainty. This could be achieved by building on existing case law from the ECJ¹ and the general anti-abuse rules such as those set out in the Parent-Subsidiary Directive (i.e. aggressive tax planning would involve a scheme that is not put in place for valid commercial reasons which reflect economic reality but rather for the main purpose or one of the main purposes of obtaining a tax advantage).

We are committed to informing clients of their tax obligations and advising them on how to comply with these obligations. We are not engaged in designing and/or promoting aggressive tax planning schemes. We do provide bespoke tax planning services for individual clients, at their request, and these services may result in the client benefitting from tax advantages resulting from one or more countries' applicable tax laws, based on the clients' specific economic facts and circumstances.

3. EU competitiveness in a global world

We support the OECD and G20 global tax initiatives and believe that in order to encourage economic growth and remain competitive, the EU should not seek to introduce tax measures and administrative burdens, including upon the tax authorities, in this area that go beyond what is introduced in other regions.

4. Level playing field among providers of tax advice

Given the differences between EU member states' rules on client confidentiality and non-disclosure requirements and between different professions within EU member states (e.g. lawyers, tax advisors and accountants), any EU action in this area should not further impact competition in the market. Any disclosure of schemes should in our view be made by the tax payer, who in addition typically has the full picture of the tax structure or transactions, and not by the tax advisor.

5. Distinction between tax avoidance and tax evasion needs to be recognised

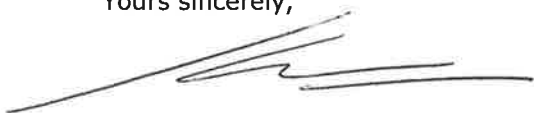
We would like to emphasise that whilst the words of avoidance and evasion in common language are similar there is a big difference between the concepts of tax evasion, which is illegal, and tax avoidance which is not illegal but may be considered to be an unintended and undesirable outcome. The consultation document appears to put these two concepts on the same footing (cf questions 4.2 (3) and (7)).

¹ Cadbury Schweppes judgement, see http://ec.europa.eu/dgs/legal_service/arrets/04c196_en.pdf

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We would be happy to discuss any comments or questions you may have regarding our responses and can be reached as follows: hkoller@deloitte.nl or jvantrigt@deloitte.nl.

Yours sincerely,



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Deloitte EU Policy Centre



Jan van Trigt
Emea Regional Tax & Legal Leader

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