

LAW SOCIETY SUBMISSION



DISINCENTIVES FOR ADVISORS AND INTERMEDIARIES FOR POTENTIALLY AGGRESSIVE TAX PLANNING SCHEMES

LAW SOCIETY OF IRELAND POSITION PAPER

EUROPEAN COMMISSION

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ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1. Introduction

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland. The Law Society welcomes the opportunity to comment on the open public consultation launched by the European Commission (the “**Commission**”) *Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes* (the “**Consultation**”).

The Law Society supports the development and use of well targeted rules to counter tax evasion and aggressive tax arrangements. However, we have the following concerns about the proposals made in the questionnaire published as part of the Consultation (the “**Consultation Document**”):

- no consideration is given to the impact of the proposals on the taxpayer / tax adviser relationship in the Consultation Document – this represents a significant gap in the analysis upon which the proposals are based;
- no consideration is given to how the proposals would / should interact with legal professional privilege – this too reflects a significant gap in the analysis on which the proposals are based;
- the Consultation Document uses the terms ‘tax evasion’, ‘tax avoidance’, ‘aggressive tax planning’ and ‘potentially aggressive tax planning’ interchangeably – this indicates that the Commission sees limited (if any) differences between those concepts which would be a fundamental shift in approach under Irish law and deviates from internationally accepted principles; and
- a number of questions in the Consultation Document focus on tax transparency and exchange of information, however, limited regard is given to the significant developments that have recently been made at EU level to enhance tax transparency and exchange of information programmes – in designing any further tax transparency and exchange of information rules, it is important to have regard to what is already covered by the existing rules.

2. General comments

Before addressing our substantive points, we think it is important to address the general tenor of the Consultation Document. It appears to us that the Consultation Document is lacking in neutrality and that the questions are designed to elicit a particular outcome. For this reason, we have chosen to make our submission by way of this position paper rather than completing the questionnaire.

The lack of neutrality in the Consultation Document is most obvious in section 5 which asks about the potential direct and indirect consequences of imposing reporting obligations on tax advisers and other intermediaries. In that section, the Consultation Document identifies 23 potential consequences of imposing reporting obligations on tax advisers and intermediaries. Of these potential consequences, only four negative potential consequences are included (primarily focussed on increased administrative burden for advisers and reduction in the

attractiveness of the EU Internal Market). The Consultation Document at no stage considers the impact any of the proposals might have on the broader taxpayer / tax adviser relationship and whether that relationship is important for the proper functioning of the tax system. In addition, there is no mention of legal professional privilege.

Designing the questionnaire in this way is likely to elicit one-dimensional responses that do not take account of factors that are highly relevant to the proposals made, such as the importance of having access to professional tax advice. While the vast majority of participants (if not all) in the Consultation will likely agree that countering aggressive tax arrangements and tax evasion are policy objectives that they support, there is limited scope for participants to provide their thoughts on the negative potential consequences (however valid they may be) of the proposals. The vast majority of participants may well agree that the proposals will have all of the positive potential consequences identified in section 5. However, it would be disingenuous to regard such a response as an endorsement of the proposals given participants are not asked to consider the negative potential consequences of the proposals.

The simplistic approach in the Consultation Document may discourage participants from raising concerns outside the remit of what is explicitly included by the Commission (to obviate the risk of being regarded as advocating a position in favour of aggressive tax arrangements). Discouraging a meaningful debate on the broader ramifications of the proposals undermines the credibility of the Consultation and is unlikely to result in sound and well-considered policy.

3. Impact of proposals on the taxpayer / tax adviser relationship

As recognised by the OECD in their 2008 report, *Study into the Role of Tax Intermediaries* (the “**2008 OECD Report**”), “As advisers, tax intermediaries play a vital role in all tax systems, helping taxpayers understand and comply with their tax obligations in an increasingly complex world.” This is particularly true in tax systems such as the Irish system which operates on a self-assessment basis where the taxpayer is responsible for correctly interpreting and applying tax law and paying the correct amount of tax. In self-assessment systems, where the applicable tax legislation comprises thousands of (often very complex) provisions, access to a competent and qualified tax adviser is essential.

Reflective of this, the 2008 OECD Report notes: “*The importance of the role tax advisers play in a tax system can be tested by answering a simple question: would compliance with tax laws improve if tax advisers did not exist? The Study Team found no country where the answer to that question is yes. Across the whole range of taxpayers, taxes and circumstances, the vast majority of tax advisers help their clients to avoid errors and deter them from engaging in unlawful or overly-aggressive activities.*” [Emphasis added.] The vast majority of tax advisers’ sole aim in advising their clients is to ensure that their clients are tax compliant. This should not be disregarded and the impact the proposals would have on the taxpayer / tax adviser relationship must be carefully considered as part of this Consultation.

In particular, the Commission ought to consider whether the proposals would discourage taxpayers from seeking professional advice and if so, whether this would be a positive development. The vast majority of tax advisers (who are bound by codes of professional conduct) assist their clients to work through very complex tax legislation in order to be tax

compliant. It would be short-sighted of the Commission to disregard the key role tax advisers play in helping taxpayers to be tax compliant in this Consultation.

4. Impact of the proposals on legal professional privilege

4.1 Commissioner Moscovici's comments at PANA

Commissioner Moscovici appeared before the European Parliament's Panama Papers Committee on 7 December 2016. At that meeting, he was asked about whether action would be taken to regulate lawyers and accountants and others that advise on tax. In his response, Commissioner Moscovici referenced the Consultation and noted: *"lawyers are in the focus and should not be able to hide behind traditional concepts like legal professional privilege arguing that they cannot provide information about their client relationship."*

Legal professional privilege (and similar civil law concepts such as professional secrecy) is not mentioned at all in the Consultation Document. Any consultation that considers the role of those who advise on tax matters and proposes placing disclosure obligations on those persons in respect of their clients' affairs is incomplete without an assessment of legal professional privilege. Has it been decided by the Commission that legal professional privilege should be ignored and / or overridden? Commissioner Moscovici's comments (coupled with the absence of any attempt to elicit views in the Consultation Document) tend to indicate that is the case. As a policy matter it would be useful to understand the reason for this approach.

Legal professional privilege is an essential and fundamental element of any developed justice system. Commissioner Moscovici's comments indicate that he regards legal professional privilege as something that protects lawyers – this is incorrect. Legal professional privilege belongs to the client. It is designed to permit clients to make full disclosure to their lawyers so that they can obtain comprehensive legal advice. It is the client, not the lawyer, who has the sole right to waive legal privilege.

4.2 Rationale underpinning legal professional privilege

It is important to understand that legal professional privilege arises not out of any private obligation of confidentiality (though lawyers do owe a duty to keep their clients' affairs confidential) but out of the public interest in ensuring the proper administration of justice.

A Canadian Supreme Court decision (*Blank v Canada* 2006 SCC 39) that was followed by the Irish High Court in *University College Cork – National University of Ireland v Electricity Supply Board* [2014] IEHC 135 succinctly outlined the rationale underpinning legal professional privilege in a passage that was quoted by the Irish High Court:

"The solicitor-client privilege has been firmly entrenched for centuries. It recognises that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their

clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice." [Emphasis added.]

Legal professional privilege is designed to facilitate clients to be free and frank in their discussions with their legal advisers so that they may be appropriately advised by a qualified professional. It is not designed to protect lawyers. It should be recognised that any encroachment on legal professional privilege will negatively affect those who ought to seek legal advice rather than lawyers.

4.3 **Distinguishing legal advice on tax matters from all other legal advice**

Any proposal to curtail legal professional privilege in respect of tax matters would result in those who seek legal advice on tax matters being treated differently to anyone seeking legal advice on any other matter. Such a distinction would be peculiar and difficult to justify.

4.4 **Legal professional privilege and the European Convention on Human Rights**

As the Commission will be aware, legal professional privilege is also protected under Articles 6 and 8 of the European Convention on Human Rights ("ECHR"). Introducing EU measures that cut across fundamental human rights protected by the ECHR would be a very radical development in EU law and such a change in direction should not be undertaken lightly.

4.5 **Legal professional privilege is not absolute**

It is important in formulating any rules requiring lawyers to disclose client information that the Commission understands how legal professional privilege operates, its importance in a well-functioning legal system and that it is not without limitation. Legal professional privilege, as protected under Irish law and under the ECHR, is not an absolute right and it may be subject to encroachment in exceptional circumstances. For example, legal professional privilege is not effective where it is used to facilitate fraud or crime.

In Ireland (and likely in many other EU Member States) tax evasion is a crime and accordingly, legal professional privilege is ineffective in seeking to avoid disclosure of such behaviour. Any suggestion that legal professional privilege can be used to facilitate tax evasion is incorrect.

4.6 **Suggested approach**

A mandatory disclosure regime requiring promoters of tax avoidance transactions with certain characteristics to disclose details of those transactions was introduced in Ireland in 2010. Recognising the importance of legal professional privilege and its

value to a proper functioning legal system, the Irish rules do not seek to override legal professional privilege and specifically provide that a promoter shall not be required to disclose any information with respect to which a claim to legal professional privilege could be maintained. We understand that equivalent rules in the UK and Portugal include similar provisions.

It is imperative that any EU proposals promoting the disclosure by advisers of client information include a similar carve-out for legally privileged information in order not to undermine the fabric of the existing legal system.

5. Importance of terminology

In the Consultation Document, the terms ‘tax evasion’, ‘tax avoidance’ and ‘aggressive tax planning’ (although separately defined) are used interchangeably. This is unhelpful and tends to equate all three behaviours where significant distinctions can (and should) be made.

5.1 Tax evasion

As noted in the Consultation Document’s glossary ‘tax evasion’ is illegal and refers to instances where a liability to tax is hidden or ignored. As tax evasion is illegal, in many jurisdictions (including Ireland), tax evasion and facilitating tax evasion is a criminal offence. In Ireland, if a person is found guilty of tax evasion or facilitating tax evasion they may be fined up to €126,970 and / or be imprisoned for up to five years.

Mandatory disclosure regimes are not introduced to combat tax evasion. It is highly unlikely that those engaged in tax evasion or facilitating tax evasion would be impacted by any proposals to introduce a mandatory disclosure regime. The Commission should recognise that the proposals made in the Consultation Document will be ineffective against tax evasion and should focus on tax avoidance.

5.2 Tax avoidance, aggressive tax planning and the rule of law

The use of the term ‘aggressive tax planning’ as a concept that is distinguished from ‘tax avoidance’ is also confusing. It is acknowledged by the OECD in their *Glossary of Tax Terms* that the term ‘tax avoidance’ is difficult to define. Does the Commission consider that there is a difference between ‘tax avoidance’ and ‘aggressive tax planning’? The introduction of the ‘aggressive tax planning’ tends to further complicate an area of law that is already very complex.

The Consultation Document refers in a number of instances to ‘potentially aggressive tax planning’, however there is no attempt to define what might be regarded as ‘potentially aggressive tax planning’. The obvious risk is that all tax planning might be regarded as ‘potentially aggressive tax planning’ – we expect that this is not the intention and this should be clarified.

Overall, the Consultation Document makes a relatively feeble attempt define the key terms upon which the main proposals are made. If this approach is followed in any

legislative proposals that emanate from the Consultation, those legislative proposals will be lacking in certainty and the rule of law is at risk of being eroded. The rule of law requires laws to be clear so that it is apparent to those to whom the law applies what their obligations are.

While we fully support the Commission's aim of developing well targeted rules to counter aggressive tax arrangements, it is important that this aim is not achieved by eroding the rule of law. We understand the main proposals in the Consultation Document as an effort to regulate *lawful* behaviour (and not illegal behaviour such as tax evasion). In that context adherence to the rule of law is essential.

6. Other comments

6.1 Existing law on tax transparency and exchange of information

Section 4 of the Consultation Document asks whether information in relation to 'potentially aggressive tax planning schemes' should be exchanged between Member States. Member States are required under Council Directive 2011/16/EU on administrative cooperation in the field of taxation ("**Directive 2011/16/EU**") to spontaneously exchange information in a number of circumstances, including where a competent authority has grounds to believe that there may be a loss of tax in another Member State and where the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within a group.

Before introducing additional legislation, the Commission should consider whether the existing (and extensive) exchange of information programmes implemented across the EU pursuant to Directive 2011/16/EU capture the type of exchanges contemplated.

6.2 Proposal to require publication

We fundamentally disagree with the proposal in section 7 of the Consultation Document suggesting the taxpayers might be required to publish some or all of the information to be disclosed to tax authorities. This proposal runs counter to the fundamental principle of confidentiality that governs the relationship between taxpayers and tax authorities in most (if not all) EU Member States.

The Irish Revenue Commissioners' *Customer Service Charter* confirms that the Irish Revenue Commissioners will treat information received from taxpayers in confidence. The *Guidelines for a Model for a European Taxpayers' Code* published by the Commission in November 2016 recognises privacy as a general principle governing the taxpayer / tax authority relationship that is "*fundamental for effective taxation*". To suggest that taxpayers should be required to publish certain information relating to their tax affairs undermines the fundamental and widely accepted premise that tax matters are matters that quite legitimately should be treated as private.

6.3 Proposal for an EU-wide code of conduct

We note the suggestion in section 7 that a code of conduct applicable to tax intermediaries on an EU-wide basis might be proposed. As the Commission is aware, the original draft of the Directive on services in the internal market (the “**Services Directive**”) included a proposal that EU-wide codes of conduct applicable to the professions (including the legal profession) would be agreed. In the first instance, even in the initial draft of the Services Directive, it was agreed that the proposal would not apply to tax-related services given the limited competence the EU has in that area. Second, the proposal to attempt to regulate professions on an EU-wide basis by agreeing EU-wide codes of conduct was firmly rejected and was not included in the final version of the Services Directive. The proposal in section 7 of the Consultation Document could be interpreted as an attempt to re-introduce the initial proposals made under the Services Directive in another guise. This is a proposal that we firmly reject. It should be for each Member State to regulate its own legal profession as it sees fit. The final version of the Services Directive provides for codes of conduct to be agreed only where they are aimed at facilitating the provision of services or the establishment of a provider in another Member State. Any extension by the EU beyond this remit would be an overreach into matters that are within the competence of Member States.

Separately, we consider that in practical terms, seeking to agree an EU-wide code of conduct that applies to tax intermediaries is unlikely to be achievable. Tax advisers are sometimes accountants, sometimes lawyers and sometimes neither. For example, in Ireland, those who advise on tax may be members of the Law Society of Ireland, the Bar Council of Ireland, the Institute of Chartered Accountants, the Irish Tax Institute or none of these organisations. In Ireland, each organisation has its own code of conduct. Would the proposed EU code of conduct apply to all organisations or just one? How would the code of conduct apply to those who advise on tax but are not members of any professional body? Would the code of conduct simply not apply at all? Would that incentivise a move away from professional bodies? What if the proposed code of conduct contradicted other codes of conduct or statutory requirements in place for regulated professions? Is it intended that the EU code of conduct would supersede any other professional codes of conduct or regulations already in place? Could this have unintended consequences that could put clients at risk by reducing the required standard, or making the required standard unenforceable? These are some of the questions that arise on a single country basis. Attempting to apply a single code of conduct on an EU wide basis (where some professionals operate in civil law systems and others in common law systems) would also raise further complexities.

7. Final comment

The Law Society is available to discuss any of the comments made in this paper and would welcome an opportunity to discuss any proposals that are made by the Commission following on from the Consultation.

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