



The Law Society

EU Commission Public Consultation on Disincentives for Advisors and Intermediaries for Potentially Aggressive Tax Planning Schemes

The Law Society's Response

February 2017



Introduction

1. This response has been prepared by the Tax Law Committee of The Law Society of England and Wales ('the Society'). The Society is the professional body for the solicitors' profession in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to Parliament, the Government and regulatory bodies and has a public interest in the reform of the law.
2. On 10 November 2016, the EU Commission announced that it was launching a public consultation on disincentives for advisors and intermediaries for potentially aggressive tax planning schemes (the 'Consultation'). The stated aim of the Consultation is to gather views on the need for EU action, available options if action is necessary and the key design features of a possible disclosure regime.
3. The Society has set out below its responses to the Consultation. We are aware of the comments being made by the CCBE in its response to the Commission and support them.
4. Before responding to the Consultation directly, we are bound to comment on the persistent practice of public authorities to present tax avoidance and tax evasion as if they are almost equal. Evasion is an illegal activity and can easily be identified as such. Tax avoidance (and the professional advice that underpins it) is a wholly legal activity. Evasion represents a deliberate non-payment of tax where the liability to tax is not in question. Avoidance involves, by definition, an issue on which the tax authorities and the taxpayer do not agree, i.e. whether tax is due or not. Whether a liability exists or not is a question of law. Evasion and avoidance are therefore entirely different issues and require different public policy solutions. Confusing the two concepts only leads to confused policy-making.

Comments on the consultation

Format of the Consultation

5. The Society considers that the questionnaire format of the Consultation is not conducive to securing full and representative responses on this topic. It focuses on the possible measures that could be taken to counter aggressive tax avoidance and tax evasion (which most respondents are unlikely to disagree with), without focus on the broader impact of the proposals, particularly on the relationship between taxpayers and their advisers. The Consultation should allow respondents to comment on wider issues such as this, rather than channelling them through a questionnaire towards a particular outcome or conclusion.
6. The Society has therefore reached the view that it would not be appropriate to respond using the questionnaire and has instead provided its responses in this document.

The need for EU action

7. The kind of 'mass marketed' schemes, which were devised by and sold through intermediaries, at which the proposals are aimed, and which were prevalent historically, are now extremely rare. For example, in the UK, a combination of the General Anti Abuse Rule, a multitude of other anti-avoidance and disclosure rules, the success of HMRC in litigation and a change in public awareness and perception

of such schemes has had a considerable impact on the effectiveness of such schemes and the willingness of taxpayers to use them. The same is true in other member states and it is therefore not apparent (and we do not consider that the case has been adequately made), that there is any need for further measures at an EU level.

Subsidiarity

8. EU directives may be proposed on matters relating to tax only if they are appropriately considered to be necessary for the establishment or functioning of the internal market. The principle of subsidiarity dictates that matters of direct tax are left to the discretion of Member States unless such relevant objectives of the EU Treaty cannot be achieved without action at the EU level. One question that is not addressed in the Consultation is the competency of the EU to act in introducing the proposed measures, having regard to the subsidiarity principle. The Society believes that this should be considered and debated properly, with consideration being given to whether it would be more appropriate for tax authorities to co-operate more closely, rather than to introduce mandatory disclosure obligations on intermediaries as envisaged in the consultation.
9. From the Consultation itself, it seems that one of the objectives is to 'avoid distortions in the single market due to diverging reporting requirements as regards such schemes so as to ensure a level playing field amongst intermediaries.' The Society does not consider that diverging reporting requirements would constitute a real distortion in the single market, or that a level playing field is prevented. Any tax adviser (wherever located) has to familiarise themselves with the tax rules on which he is advising, which are different between Member States, and additional differences in reporting requirements will not make a material difference to the adviser's ability to advise. It seems to the Society that it is for Member States to decide whether or not they wish to have access to information about transactions entered into by their own taxpayers, and legislate accordingly. As is demonstrated by the UK rules, it is perfectly possible to do this on a jurisdiction by jurisdiction basis. Avoidance schemes are subject to local tax regimes and should be dealt with on that basis.

Tax Avoidance is not Tax Evasion

10. The Society considers that the distinction between tax evasion and tax avoidance is not made sufficiently clear in the Consultation or the related press release and there is a blurring of the line between what is illegal behaviour and what may be perceived as unacceptably aggressive (but nonetheless legal) tax planning. This is important, because media and public debate on the matter does not always focus on the distinction, and associating tax evasion and avoidance only exacerbates this and also potentially implies that tax professionals who have had involvement with tax avoidance schemes should be equated with those involved with tax evasion.
11. It is also notable that Action 12 of the OECD's Base Erosion and Profit Shifting ('BEPS') project (which produced guidelines for the disclosure of aggressive tax planning strategies) refers only to tax avoidance and not tax evasion, which is dealt with through criminal law. Indeed, professional advisers and lawyers will be governed by the professional standards of their own regulatory bodies and legal professional privilege (or their equivalent civil law provisions) cannot be used to conceal criminal activity. Further, other measures are in place to deal with tax

evasion, such as the EU anti-money-laundering directive. This is not addressed in the Consultation.

12. The proposals are therefore not in line with the OECD guidelines and are indicative of 'mission creep', potentially associating a large number of respectable intermediaries with a small number who have involvement in criminal activity.

Ability to take tax advice, and importance of legal professional privilege

13. Most common law jurisdictions have legal professional privilege or equivalent measures, and civil law jurisdictions will have forms of professional secrecy. These rules safeguard the principle of the rule of law, ensure appropriate access to justice and provide legal certainty to taxpayers, by allowing full and frank disclosure between taxpayers and their legal advisers. These provisions are also protected by the European Convention on Human Rights. No measures should be introduced which could in any way erode these rights and hence there should be appropriate exclusions which would preserve legal professional privilege and professional confidentiality rights of taxpayers.
14. Anything that deters taxpayers from taking advice on their tax position should be approached with caution, as this is likely to lead to a decrease in accurate compliance.

Crossover with information reporting

15. The EU's Directive on Administrative Co-operation in the Field of Taxation ('DAC'), which has (amongst other things) enabled the implementation of BEPS Action 13 on country-by-country reporting, is already very wide-ranging and requires the spontaneous exchange of information between tax authorities in EU member states. The Society would expect that the obligations under DAC to be broad enough to require the exchange of information relating to aggressive tax avoidance schemes. Moreover, it is not clear how any new disclosure requirements would interact with existing information exchange provisions. We would further note that provisions aimed at improving transparency on tax rulings are now also in effect at an EU level.

Contact Details:

Officer's Name: Helena Raulus

Officer's Title: Interim Head Brussels Office

Officer's Email address: Helena.Raulus@LawSociety.org.uk

Officer's Telephone number: 0032 2 743 85 96