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European Commission Public Consultation on Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes Response from the CCBE

23/02/2017

1. The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers
2. The CCBE is thankful for the opportunity to provide comments in response to this important Commission Consultation. The CCBE aims to assist the Commission through constructive suggestions and observations.
3. The document lodged by the EU Commission on 10 November 2016 focuses on "*aggressive tax avoidance schemes",* but at the same time the European Commission has launched '*a public consultation to gather feedback on the way forward for EU action on advisers and intermediaries who facilitate* ***tax evasion*** [**emphasis added**] *and tax avoidance*'. The CCBE considers that this semantic shift is not appropriate, and that it creates confusion between two very different concepts.
4. *Tax avoidance* is not illegal. **Tax evasion**, by contrast, is illegal and falls into an entirely different category. The consultation paper shows that the European Commission is not itself in a position to define aggressive tax planning. In assessing what is aggressive or not aggressive, subjectivity becomes a factor, which is incompatible with the provisions set out in article 49 of the European Charter on Fundamental Rights. In relation to a European wide measure such as this, the potential scope of abuse and impact on legal certainty cannot be underestimated.
5. The questionnaire is designed in a way that is likely to illicit one-dimensional responses that do not consider factors that are highly relevant to the proposals made, such as the importance of having access to professional tax advice.
6. Reporting rules on the part of intermediaries already exist in certain EU countries. The inclusion of reference to **tax evasion** in this light is highly inappropriate and disingenuous. The OECD recognises that mandatory disclosure rules are of relevance to counter aggressive or abusive *tax avoidance* but does not mention **tax evasion**, which is addressed through obligations under criminal law.
7. Lawyers and professional advisers are governed by their professional bodies to advise clients within the law, to be involved in **tax evasion** would be a breach of these obligations. The OECD report states that any disclosure obligations should lie with the taxpayer where the intermediary/promotor invokes privilege or professional secrecy. The position of the OECD in this regard should be noted.
8. The consultation raises a serious question as to whether rules should be introduced with a cross-border aspect, where the principle of subsidiarity has not been properly considered. Having regard to the inherent right of EU member states to determine tax policies, an important question, which does not appear in the consultation, is whether the EU has competence to act.
9. The CCBE does not, for the reasons stated in this submission, believe that the suggested measures are suitable or workable at EU level. The CCBE wishes to emphasise that any mandatory reporting obligations for intermediaries if ever introduced must ensure that the principles governing professional secrecy and legal professional privilege are acknowledged and respected in any such legislation.

1. INTRODUCTION

1.1. The Council of Bars and Law Societies of Europe (CCBE) represents the Bars and Law Societies of 32 countries (including the 28 EU Member States and Norway, Iceland, Liechtenstein and Switzerland) and a further 13 associate and observer countries, and through them more than 1 million European lawyers

1.2. The CCBE is thankful for the opportunity to provide comments in response to this important Commission Consultation. The CCBE aims to assist the Commission through constructive suggestions and observations.

1.3. The CCBE submission is in the form of a position paper - rather than a response to the questionnaire - due to the composition of the CCBE as a Pan-European Organisation. In addition, the CCBE has observations on the wording, nature and options presented by the questions contained in the questionnaire, and these observations are mentioned below.

1.4. The consultation document lodged by the EU Commission on 10 November 2016[1] highlighted that the European Commission was launching '*a public consultation to gather feedback on the way forward for EU action on advisers and intermediaries who facilitate* ***tax evasion*** [**emphasis added**] *and tax avoidance*'.

1.5. The press release outlines that '*the Commission is interested in gathering views on how a mandatory disclosure scheme for tax advisers* ***could be*** [**emphasis added**] *put in place. Such rules would oblige intermediaries to give early information on schemes which could be viewed as aggressive or abusive planning for tax purposes and would reflect the goals of the OECD's non-binding guidelines (BEPS Action 12) for the disclosure of aggressive tax planning strategies. This public consultation will help to decide whether it is appropriate to introduce binding rules at the EU level and, if so, what the most legal suitable legal instrument should be. The public consultation will run until 16 February.*'

1.6. The press release goes on to state, '*Many companies and individuals rely on intermediaries to design financial structures that help them to avoid* ***paying their fair share of tax****.* [**emphasis added**]'.

1.7. The press release refers to the Council having invited the European Commission, '*to consider legislative initiatives on mandatory disclosure rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in* ***tax evasion*** [**emphasis added**] *or avoidance schemes*'[2].

1.8. The press release finishes by stating that, *'[t]his consultation will gather views on whether there is a need for EU action aimed at introducing more effective deterrents for tax advisers engaged in operations that facilitate* ***tax evasion*** [**emphasis added**] *and tax avoidance, and how such rules should be designed.'*

1.9. The target that the proposals aim at may no longer be a significant one. Looking at the UK position, for instance, the 'mass market' *tax avoidance* schemes that were sold through intermediaries in the 1990s and early 2000s now no longer really exist. With the introduction of anti-avoidance rules, the new General Anti Abuse Rule ("GAAR") and a more hostile environment in the courts, the UK Revenue Authorities ("HMRC") have had a considerable success in deterring taxpayers from participating in such schemes. This is borne out by the number of disclosures made to HMRC under the UK's disclosure regime and cannot be explained, by the disclosure regime itself. This is also the position in Ireland. The same applies e.g. for Germany. *Tax avoidance* schemes, popular until the late 2000s no longer exist. The applicable tax law was changed in an effective manner. In addition, a general anti-abuse rule has existed for decades, § 42 General Tax Code (Abgabenordnung), which is applied in an effective manner and was amended by a so-called Application Decree, in order to serve in cases of cross border *avoidance* schemes. Similar to the UK, Germany, and Ireland, Belgium in recent years has supplemented its tax legislation both with a general anti-abuse rule ("GAAR") and specific anti-abuse provisions. It may be considered that those rules have had success in deterring taxpayers from participating in "mass market *tax avoidance* schemes" or "tax products" (in Belgium, the success of such "tax products" refer to the period prior to 1992 with the introduction of a first version of the GAAR). Since March 2012, the GAAR was completely reformulated in a new version which achieved a clear deterring effect. This is true for internal *tax avoidance* schemes as well as cross-borders schemes. In Austria, an anti-abuse clause and an economic approach when assessing tax matters have been applicable for decades (see §§21-22 BAO – Bundesabgabenordnung). The position is the same in other member states. [For the shortcomings of the UK, Irish, and Portuguese mandatory disclosure regimes, please see below.]

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[1] See European Commission Press Release IP/16/3618

[2] See EU Council Press Release of 25 May 2016.

2. INITIAL COMMENTARY OF TONE OF CONSULTATION

2.1. Unhelpfully for such an important consultation, the wording of the press release associated with the launch of the public consultation document has sought to blur the very important distinction between what is illegal – **tax evasion** – and what is legal– *tax avoidance*. It has repeated this error in a number of sections of the relatively short press release. It would be expected that the Commission would be more responsible and better informed of such distinctions.

2.2. Moreover, there is a lack of clarity about the concept of 'fair share' (as mentioned in the press release) of tax, a concept that is completely undefined and indeed undefinable. No credible proposal, which could potentially override important well established rights, should be based on such a vague policy goal. In addition, such a vague concept would not meet constitutional/legal requirements.

2.3. The CCBE agrees that **tax evasion** deprives countries of necessary resources, and the CCBE condemns such practices.

2.4. However, *tax avoidance*, even where falling under the description of *aggressive* or *abusive* avoidance, is not illegal no matter the level of opprobrium society might place on such practices. **Tax evasion**, by contrast, is illegal and falls into an entirely different category and should, particularly when the subject of consultations issued by lawmakers to the public, be at all times differentiated from what is legal.

2.5. The importance of the distinction between *tax avoidance* and **tax evasion**, with regard to the consultation and associated documents, can be illustrated as follows:

a) Within public discourse, which may not attach proper significance to legal distinctions, the linkage of *tax avoidance* and **tax evasion** carries the risk of viewing both practices as being similar. Matters should and must be assessed with evidence-based findings to ensure that new rules balance a country's needs with compliance burdens.[3] It also, perhaps inadvertently, infers in the public consciousness that taxation professionals and other intermediaries are implicit in **tax evasion** activities when **tax evasion** and *tax avoidance* are linked as they are in the consultation document. This does not reflect the reality of the situation, which is that **tax evasion** takes place outside the realm of the reputable taxation advisory professions, and to tar all reputable advisers through such inferences is, at best, unfair, undeserved, and irresponsible.

b) The reference to countering **tax evasion** in the context of mandatory disclosure rules involves the inclusion of an *outlier* as a reason for the introduction of such rules. Mandatory reporting rules for intermediaries, such as have been introduced in Ireland, the UK, and Portugal, do not address **tax evasion**. Reporting rules in relation to **tax evasion** on the part of intermediaries already exist at an EU level.[4] The inclusion of a reference to **tax evasion** in this light is highly inappropriate and disingenuous.

c) Action 12 of the BEPS Project, which appears to be the main reason behind the invitation of the Council to the Commission to consider rules to counter *tax avoidance* and **tax evasion**, does not mention **tax evasion** in any place. The OECD recognises that mandatory disclosure rules are of relevance to counter aggressive or abusive *tax avoidance*, but does not mention **tax evasion**, which is addressed through obligations under criminal law. Whilst the Council invitation may be read as seeking measures to tackle **tax evasion** as well as *tax avoidance*, the inclusion of **tax evasion** by the Commission in a consultation on mandatory disclosure by intermediaries is accordingly flawed.

d) Professional advisers and lawyers are governed by their professional bodies to advise clients within the law and to be involved in **tax evasion** would be a breach of these obligations. The rule of law, access to justice, and legal certainty (all vital principles in every member state which the Commission defends and promotes) require that a taxpayer be able to seek legal advice as to his tax position without fear that his financial affairs will be automatically disclosed or

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[3] As highlighted in Action 12 of the BEPS Project.

[4] See Article 33.1 Directive (EU) 2015/849:

Article 33

1. Member States shall require obliged entities, and, where applicable, their directors and employees, to cooperate fully by promptly:

(a)informing the FIU, including by filing a report, on their own initiative, where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing, and by promptly responding to requests by the FIU for additional information in such cases; and

(b)providing the FIU, directly or indirectly, at its request, with all necessary information, in accordance with the procedures established by the applicable law.

All suspicious transactions, including attempted transactions, shall be reported.

disclosable to the tax authorities. The taxpayer must be entitled to take legal advice, and his lawyer must be entitled to provide that advice, without fear of disclosure to the tax authorities. Any regime that overrides such rights is an unwarranted invasion by the state into the private affairs of a person (whether a natural or a legal person). There is no impunity or immunity for the lawyer who must respect strict disciplinary rules and who faces State prosecution if he breaks his oath. The lawyer is a citizen, a professional who is subject to professional secrecy which protects democratic principles consisting in the protection of fundamental rights.

e) The consultation document in referring to **tax evasion** misses this important point. In this regard, it does not distinguish between a very small minority of professionals that the measures might be relevant to and the vast majority of responsible advisers without whom the taxation systems, commercial business activity, and individuals' tax affairs in Europe could not function satisfactorily.

2.6. The questionnaire does not consider the impact that 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. Designing the questionnaire in this way is likely to illicit 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. It is important to remember, as members of the CCBE have commented to us, that the nature of taxation advice obtained in most cases is due to the client wishing to ensure their compliance in relation to tax laws.

2.7. It is, in summary, unfortunate that the Commission has in its consultation document blurred what might be perceived as the proper purpose for considering mandatory reporting obligations by intermediaries (as long as this does not impact on legal privilege, see below) through its insertion of **tax evasion** as a motive for such measures. Such measures are only relevant in the context of *tax avoidance*, as the OECD has noted.[5] In the case of **tax evasion**, sufficient measures already exist to address intermediaries' obligations, particularly under the EU anti-money laundering directive, and the intermingling and blurring of the distinction between *tax avoidance* and **tax evasion** – both in the press release and the survey questions - ignores this very fact. Additionally, **tax evasion** will generally not involve any input from reputable advisor professions and to direct measures countering **tax evasion** at such professions serves no purpose save to taint the reputation of the professions. The proposals may well have an impact on how and when taxpayers seek tax advice, and in some instances, could have the effect of deterring taxpayers from seeking tax advice. This is unlikely to be an objective of the proposals but could be a result of imposing broad disclosure obligations on tax advisers.

3. SUMMARY OF KEY POINTS

3.1. The CCBE has serious concerns about the form of the public consultation and the proposals which are envisaged having regard to the format of the questionnaire. In particular, the CCBE does not consider it appropriate to introduce mandatory reporting provisions, which appear to be modelled on UK law, for the purposes of achieving the objectives in relation to aggressive *tax avoidance*. Again, the CCBE does not consider that such measures are appropriate to counter **tax evasion**, which are addressed under the EU Anti-Money Laundering Directive. The CCBE notes from certain sources that legislation similar to the EU anti-money laundering legislation might be introduced in relation to the proposed mandatory reporting obligations. The CCBE is concerned that this again would only blur the important distinction between criminal and legal activities.

3.2. The CCBE stresses the need to ensure that no measures are introduced which could potentially impact on professional secrecy, which apply in most civil law jurisdictions, and legal professional privilege which applies in common law jurisdictions. This is particularly the case having regard to positions adopted by the CCBE in 2016.[6] Although the CCBE considers that mandatory disclosure measures are of questionable value and effect, if such measures are introduced, it would be necessary for any such disclosures not to apply to professional advisors, but to the client/taxpayer in order to preserve the professional secrecy and legal professional privilege rights enshrined in European and national case law.

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[5] And as Ireland, the UK and Portugal – all being countries where mandatory disclosure regimes are in place – have acknowledged.

[6] See: CCBE response to the online public consultation of the European Commission on further corporate tax transparency (08/09/2015); and E comments on the OECD public discussion draft concerning BEPS Action 12: Mandatory Disclosure Rules (30/04/2015).

3.3. It is the view of the CCBE that there are inherent difficulties in introducing a mandatory disclosure regime. In particular, the following summarises a number of points which are based on experience of such measures within the UK, Ireland, and Portugal:

a) Whereas mandatory reporting regimes have been introduced in the UK, Ireland and Portugal, such measures generally apply in relation to particular types of *abusive* arrangements under domestic tax rules. The mandatory disclosure rules apply in relation to certain hallmarked schemes and are generally addressed within domestic legislation in areas which are of most concern from a tax/government coffer risk perspective. To introduce hallmarks on a European wide scale would, in the view of the CCBE, be unworkable and would significantly undermine the rule of law and legal certainty, the principles of which are enshrined in law throughout the EU. All tax systems are designed differently. Producing an EU-wide list of hallmarks, raises the following questions: should it only cover aggressive *tax avoidance* that is prevalent / possible in all EU jurisdictions or, aggressive *tax avoidance* that is prevalent / possible in any jurisdiction? The former would result in a limited list of hallmarks and may therefore undermine the proposal entirely, while the latter would be entirely unworkable and likely result in all types of non-aggressive arrangements being disclosed.

   The existing disclosure regimes are structured so as to address member state specific concerns and to deal with the particular tax regimes of the member state concerned. Putting aside an EU based tax (like VAT), the UK disclosure regime, for instance, could not adequately work if disclosure obligations on UK taxpayers had to satisfy the particular requirements of the tax authorities of all member states. The resultant regime would either be all-embracing and thus cumbersome and practically unworkable, or so generic and vague as to be useless.

b) It has been the experience of tax lawyers in the UK, Ireland, and Portugal that the provisions imported into domestic law in these jurisdictions fail to reach the standards of legal certainty, such that individual taxpayers and advisors can obtain certainty on the extent to which the provisions apply. In this regard, even in relation to provisions which only have application in domestic law in those jurisdictions, there is significant uncertainty which arises from the legislation in question. The impact of this in the UK has been addressed through voluminous non-statutory guidelines issued by the HMRC (the UK Revenue authority), giving non-statutory views on the extent and coverage of the provisions in question, and a similar situation applies in Ireland and Portugal. It is the CCBE's view, that such a practice of legislation creates and undermines the rule of law that should apply in relation to advanced legal jurisdictions.

c) The consultation paper shows that the European Commission is not in a position itself to define aggressive tax planning. In assessing what is aggressive or not aggressive, subjectivity becomes a factor and in relation to a European wide measure such as this, the potential scope of abuse and impact on legal certainty cannot be underestimated.

d) The need to use general and specific benchmarks, recommended by the OECD and included in the consultation paper, to identify tax planning schemes shows how difficult it is to define objectively "aggressive tax planning".

e) In France, there was an attempt to introduce mandatory disclosure of *tax optimisation* schemes in the Finance Law 2014. The notion of "*tax optimisation* scheme" was defined as "Any combination of legal, financial, accounting or tax instruments processes and instruments: 1) for which the main purpose is to reduce the tax burden of a taxpayer or to defer the triggering of tax charges or to obtain the reimbursement of the tax; 2) And which fulfil the criteria provided in a decree". The French Constitutional Council overturned the provisions which were making it mandatory for each person using a "*tax optimisation* scheme" to declare it to the tax authorities. The Council found that the definition of the optimisation scheme was "generic and vague". According to the Constitutional Court "the constitutional principles of accessibility and intelligibility of the law, deriving from Articles 4, 5, 6 and 16 of the Declaration of 1789, require the adoption by the legislator of sufficiently precise provisions and unambiguous formulas in order to protect the legal subject against any unconstitutional interpretation or risk of arbitrariness, without deferring to administrative or judicial authorities the task of laying down rules which must be established by the law according the Constitution".[7]

f) In relation to professional secrecy and legal professional privilege, it should be noted that the European Commission proposals, if introduced, would raise the question as to whether a lawyer should report if he/she acted within the law. In relation to comparative initiatives, the OECD report itself speaks of legal and illegal tax planning schemes but is more careful about the follow-up actions to be taken by states. In particular, the OECD report states that any disclosure

[7] Conseil Constitutionnel, décision n° 2013-685 DC du 29 décembre 2013.

obligation should lie with the taxpayer where the intermediary/promotor invokes privilege or professional secrecy. The position of the OECD in this regard should be noted.

3.4. The consultation raises a serious question as to whether rules should be introduced with a cross-border aspect, where the principle of subsidiarity has not been properly considered. Having regard to the inherent right of EU member states to determine tax policies, an important question, which does not appear in the consultation, is whether the EU has competence to act. In this regard, if action is required, then closer co-operation between tax authorities is the proper way of addressing these issues rather than creating mandatory disclosure obligations on the part of intermediaries who will be subject to professional secrecy and legal professional privilege obligations in relation to dealing with clients. Essentially, if the target of the measures is to reduce cross-border *tax avoidance* schemes, closer co-operation between tax authorities would be a better and more workable method of achieving this, especially due to the wide differences in Member States' tax rules in the absence of harmonisation.

3.5. The CCBE also questions the approach of introducing mandatory disclosure rules for intermediaries as far as the effectiveness of the proposed new regime is concerned. **Tax evasion** is limited to a small category of advisers outside the mainstream who will simply move offshore, outside of the Union so as to escape a new mandatory disclosure regime. A better way to deal with such a class of advisers is better policing of the tax systems by each member state.

3.6. The EU Directive 2011/16/EU on administrative cooperation in tax matters (the "DAC") is now extremely wide-ranging and requires EU tax authorities to spontaneously provide information to other EU tax authorities where they consider that there may be a loss of tax in that other EU Member State – surely this obligation is broad enough to require exchange of information in relation to aggressive tax planning schemes that impact other EU Member States.

3.7. Commentary on the above points is outlined further below.

4. CONSULTATION QUESTIONNAIRES

4.1. The consultation questions seek views on many questions on *tax avoidance* and **tax evasion**. Although the consultation document does highlight definitions of what constitutes *tax avoidance* and **tax evasion**, the phrases are used interchangeably in the provisions and their meaning is lost. By interchangeably using the terms **tax evasion** and *tax avoidance*, the consultation document fails to solicit proper commentary or identify adequately (or indeed at all) the behaviour which is the target of the proposals.

4.2. Again, the CCBE does not consider that measures suggested in the consultation are appropriate to counter **tax evasion**, which are addressed under the EU Anti-Money Laundering Directive. Additionally, the inclusion of **tax evasion** as the target of mandatory disclosure by intermediaries ignores the reality of **tax evasion**, which is an activity that generally does not involve intermediaries. The inclusion of **tax evasion** therefore serves no purpose other than to taint reputable professional intermediaries in the public's mind.

4.3. Proposals of the type being considered in the consultation document are far-reaching and should be considered having regard to evidence based assessments on such regimes introduced in member states. In this regard, from research carried out, mandatory reporting by intermediaries in relation to *tax avoidance*[8] has been introduced in the UK, Ireland and Portugal.

4.4. The comments outlined below are drawn from evidence gathered on such measures.

5. MANDATORY DISCLOSURE FOR INTERMEDIARIES – PROFESSIONAL SECRECY/ LEGAL PROFESSIONAL PRIVILEGE

General observations

5.1. The CCBE wishes to comment on this aspect in the event that measures may be introduced, as indicated. The CCBE does not for the reasons stated in this submission, believe that the suggested measures are suitable or workable at EU level.

[8] No jurisdiction has to the knowledge of the CCBE introduced such measures in relation to reporting of tax evasion. This is presumably for the simple reason that such measures are inappropriate for countering tax evasion, which is a criminal offence and should be dealt with through reporting obligations under anti-money laundering legislation or equivalent.

5.2. The CCBE wishes to emphasise that any mandatory reporting obligations for intermediaries must ensure that the principles governing professional secrecy and legal professional privilege are acknowledged and respected in any such legislation.

5.3. The purpose of professional secrecy / legal professional privilege is to facilitate full and frank disclosure between those who need legal advice and their lawyers and safeguarding this arrangement is in the public interest. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of information on the basis of confidence. Without the certainty of confidentiality, there can be no trust. Confidentiality is therefore a primary and fundamental right of the client. The lawyer's obligation to respect confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore protected by the State and at European level[9].

5.4. While the CCBE does not propose to explain the origin, the basis for, or the extent of LPP and Professional secrecy, it is thought worthwhile to make some introductory comments to set the context. LLP / professional secrecy is a right held by clients and not a right, privilege or authority held by a lawyer. A lawyer must not disclose information subject to LPP and professional secrecy unless the privilege is unambiguously waived by the lawyer's client and such waiver has been expressly communicated to the lawyer. Even if authorisation to waive is given, the lawyer can still choose to maintain professional secrecy to protect, if this is required in the interest of the client. However, it is important to note that in some EU member states clients are not permitted to waive professional secrecy.

5.5. The importance of professional secrecy / LPP in Member States has been recognised in decisions of the European Courts as being fundamental to the proper administration of justice by the courts and recognises the need for professional advice to be independent[10]. This is not an illusory or esoteric concept but a substantive tool in the proper administration of justice. LPP / professional secrecy is a human right protected by the European Convention on Human Rights. This is shown in the following quotes:

AM&S Europe Limited v. Commission of the European Communities – C-155/79 – judgment by Court of Justice of the European Union of 18 May 1982 (see par. 21 and 24).

Para. 21: *« […] there are to be found in the national laws of the member States common criteria in as much as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand, such communications are made for the purposes and the interests of the client's rights of defense and, on the other hand, they emanate from independent lawyers […] . »*

Para. 24: *« […] it should be stated that the requirements as to the position and status of an independent lawyer, which must be fulfilled by the legal advisor from which the written communications which may be protected emanate, is based on a conception that the lawyer's role in collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs."*

The judgement was confirmed in the case Akzo Nobel Chemicals and Akcros Chemicals Ltd – case T-125/03 - judgment of the General Court of 17 September 2007 and case 17 C–550/07 P (appeal) – judgment of the Court of Justice 14 September 2010 (see paragraphs 40-42, 69-70).

In the case *Ordre des barreaux francophones et germanophone* – C–305/05 – judgment by Court of Justice of the European Union of 26 June 2007 (see paragraph 32), the Court held:

"Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations."

The European Court of Human Rights (case of Wieser and Bicos Beteiligungen GmbH v. Austria no. 74336/01) held:

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[9] On Confidentiality/Professional Secrecy/Legal Professional Privilege, see CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers and the CCBE comments on the OECD Public Discussion Draft concerning BEPS Action 12: Mandatory Disclosure Rules of 30 April 2015.

[10] See AM&S Europe Limited v. Commission of the European Communities – Case 155/79 and Akzo Nobel Chemicals – case T-125/03 - judgment of the General Court of 17 September 2007 and case 17 C–550/07P (appeal) – judgment of the Court of Justice 14 September 2010

Par. 65: *"The Court has attached particular weight to [the] risk of impinging on [the] right to professional secrecy since it may have repercussions on the proper administration of justice."*

Par. 68: *"[…] that a lawyer's duty of professional secrecy also serves to protect the client."*

The European Court of Human Rights (case of OFERTA PLUS S.R.L. v. MOLDOVA, no. 14385/04), paragraph 145 et seq. also held:

"that one of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information exchanged between them must be protected. This privilege encourages open and honest communication between clients and lawyers. The Court recalls that it has previously held that confidential communication with one's lawyer is protected by the Convention as an important safeguard of one's right to defence."

Furthermore, in its ruling Michaud v. France (2012), related to anti-money laundering, the European Court of Human Rights stated that the declaration of suspected laundering provided by the French law was a justified and proportionate interference with the European Convention of Human Rights, by violating professional secrecy of the lawyer, only because 2 elements were meeting: 1) no disclosure in legal advice or legal representation activities of the lawyer 2) the filter of the president of the Bar.

In Germany, professional secrecy is also counted among the fundamental rights. The Federal Constitutional Court confirmed this on a regular basis. For instance:

Federal Constitutional Court (BVerfG), 2 BvR 1520/01, judgment of 30 March 2004:

Paragraph 104: "Professional secrecy is the basic condition for mutual trust between a lawyer and his client. As an indispensable element of professional exercise, professional secrecy is subject to fundamental protection of occupational freedom, as laid down in Article 12 of the Basic Law for the Federal Republic of Germany."

Federal Constitutional Court (BVerfG), 2 BvR 2094/05, judgment of 18 April 2007:

Paragraphs 42/43*: "Obligations on lawyers to disclose confidential information or the authorities' access on confidential information generally undermines professional secrecy and the trustful relation to the client and may have repercussions on the lawyer's professional exercise."*

The lawyer's obligation of confidentiality may be outweighed by cases in which there is a public interest on preventing or combating serious crimes such as laid down in sections 138 and 139 of the German Criminal Code.

In Ireland, for instance, LPP has been described by the High Court of Ireland as *"a fundamental condition on which the administration of justice as a whole rests and as such is a relevant constitutional right of each and every person before the laws of Ireland"*. In Ireland, the extent of LPP has been established as a matter of Irish law by a succession of High Court and Supreme Court decisions over the years. In the context of the mandatory disclosure rules introduced in Ireland, by exempting privileged documents from the mandatory disclosure requirements, the Irish government was recognising the constitutional imperative of exempting from the disclosure requirements all information and documents that the Irish courts would recognise as privileged. It was not, and could not, be left to the Revenue Commissioners to determine what should be exempted from disclosure on this basis. Whether something is legally professionally privileged is something to be established as a matter of law, laid down under the principles established by the Courts of Ireland.

5.6. As such, in the context of Germany and Ireland alone, the introduction of reporting obligations on the part of legal advisers in breach of professional secrecy / LPP, which is a fundamental right of clients, would most likely require a constitutional change. Similarly, in Portugal, the introduction of severe reporting obligations on the part of lawyers must also require legal changes, in order to adequate to the existing rules on professional secrecy.

Professional secrecy / LPP – as a fundamental protection - is acknowledged in both UK and Irish mandatory reporting legislation.

5.7. The CCBE is particularly concerned that the protection recognised in the legislation is not eroded by the introduction of measures by the Commission. This is one of the principal issues that the legal profession is focusing on in relation to the mandatory disclosure regime. Clearly any purported erosion of LPP in the context of the mandatory disclosure regime could have much wider ramifications for the profession and the administration of justice as a whole.

5.8. It must be remembered that LPP is a fundamental right of a client who seeks legal advice from a lawyer regardless of whether the subject-matter of such advice pertains to tax law or not.

Professional secrecy is an obligation that, in many Member States, is protected under sanctions in the criminal law codes, for example in Luxembourg, Belgium, Germany, and France. Additionally, it should be noted that in many jurisdictions, tax authorities do not have the right to seek communications between lawyers and clients or set aside the rights and obligations of LPP and professional secrecy.[11] To introduce measures at EU level which seek to set aside these national rights and obligations – and which are directed at the proper administration of justice is dangerous at best.

5.9. It would be unacceptable if the disclosure obligation on lawyers were to undermine LPP / professional secrecy in any way. In order to preserve the standing of LPP / professional secrecy in accordance with clients' fundamental rights in that regard, it must be made clear in any proposed legislation that where a client is asserting LPP / professional secrecy, the lawyer is only required to notify that assertion and inform the client of the client's disclosure obligations.

5.10. Additionally, it should be noted that if the new measures seek to require lawyers to disclose transactions in breach of LPP or professional secrecy requirements, then lawyers will not be able to comply having regard to LPP and professional secrecy. The proposals indicate that penalties for non-compliance will be part of the regime, if introduced. To impose penalties for respecting human rights (through observance of LPP or professional secrecy requirements) permits an outcome where lawyers cannot defend themselves against penalties for non-compliance. Clients may not be persuaded to waive LPP or professional secrecy in such cases.

5.11. The position regarding LPP or Professional Secrecy in the mandatory reporting regimes in Ireland, the UK, and Portugal is as follows.

Ireland

5.12. There is no obligation on legal professionals who are promoters to disclose details of transactions that are promoted or instigated by the legal professionals where LPP is claimed by a client.

5.13. Legal professionals have reporting obligations where a client waives LPP.

UK

5.14. Special provision is made so as to protect legal professional privilege (in Scotland, the duty to keep communications confidential), the legislation recognising that legal professional privilege can prevent the promoter from providing the information required to make a full disclosure. In such a case provision is made that the disclosure regime does not require any person to disclose such "privileged" information[12]. In practice, therefore, the regime allows the promoter who is a lawyer to ask his client to waive legal privilege, and if such a waiver is given, the promoter can (and must) then disclose. If no such waiver is given, the promoter is not required to breach the obligations he owes to his client and, instead, the disclosure obligation then falls on the user of the scheme concerned[13]. The legal professional asserting that legal privilege prevents disclosure must advise his/her clients of their obligation to disclose and must also advise HMRC that the legal professional's obligation to disclose has not been complied with because of the assertion of legal professional privilege.

Portugal

5.15. The Decree that establishes mandatory disclosure obligations states that lawyers and Law Firms are not to be considered to be "*promoters*", therefore not subject to disclosure obligations, in a series of situation that pretty much covers about every aspect of a lawyer's activity, namely:

Legal advice on the tax planning scheme/action by lawyer or law firms in the context of the evaluation of the client legal situation, within the scope of a legal consultation, in the exercise of the mission of defence or in representation of the client in a law process or regarding a law process, including counselling as to the best way to file a legal action or avoid one, whether the information about the scheme/action is obtained before, during or after the process, as well as within the scope of all other acts that are only to be practised by lawyers and that are specifically referred in the Law 49/2004, 24 of August (Law defining the acts of Lawyers).

[11] Examples include Ireland, the UK, Luxembourg.
[12] See section 314 of the Finance Act ("FA") 2004.
[13] By virtue of section 310 of the Finance Act ("FA") 2004.

5.16. On the other hand, according to Law 49/2004, of 24 of August (Law defining the acts of Lawyers), lawyers in Portugal are prevented from soliciting clients, and are therefore not permitted to lawyers on their initiative to suggest tax planning schemes to clients.

5.17. In that sense, professional secrecy is properly defended in Portugal when conflicting with mandatory disclosure obligations on aggressive tax planning.

6. MANDATORY DISCLOSURE FOR INTERMEDIARIES – EFFECTIVENESS

6.1. The CCBE does not consider it appropriate to introduce mandatory reporting provisions, which appear to be modelled on UK law, for the purposes of achieving the objectives in relation to aggressive *tax avoidance*.

6.2. The CCBE does not consider that such measures are appropriate to counter **tax evasion**, which are addressed under the EU Anti-Money Laundering Directive. For the purposes of providing proper commentary on mandatory reporting provisions, the reference to **tax evasion** will be ignored and the countering of *tax avoidance* as a target for the measures will be assumed.

6.3. The CCBE does not consider the measures will have the desired degree of effect and are likely to result in the measures affecting reputable advisers more keenly than advisers who might be intended to fall within the scope of such provisions. Reputable advisers deal generally with clients who seek full legal compliance in their business dealings and will not generally engage in more exotic forms of *tax avoidance* planning. The introduction of mandatory disclosure provisions, given the experience in the UK, Ireland, and Portugal which is outlined below, will be accompanied by definitions and concepts which prevent reputable advisers giving absolute clarity on the scope of the provisions. This uncertainty undermines the EU legal systems which are generally founded upon the important principles of the rule of law and legal certainty.

6.4. Measures which are unclear and are capable of subjective application offend against these principles and such measures are therefore 'bad law'.

6.5. The position in Ireland, the UK and Portugal is addressed below by way of example.

Ireland[14]

6.6. The regime in Ireland was introduced in 2010 and revised again in 2011 and in 2015.

6.7. The regime in Ireland lacks clarity on when the disclosure obligation exists and the information that must then be disclosed. This lack of clarity, through the potential imposition of a high level of penalties, places a significant onus on promoters and taxpayers to assess provisions which are of their nature subjective.

6.8. The lack of clarity is augmented by the lack of response or feedback on any disclosure made. In particular, as the regime operates independent of the Irish general anti-avoidance provision 'GAAR'[15], which can be invoked without time-limits applying, greater uncertainty is now introduced for intermediaries.

6.9. The wide nature of the hallmarks (specified descriptions) for the reporting of transactions potentially covers ordinary forms of tax mitigation as well as more aggressive planning. For example, hallmarks include:

a) Any form of employment tax saving transaction

b) Any form of transaction that might convert what would otherwise be income into gains subject to capital gains tax.

6.10. The low hurdle for the application of the reporting obligations has been tempered by guidelines issued by the Revenue Commissioners which outline transactions that would not fall within the scope of the measures. This is entirely unsatisfactory in a regime subject to the rule of law.

6.11. The purpose and tangible benefit of the regime is unclear. The regime does not provide for any tangible result arising from a disclosure for a promoter or indeed Ireland. There is no feedback and there is no confirmation obtained or obtainable by a promoter/ taxpayer that the GAAR provisions will not be invoked. It is submitted that this has undermined the effectiveness of the regime.

[14] A guidance note on the workings of the Irish legislation is found in the attached link - http://www.revenue.ie/en/about/foi/s16/income-tax-capital-gains-tax-corporation-tax/part-33/33-03-01.pdf

[15] In section 811C TCA.

6.12. In Ireland, disclosures have been few since the introduction of the measures in 2010.[16]

[16] Up to date figures from Revenue awaited.

Portugal

6.13. Portugal

a) Since 15 May 2008 Portugal has in place legislation – namely, the Decree-Law 29/2008, of 25 February, 2008 – that establishes several communication, information and clarification obligations towards the tax authorities on tax planning schemes/actions that may be proposed/adopted, that exclusively or mainly have the objective to gain fiscal advantages to the beneficiary of the scheme/action on taxes such as income tax (*IRS)*, corporation tax (*IRC*), VAT (*IVA*) or property tax (*IMI/IMT/Selo*).

b) The regime in Portugal does not distinguish between legal or illegal tax planning, using the term abusive.

c) The problem with this Decree is that it does not offer legal certainty, once it uses terms and expressions that, on the one hand, give the tax authorities some discretion in its enforcement and, on the other hand, can lead to misinterpretation with serious consequences for its recipients, because the infringement of disclosure obligations established in the Decree is punishable with fines that can also be followed by sanctions on the entities who fail to comply with disclosure obligations.

6.14. The tax authorities gather the information that is received and use it to study those tax planning schemes/actions and prepare legislative and regulatory measures to prevent the appearance of schemes/actions like it.

6.15. Furthermore, to prevent **tax evasion** and *tax avoidance*, the tax authorities disclose to the public, through its web page on the internet, the tax planning schemes/actions that can be considered abusive and that may lead to investigation procedures, be reclassified as such and subject to corrections or that may lead to the use of anti-abuse provisions, functioning as hallmarks.

6.16. In the first two years, 87 communications were made, which represents a small number. Recent years statistics are not yet publicly available.

UK

6.17. Under sections 307-319 of the Finance Act ("FA") 2004, and various regulations made under powers conferred in that Act, the United Kingdom ("UK") introduced a regime that requires disclosure to the UK Tax Authority (HM Revenue & Customs, "HMRC"), by certain identified persons, of schemes and arrangements that are (broadly put) designed to achieve a tax advantage. This is the Disclosure of *Tax Avoidance* Schemes ("DOTAS") regime.

6.18. The DOTAS regime has a number of important elements:

a) It applies to "notifiable arrangements" and "notifiable proposals" (s.306 FA 2004). The former is an arrangement prescribed in regulations (see below) which enable, or might be expected to enable, a person to obtain a prescribed tax advantage where the main benefit that might be expected to arise is the obtaining of that advantage. The test is thus "objective" (focusing on what might be expected to happen) rather than "subjective" (focusing on what a person intended). The latter, a "notifiable proposal", is a proposal for an arrangement which, if implemented, would itself be notifiable. HMRC is permitted to apply to the independent Tax Tribunal for an order that a specific proposal is, or particular arrangements are, notifiable (s.306A).

b) The regime places obligations on a "promoter" who is a person who, in the course of a "relevant business", is responsible for the design, marketing, organisation or management of a "tax advantaged" scheme, or who directly or indirectly makes a scheme available for implementation by another person. A relevant business is any trade, profession, or business which involves the provision of services related to tax or is carried out by a bank (s.307). This extends, therefore, to both lawyers and accountants providing tax advice.

c) The regime applies to most UK taxes, covering Income Tax, Corporation Tax, Capital Gains Tax, Petroleum Revenue Tax, National Insurance Contributions, Stamp Duties, Inheritance Tax (for Trust arrangements) and the Annual Tax on Enveloped Dwellings (a special UK tax on residential properties held by corporate vehicles)[17].

[17] There is a similar disclosure regime for VAT (see Schedule 11A, Value Added Tax Act 1994); the issue of privilege and confidentiality should not arise here since the obligation to disclose is placed on (and only on) the taxable person and not on an adviser.

d) Provision is made to identify the types of tax planning/*tax avoidance* in question by regulations which prescribe certain types of arrangements[18]. Those are arrangements which fall within certain descriptions (known as "hallmarks") which are expected to provide a tax advantage as a main benefit. There are three generic hallmarks, designed to capture features indicative of *avoidance*, namely confidentiality, the charging of premium (tax related) fees and standardised (i.e. packaged) tax products. There are also certain specific hallmarks which are designed to target known revenue risks relating to the use of tax losses, leasing transactions, arrangements in relation to employment income, schemes involving particular financial products and the Annual Tax on Enveloped Dwellings. There are also separate descriptions to capture certain types of Stamp Duty Land Tax and Inheritance Tax schemes.

e) The regime requires the provision of prescribed information. This includes the promoter's name and address, details of the relevant arrangements, information explaining the arrangements and, in particular, the feature of the arrangements from which the tax advantage is expected to arise and the relevant statutory provisions on which the tax advantage is based (see the Tax Avoidance Schemes (Information) Regulations 2012, SI 2012/1836).

6.19. HMRC also produce statistics revealing the number and category of disclosures made; see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/379821/HMRC_-_Tax_avoidance_disclosure_statistics_1_Aug_2004_to_30_Sept_2014.pdf

6.20. These show a large number of disclosures in the first years of the regime (over 500 direct tax notifications in 2004/05) and a very small number in recent years (no more than 10 in 2014). This evidences a huge drop off in tax planning schemes, as might be expected. There are no specific statistics dealing with user or client notifications where legal privilege was maintained, but experience has shown that privilege is typically maintained where the client wishes to make (and control the form of) disclosure; privilege is often waived when the client would rather the legal adviser had the responsibility of meeting the disclosure obligations.

6.21. We are not aware of any instance in which the client maintained privilege, took on the obligation to disclose and then simply failed to do so. In the vast majority of cases, our understanding is that the regime has worked well in that the principle of legal privilege is maintained while, at the same time, HMRC has been able to access the desired information through users of schemes.

7. MANDATORY DISCLOSURE FOR INTERMEDIARIES - COMPETITIVENESS

7.1. The complexity of tax rules and the rule of law is a measure of improving the international competitiveness of the EU and being internationally competitive is vital to the sourcing of investment into the EU. However, it is not the only requirement to be internationally competitive, as international studies have also focused *inter alia* on the following areas:

a) Regulation including complexity in the taxation system;

b) Labour Market rules;

c) Cost competitiveness.

7.2. On the first of these factors, it is generally recognised[19] that for a jurisdiction to remain internationally competitive for business, the tax system in the jurisdiction should be (1) sufficiently clear for business to operate with confidence, (2) stable so that long-term decisions can be made without the risk of tax changes and (3) fiscally comparable to its competitors' tax systems to ensure that financing and investment transactions can be made without additional cost.

7.3. Approval of this view - that tax competitiveness goes beyond rates of tax - is found in a quotation of the UK Chancellor in his UK Supplementary Budget speech of 2010, where, in announcing the establishment of an Office of Tax Simplification, he stated:

> *"**tax competitiveness** is not just about rates **and** incidence **of tax**. Predictability, stability **and** simplicity are also important"*.

7.4. The CCBE is strongly of the view that the mandatory disclosure regime, as proposed, is likely to result in more aggressive advice being provided by advisers from outside of the EU. This will perhaps result in less rather than more regulatory oversight on the provision of professional advice.

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[18] See, eg, the Tax Avoidance (Prescribed Description of Arrangements) Regulations 2006, SI 2006/1543.

[19] See '*Countering Tax Avoidance in the UK: Which Way Forward?*' – published by the Tax Law Review Committee of the Institute for Fiscal Studies, February 2009

7.5. Additionally, in light of the ease of obtaining advice from jurisdictions outside the EU the introduction of measures requiring reporting by intermediaries operating in the EU is likely to have little practical effect on cross border tax avoidance schemes. Such measures would in that case only seek to obtain a competitive disadvantage for intermediaries in the EU.

7.6. Finally, Member States remain sovereign in tax matters. Indeed, the States, even within the European Union, are engaged in a fierce tax competition. This tax competition seeks to attract the maximum number of legal and physical persons and thereby goods and capital. The European citizen as a taxpayer cannot be held responsible for taking advantage of this competition. The taxpayer and his/her lawyer are not liable for this situation. The fiscal morality, presented by the state authorities as a standard of virtue could be considered as damaging to the Rule of Law. In this situation, the Rule of Law would disappear in favour of an economic morality defined *a posteriori*. The risk and also the temptation to undermine the Rule of Law are important. A majority of developed countries are laying down an annual Tax law which tends to overcome deficiencies experienced during the previous year related to expected revenues. These periodic and frequent changes usually reflect short term and non-prospective research. What was considered as virtuous can suddenly become amoral. The tax payer and his/her lawyer cannot be held responsible for such an instability which makes tax morality shapeless and inconsistent. A harmonisation of the legislations could be the solution to solve this competition and legal uncertainty. Members States and the European Commission could resolve tax avoidance via a tax harmonisation which would ensure the protection of human rights.