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CCBE Response to OECD Working Papers on the Role of Tax Intermediaries

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1. The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further six European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

2. In formulating our response, we have considered the following papers issued by OECD:

   2.1 Working paper 1 – 'How the study team is working'
   2.2 Working paper 2 – 'Draft framework for the report'
   2.3 Working paper 3 – 'The emerging direction of the study'
   2.4 Working paper 4 -'Placing risk management and the enhanced relationship in context'
   2.5 Working paper 5 -'Risk Management'
   2.6 Working paper 6- 'The enhanced relationship'

3. Having reviewed the papers in detail, there are many desirable goals stated which are clearly in the public interest in terms of achieving a more effective relationship between Revenue authorities and taxpayers and the intermediaries who advise them. In particular, we endorse the desirable objectives of a relationship between Revenue authorities and taxpayers that is built around commercial awareness, impartiality, proportionality, disclosure and responsiveness which are fully articulated in Working Paper 6. We also agree that if such an enhanced relationship can be built, a reduction in compliance costs and greater certainty in structuring a taxpayer's affairs are potentially material benefits that could accrue from the proposals. It is also axiomatic to note that enabling Revenue Authorities to work more efficiently could reduce public sector compliance costs and so benefit citizens in a particular jurisdiction generally. We have however in our review identified some particular concerns.

4. We should therefore like to separate out our concerns into a number of specific areas where we will make specific comments. These are:

   4.1 Impact on legal professional privilege / professional secrecy (see in particular paragraphs 11-13 of Appendix III of Working Paper 6)
   4.2 Implications for proposed risk assessment of tax advisers (see in particular paragraph 38 of Working Paper 5)
   4.3 Relevance and applicability of proposals outside the realm of large corporate taxpayers
   4.4 Concerns about the definition of 'unacceptable tax minimisation'
   4.5 Overall workability of new approach based on 'relationship'

5. **Impact on Legal Professional privilege / Professional secrecy**

   5.1 We note in particular the comments at paragraph 13 of Appendix III to Working Paper 6 that participation in the enhanced relationship would not, in the view of the study group require tax plans to disclose information subject to legal professional privilege ('**LPP**') or **professional secrecy**. We remain concerned about this matter. Whilst it is suggested in paragraph 13 that what would be disclosed in the first instance would be the disclosure of facts rather than the legal conclusions to be drawn from those facts, we feel it is inevitable that in a process where a Revenue authority responds with further questions or comments, the Revenue authority are very likely to wish to understand the legal analysis of the factual issues. In this context, once the taxpayer has made the initial disclosure it is difficult to see that resolution of the matter will generally progress without being drawn into legal argument and a request to disclose the privileged advice. Moreover, in many European jurisdictions, the scope of professional secrecy is more extensive than that of LPP. In such jurisdictions the facts

on which legal conclusions are drawn may be covered by professional secrecy, and may consequently not be disclosed to a Revenue authority.

5.2 As a related matter, we appreciate that the extent of the capacity of clients to waive LPP or professional secrecy varies between different jurisdictions amongst our member states. In some jurisdictions, clients may not waive professional secrecy at all. In this context, it would be essential even where the taxpayer wished **voluntarily** to disclose the basis of his legal advice for any agreed process not to undermine the concept of LPP or professional secrecy; it follows that for the Revenue authorities to gain the confidence of taxpayers and their legal advisers, we would propose there should be an express 'carve out' such that any disclosure made in this context would not be capable of being construed as a waiver of LPP or professional secrecy more generally by the taxpayer.

5.3 The study team envisages that if disclosure to a revenue body is made directly from a tax adviser, it can only be on the taxpayer's instructions or under a statutory obligation that requires direct disclosure from the adviser (paragraph 20 of Appendix III of Paper 6). We understand that the study team is not suggesting new statutory obligations to be created, but we still want to emphasize that the legal profession has opposed the enactment of information duties for lawyers in the framework of the fight against money laundering, and will strongly oppose any new attempt to chip away at LPP or professional secrecy.

6. Risk Assessing advisers

We should like to place on record our serious concern about the proposal that revenue authorities formally risk assess individual firms and tax advisers as part of this project and make such risk assessments available (see Paragraph 41 of Working Paper 5). We are opposed to this process in principle for a number of reasons as follows:

6.1 Objectivity

(a) We are sceptical on principle whether there would be a sufficient degree of impartiality on the part of the Revenue authorities for such risk assessment to be undertaken in a transparent and acceptable manner. Given that as we understand it, the risk assessment would be undertaken by the Revenue authorities themselves and not by an independent third party, there are related concerns about the impartiality and consistency with which risk assessments would be undertaken especially when it comes to specific law firms or other tax advisers.

(b) Assuming that the first hand perspective of Revenue officials interacting with the relevant firms would be influential in the risk assessment, this gives rise to risks of potential subjectivity on the part of Revenue officials which would need to be counterbalanced by some third party vetting for the process to be credible.

(c) We also envisage the process of maintaining and updating records on firms could be highly bureaucratic and expensive. To the extent that the reputation or position of firms is dependent upon senior individuals working within the firms, it is difficult to see how any assessment could be properly maintained without also monitoring movement of key individuals between professional firms

6.2 Desirability

We endorse the comments of the CFE in its submission of June 26, 2007 expressing scepticism about the potential commercial consequences of risk assessment for legal advisers and other tax professionals. These could be particularly acute in the case of smaller professional firms and specifically sole practitioners if the risk assessment was

linked to the capacity of the individual firm to obtain professional indemnity insurance (PII) as if the risk assessment was made known to the adviser but was otherwise confidential, there would be a duty to disclose to insurers as a relevant fact given the duty of utmost good faith that normally applies to insurance. In the context of preserving taxpayer choice of the widest range of advisers, it is difficult to see how one could protect against the risk that advisers who were prepared to represent taxpayers in areas of controversy might not be given a 'high risk' assessment that could impact adversely on the viability of their business in relation to their PII position. We are also concerned that this information might when an adviser was dealing with another part of the Revenue authority potentially prejudice the view of other Revenue officials.

6.3 Consequences of increase in Revenue power

The risk-assessments can only be effective if they carry such commercial consequences that few practitioners would be likely seek a "high-risk" rating. Indeed the paper explicitly makes clear that such a "high risk" rating would be associated with increased inquiries and thus higher costs for clients. A "high-risk" rating may be perceived, in effect, as a penalty, which the revenue could apply to advisors even though they have recommended actions which are entirely legal.
In the hands of the Revenue such risk assessments may be perceived as a powerful tool to discourage advisors from recommending to clients actions which are entirely legal on a subjective basis that it is not in the interests of the Revenue.
Such a "high risk" rating may undermine the trust between advisors and the Revenue as it may be perceived as tantamount to a subjective "blacklist" of those advisors who legitimately challenge the revenue. This could threaten the independence of legal and other tax advisers and have the reverse affect that the Working Papers are advocating in undermining trust between the Revenue authorities and advisers.

7. **Applicability of proposals outside of the large corporate area**

We note that Working Paper 2, paragraph 4a. mentions the potential application of the proposals to large public corporates and that this principle is developed specifically in paragraph 12 of Working Paper 4 noting that there may be significant incentives in adopting the 'enhanced relationship' proposals for this group of taxpayers given the size and complexity of their business and the particular challenges that ongoing compliance may generate for them in the context of achieving certainty for their public reporting to shareholders.

We are not however convinced that the working papers as currently constructed make a convincing case for the potential applicability to these principles and benefits to a wider range of tax payers, specifically high net worth individuals who are referred to alongside large corporates at paragraph 4a of Working Paper 2. In practical terms, the profile and issues facing most high net worth individuals differ radically from those of large corporates so the logic of this taxpayer group being suitable to this approach is difficult to follow.

8. **Potential impact of proposals on smaller and independent legal and other tax advisory firms**

We have a generic concern that the proposals on enhanced relationships between revenue authorities and tax intermediaries referred to at Paragraph 47 – 57 of Working Paper 6 may work against the interests of those lawyers and other tax advisers who work outside of large firms of lawyers and accountants.

By orientation, large organisations such as national Revenue authorities may feel more 'comfortable' in building enhanced relationships in an advisory context with large firms of lawyers and accountants who have similar organisational profiles. It follows from this that to the extent that the proposals are based around the capacity to generate formal working relationships to make the process viable, smaller firms will by definition have less capacity to

develop resource and effort in dealing with Revenue authorities and may therefore be impacted negatively in consequence in the context of their ability to seek informal reassurance of points of controversy at an early stage. We see this as a potentially concerning issue in the context of maintaining a 'level playing field' between advisers relationships with Revenue authorities given the possibility of special relationships developing between large firms and Revenue authorities for the reasons stated.

9. **Defining unacceptable tax minimisation**

9.1 There are a number of comments throughout the paper which focus on concepts of 'unacceptable tax minimisation' (in particular, Working Paper 2, paragraph 10) and an explicit acceptance that the view of Revenue authorities and tax advisers about what is the 'right' amount of tax can and often do vary materially. We are concerned about the implicit possibility in these comments of blurring the distinction between :

- what amounts to criminal tax evasion which is unacceptable as in breach of the law on; and
- taxpayers acting within the law engaging in what is perceived by Revenue authorities as 'aggressive' but lawful tax planning

Whilst there may be different moral views on whether certain lawful tax planning is desirable, perceptions of aggression can vary widely. Without taking a stance on the moral issue, we firmly believe that if an individual is acting within the law, he should be able to place his case before the Revenue authority and courts without being stigmatised and to engage legal counsel to argue his case.
It is highly unlikely that there will be a consensus between advisors and revenue officials as to the meaning of "unacceptable tax minimisation". In the context or building a trusting relationship between advisors and revenue this renders this key term somewhat meaningless.
Unlike the Seoul Declaration from which these working paper germinate, this study focuses on tax planning which is not illegal but has unintended and unexpected tax revenue consequences from the perspective of the revenue. We contend that this must be a matter for the revenue, and not the tax advisor or the taxpayer. The paper is right to note that ultimately, if tax planning works within an interpretation of existing tax law that courts support, only governments and legislatures can change the wording of the law to alter the interpretation.
We note the reference to the "spirit of the law" (paragraph 12 of Working Paper 5). It may be tempting for some policymakers to go down a route where the "spirit of the law" is evoked over compliance with the rule of law. This temptation should be resisted as a concept which is far too uncertain, arbitrary, and certainly no basis for policy or enhanced trust.

9.2 We note the reference in the study to the introduction in certain jurisdictions of 'tax shelter' legislation (in particular at paragraph 56 of Working Paper 5). Equally, it is accepted at paragraph 57 that taxpayers are free to seek advance rulings in certain cases where there is uncertainty about the tax implications of engaging in a particular commercial transaction. Our firmly held view is that a combination of these two potential routes will enable Revenue authorities and tax payers to:

- In cases where Revenue authorities identify areas of so called 'aggressive' tax avoidance that they wish to be advised of contemporaneously rather than retrospectively through normal self-assessment procedures; and
- In the case of taxpayers, identify areas of uncertainty where they wish to seek advance comfort on specific transactions.

In conclusion, we suggest that consideration be given to the possibility of these measures in combination as a more appropriate manner of seeking to enhance levels of information flow from taxpayers which is seen as a desirable objective. In essence, they would appear to offer

a more uniform and objective basis which is open to taxpayers at large to be advised of or seek to take advantage of in appropriate circumstances than a blurring of the line between tax evasion and lawful but aggressive tax planning.

10. Conclusion

In summary, whilst as noted above, we see much in the proposals that is well intended and a number of desirable objectives articulated, we retain a degree of scepticism as to the workability of the proposals. Specifically, we remain concerned about the potential impact of the proposals in their current form on the specific area of legal professional privilege / professional secrecy, as well as the potential for them to detract from the ability of taxpayers to engage the attorneys and other tax advisers of their choice to assist them in the conduct of their tax affairs.