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## **Opinion Statement PAC 2/2016 and FC 8/2016**

# **The role of tax advisers with regard to tax avoidance**

**Prepared by the CFE Fiscal and Professional Affairs Committees**

**Submitted to the European institutions and the OECD in June 2016**

*The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.*

*The CFE is registered in the EU Transparency Register (no. 3543183647-05).*

*We will be pleased to answer any questions you may have concerning CFE comments. For further information, please contact Dick Barmantlo, Chairman of the CFE Professional Affairs Committee, Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, CFE Tax Policy Manager, at [brusselsoffice@cfe-eutax.org](mailto:brusselsoffice@cfe-eutax.org).*

## The context

Recent discussions on tax avoidance have shed a light on the role of tax advisers in promoting, implementing and preventing tax planning which may be deemed aggressive.

There is little practical guidance for tax advisers on this. Some countries have regulated professional conduct of tax advisers in their laws. In most countries, sometimes additionally, professional bodies at national level have enacted codes of conduct or ethics for their members. Professional bodies that are members of CFE also have endorsed the CFE principles on “Professional qualifications and ethics of tax advisers in Europe”<sup>1</sup>. In addition, some tax firms have adopted their own code.

Most codes by professional bodies have been adopted before the emergence of the public tax avoidance discussion and do not contain specific provisions on tax avoidance or aggressive tax planning. An exception are the rules on “Professional Conduct in Relation to Taxation”<sup>2 3</sup>, developed by a number of professional bodies in the United Kingdom which provide more detailed guidance on how tax professionals are expected to deal with regard to tax avoidance. The UK tax administration has asked these bodies to still “*take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance*”.

At international level, the OECD has asked governments to reconsider the role of tax advisers, focusing on the role tax advisers can play in increasing compliance:

In its “Study into the Role of Tax Intermediaries”<sup>4</sup> presented in April 2008, the OECD acknowledged that “*tax intermediaries play a vital role in all our tax systems by helping taxpayers understand and comply with their tax obligations in an increasingly complex world*”. In May 2013, the OECD published its report “Co-operative Compliance: A Framework”<sup>5</sup> in which it reports on progress countries have achieved in establishing enhanced relationships with large corporate taxpayers and tax advisers. It asks for “*a ‘change’ in mindset and/or a cultural change on the part of advisers*” to the extent they cling to an “*adversarial relationship*”. Tax advisers have also been linked to the OECD “base erosion and profit shifting” (BEPS) project, through considerations on the introduction of “Mandatory Disclosure Rules”<sup>6</sup> which oblige tax advisers and promoters of certain tax planning schemes to report these to tax authorities. In August 2015, the OECD report “Tax Administration 2015”<sup>7</sup> suggested that engagement with the tax intermediary community provides “*opportunities for revenue bodies to leverage improved compliance with the tax laws*”. This approach has been set out in a more detailed way in the May 2016 OECD Report “*Rethinking tax services. The changing role of tax service providers in SME tax compliance*”<sup>8</sup>.

The term “tax intermediary” has met resistance from tax advisers who emphasise that although they are obliged to maintain a certain independence from the client and to respect precedence of the law

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<sup>1</sup> [www.cfe-eutax.org/sites/default/files/Professional%20Code\\_20042012.pdf](http://www.cfe-eutax.org/sites/default/files/Professional%20Code_20042012.pdf).

<sup>2</sup> <http://www.tax.org.uk/professional-standards/professional-rules/professional-conduct-relation-taxation>

<sup>3</sup> Another example is the Manifesto of the French Tax Lawyers’ Institute IACF: <http://www.iacf.asso.fr/presentation-de-l-iacf/manifeste-iacf/>

<sup>4</sup> [www.oecd.org/tax/administration/studyintotheoleoftaxintermediaries.htm](http://www.oecd.org/tax/administration/studyintotheoleoftaxintermediaries.htm).

<sup>5</sup> [www.oecd.org/ctp/administration/co-operative-compliance.htm](http://www.oecd.org/ctp/administration/co-operative-compliance.htm).

<sup>6</sup> [www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm](http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm).

<sup>7</sup> [www.oecd.org/ctp/administration/tax-administration-23077727.htm](http://www.oecd.org/ctp/administration/tax-administration-23077727.htm).

<sup>8</sup> <http://www.oecd.org/tax/rethinking-tax-services-9789264256200-en.htm>

over their client's expectations, they should not be considered an in-between, as their position will be on the client's side.

In November 2015, the CFE, together with two other professional bodies, AOTCA (Asia-Oceania Tax Consultants' Association) and STEP (Society of Trust and Estate Practitioners), presented a proposal for a Model Taxpayer Charter, listing rights and responsibilities of taxpayers towards tax administration<sup>9</sup>. As the client's representative, the tax adviser's rights and obligations towards tax administration result from the client's rights and obligations.

At the EU level, the European Parliament, in November 2015, adopted a non-legislative report *on Tax Rulings and other Measures similar in Nature or Effect*<sup>10</sup>, outlining the Parliament's position on some key issues, such as tax advisers' role and liabilities. This work is being followed up by a second report<sup>11</sup> due to be adopted on 4 July 2016, which calls for "concrete sanctions, including the possibility to revoke business licenses for professionals and companies proven to be involved in designing, advising on the use of, or utilising aggressive tax planning [and evasion] schemes."

It is in the context of these developments that the CFE Professional Affairs and Fiscal Committees have jointly issued this Opinion Statement. It is a response to the initiatives launched by governments and international organisations to engage tax advisers in the task of enhancing taxpayers' compliance.

The question to what extent tax advisers can meet government's expectations is intrinsically linked to their responsibility towards the client.

### **The tasks of tax advisers**

Tax advisers are responsible for helping their clients comply with their obligations under tax law and to enable them to make full use of their rights in tax matters. Tax advisers are taxpayer's chosen and trusted representatives in their dealings with tax administration and, in some countries, fiscal or administrative courts. Taxpayers have the right to be advised and represented by qualified tax professionals of their choice.

Tax advisers may provide the legal advice and services which are necessary to fulfil these tasks. Law may provide for specific requirements to guarantee the necessary qualification, independence and reliability of tax advisers, in the interest of their clients.

Taxpayers assisted by their tax advisers have to provide tax administration with the cooperation necessary to carry out a correct assessment of taxes.

### **Respecting the law**

Tax advisers and their clients have to fully respect the law. This includes written law, case law and unwritten recognised legal principles, like, in some countries, the concept of *abuse of rights*. Where

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<sup>9</sup> [www.taxpayercharter.com/](http://www.taxpayercharter.com/); [www.cfe-eutax.org/node/5054](http://www.cfe-eutax.org/node/5054)

<sup>10</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN&language=EN>

<sup>11</sup> [http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-580\\_528&format=PDF&language=EN&secondRef=01](http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-580_528&format=PDF&language=EN&secondRef=01)

the letter of the law is not clear, they have to identify the meaning of the law using techniques of interpretation.

The law itself, including case law and legislative materials such as parliamentary history, must enable the taxpayer or tax adviser to reliably determine the meaning of the law and apply the law in the specific case of their client.

Tax advisers and their clients are not bound by opinions of the tax administration, expressed in letters, public statements, circulars, administrative regulations or other communications, on how laws should be interpreted. However, increasingly tax advisers are required not only to take account of the law but also, where it is clear, the policy intention when setting the law.

While they are not bound by any opinion on what has been the intention of the legislator, unless this intention is apparent from the legislative materials, it is good practice to advise clients of the risks in adopting a course of action which may be considered aggressive planning by the tax administration. Tax advisers and their clients may thus deviate from tax administration's opinion or interpretation but it is advisable to indicate such difference in opinion, where the tax administration's opinion has been communicated clearly.

It is a fundamental right of a tax adviser to practice his/her profession in accordance with the law. Any restriction to this right needs to be based on an act of Parliament and has to be proportionate. Professional ethics translate the message of the law into professional duties. Tax advisers who are members of a professional body will have additional obligations which may include the requirements to act with integrity and honesty at all times, observe client confidentiality, hold professional indemnity insurance and engage in ongoing professional development to maintain professional and technical competence.

Tax advisers and their clients should not be sanctioned for behaviour not prohibited by the law.

### **Respecting the client's interest**

Tax advisers will ensure that their clients take informed decisions. If a client asks a tax adviser to engage in an arrangement which, albeit being legal, may have negative consequences for the client, as it may be deemed aggressive by tax authorities or cause reputational damage, the tax adviser will make the client aware of this risk. The final decision shall rest with the client.

Where tax advisers can demonstrate that they have informed a client of possible negative consequences of a certain tax behaviour, they should not be liable to recourse or sanctions.

Tax advisers are obliged to make clients aware of realistic opportunities to reduce their tax burden<sup>12</sup>. This may include opportunities that may lie in a so-called grey-area and that may be considered tax avoidance. However, tax advisers do not have to advise on arrangements that are unlikely to be accepted by tax administration or that are not in line with the adviser's own ethical principles. In the latter case, a tax adviser may decide to refrain from representing the client and will inform the latter that he is not willing to advise on these planning opportunities, remaining the final decision to the client to seek assistance elsewhere.

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<sup>12</sup> See also the UK High Court of Justice's decision in case *Mehjoo v Harben Barker*, [2013] EWHC 1500 (QB).

Cooperative behaviour towards tax administration will usually be in the client's interest. Nevertheless, a client may choose not to be more cooperative than he is legally obliged to. It cannot be assumed, neither by the state nor by the tax adviser, that a client is ready to share information he is not obliged to share.

### **Cooperative compliance agreements**

Tax advisers welcome *co-operative compliance* which bears a huge potential for reducing compliance effort for taxpayers and administrative cost for tax administration.

*Co-operative compliance* means a voluntary agreement between taxpayer and tax administration which has been characterised by the OECD as “transparency in exchange for certainty” and which can be of mutual interest. For example, this may include a settlement agreement following an audit or investigation by the tax authority. As the case may be, the agreement may involve the tax adviser.

When concluding an agreement in which the taxpayer commits himself (and their tax adviser) to do more than is legally required, the taxpayer should be aware of this.

Even in an agreement in which a client commits himself to do more than is legally owed, the tax adviser will watch whether the collaboration remains fully in his client's interest and will advise the client accordingly.

A client shall not incur any disadvantage from not cooperating more than he has to under the law.

A tax adviser may not enter into an agreement with the administration that touches upon his obligation to serve his client's interests, unless the client has acknowledged and agreed with such agreement.

### **Mandatory reporting rules**

Where tax advisers are obliged to notify tax administration of certain arrangements,

- Unless prohibited by law, tax advisers should inform the client of this obligation, prior to the client's decision to enter into the said arrangement.
- tax advisers shall not be obliged to report to the tax administration any documentation other than a description of the arrangement itself.
- If the tax adviser is not certain whether to notify the tax authorities or not, for example, if by reporting he might infringe the taxpayer's human rights, he should seek professional legal advice before disclosing such information.

### **Concluding remark**

As stated in the CFE European Tax Advisers Priorities in EU Policy 2014-2019<sup>13</sup>, “*Tax advisers play an important role in ensuring taxpayer compliance. They are not only bound by law but also by codes of*

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<sup>13</sup> <http://www.cfe-eutax.org/sites/default/files/European%20Tax%20Advisers'%20Priorities%202014-2019,%20page%20version.pdf>

*conduct of their professional bodies. Their independency should be recognised by tax authorities and safeguarded. The right to effective legal representation is part of an individual's human and fundamental rights to privacy and a fair trial. These will only be effective if clients can trust that information shared with their adviser will remain confidential and that tax advisers are not watchdogs of the tax administration. Tax professionals, when representing clients in tax matters, should be granted recognised privilege throughout the EU, not only if they are member of the profession of lawyers. The specific importance of tax advisers' independence and qualification should not be ignored by applying a one-size-fits-all approach in the regulation of services".*