
Discussion Paper

“Professional Judgment in Tax Planning - An Ethics Quality Bar for All Tax Advisers”

Prepared by the CFE Professional Affairs Committee
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CFE Tax Advisers Europe is a Brussels-based association representing the European tax institutes and associations of tax advisers. Founded in 1959, CFE brings together 33 national organisations from 26 European countries, associated with more than 600,000 tax advisers via the Global Tax Advisers Platform (GTAP). CFE is part of the European Union Transparency Register no. 3543183647-05. We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Philippe Vanclooster, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Director of Tax Policy, at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

Executive Summary

This discussion paper is founded on CFE’s commitment to high professional standards in tax advice and seeks to promote ethical professional judgment across all tax advisers in Europe. While tax advisers play a valuable role in the proper functioning of tax systems, this role can be undermined by the promotion of abusive tax arrangements within legal parameters. CFE has issued this paper to stimulate discussion on how to tackle this problem among all who have an interest in how our tax systems function in Europe, not just tax specialists. We are actively seeking stakeholder feedback.

“If it is legal, is it acceptable?” is the central ethical question which inspired this paper. It is distinct from criminal tax evasion – breaking the law – which CFE unequivocally condemns. The question comes down to whether there is manipulation and artificiality in tax planning, for example, where planning arrangements are designed without any genuine underlying economic purpose other than achieving the tax saving. Some commentators refer to this problem as “aggressive tax avoidance”, but we are mindful of the endless debates over terminology, not least due to the problems of translation. Therefore, we refer generically to abusive and aggressive tax-avoidance arrangements and we focus on what could be done to address the problem as a whole in relation to all tax advisers in Europe.

This paper is focused on the future, noting that tax systems will play a key role in repairing the strained public finance conditions after the COVID-19 pandemic, as well as the growing transformational impact of technology on tax services and tax administration overall. Equally, the paper summarises the significant changes over recent years in business practices and societal expectations with regard to tax; targeted EU and international policy initiatives to address abusive arrangements; and some key legal obligations, constraints and cultural attitudes at national level which are relevant for the work of advisers.

It is important to bear in mind not only that tax advisers do not work in a vacuum but also that there are significant differences between tax advisers. While many are members of a professional body, such as the members of CFE member bodies, some are subject to mandatory regulation, some accept voluntary regulation, and a significant number are unregulated and without affiliation to a professional body, in a context where most European countries do not impose market access rules for the provision of tax advice. Our paper concerns the professional behaviour of all advisers, whatever their status.

The principal objective of the paper is to seek feedback on a proposed “ethics quality bar” based on five short questions that all tax advisers should reflect on when undertaking their advisory role in the overall tax system. Legislators design tax laws; tax administrations apply the law in collecting taxes due; and taxpayers comply with the law, while availing themselves of applicable rights. Tax advisers play a critical role by exercising professional judgment on taxpayers’ rights and obligations in advising across a range of areas, for example, the relevant aspects of the law, jurisprudence and administrative matters, as well as the consequences of taking or not taking their advice. The ethical quality of this professional judgment is therefore critical on the question “If it is legal, is it acceptable?”.

CFE seeks views on whether the five short questions below can help to steer all advisers in the direction of an appropriate balance between the rights and obligations of taxpayers, avoiding abusive planning. The questions are best read in conjunction with the illustrative examples included in the paper, to have an appreciation of how the questions can be applied to legal and operational matters common in business contexts.

Setting an Ethics Quality Bar for Professional Judgment in Relation to Tax Planning

Five Key Questions for Tax Advisers to Reflect on When Preparing and Providing Advice:

1. Is there a genuine economic purpose for the tax planning apart from achieving a tax benefit, either now or in the future?
2. Are the arrangements artificial or manipulated in a form-over-substance approach to achieve a tax benefit?
3. Is the tax planning based on interpretations of applicable international and national tax law which are likely to be considered credible by the courts and informed stakeholders?
4. Would the arrangement be implemented if the relevant tax authority had a full overview of every aspect of the planning?
5. Are there any other potential reasons why the tax planning could be perceived by policy-makers and the general public as abusive?

CFE actively encourages all interested stakeholders to provide feedback on the proposed ethics quality bar, the above five key questions and all other aspects of this paper. We are fully open to working with all stakeholders who support high professional standards across all tax advisers in Europe. CFE particularly underlines the importance of engaging with policy-makers and tax administrations to ensure that high professional standards are ensured even where they are not voluntarily adopted.

Among the key conclusions from this paper on which we would also welcome feedback is the view that the efficiency of our tax systems can be enhanced if the quality bar works effectively across all tax advisers – and is widely understood to do so. Specifically, we refer to benefits in terms of proportionality in the regulatory requirements for tax transparency and reporting. On this basis, we look to tax policy-makers and tax administrations to embrace the promotion of ethical tax advice so as to ensure that high professional standards are not undermined within the market. We acknowledge that this is also a matter of “self-interest” for the tax professional community: the perception of high standards is critical with respect to the general public’s trust in tax advisers and to the ongoing attractiveness of the profession of tax adviser as a career for diverse top talent.

Purpose and scope of the paper

The principal objective of this paper is to promote and seek stakeholder feedback on the concept of an ethics “quality bar” in the exercise of professional judgment by tax advisers when giving advice on tax planning, with the specific aim of guarding against abusive tax arrangements based on manipulation and artificiality in the design of transactions, structures and arrangements. There have been societal and policy-maker concerns in the recent past about the role of advisers in these respects. There has also been some acknowledgement – although there usefully could be much more – that tax advisers operate in a wide variety of professional and business environments. Some advisers, such as the members of the CFE member bodies, follow professional rules. Some tax advisers are subject to mandatory regulation, some accept voluntary regulation, and some are unregulated and do not have affiliation with a professional body.

This paper is written with reference to all advisers, whatever their background and status, and outlines CFE’s ambition to ensure that the consideration of ethics in the provision of tax advice is appropriate with respect to both taxpayers’ rights and their obligations and avoids abusive tax arrangements. This ambition is inspired by the ethical question “If it is legal, is it acceptable?”. CFE is of the view that an agile, “future-proofing” approach to this question is needed on account of the constant evolution of our tax systems, development of new technology and creation of different business models.

We refer to an ethics quality bar as a level of qualitative reflection underpinning professional judgment which steers against advice that is abusive on account of manipulation and artificiality in the use of legal means, vehicles and arrangements to reach a desired tax outcome. Whether or not in the media headlines, as in previous years, such a quality bar is of societal relevance, as an abusive advantage for a client served by an adviser results in a burden on all other taxpayers and also undermines public policy objectives. We seek feedback on the concept and will look to work collaboratively with all like-minded organisations committed to the same goal of ethical professional judgment.

The paper is aimed at all providers of tax advice in Europe, national and EU-level tax policy-makers and authorities, and all in the broader stakeholder community who take a direct interest in the good functioning of our tax systems. The scope of the paper is firmly on professional judgment of tax advisers

when advising clients with respect to the tax rules that exist at the point in time when the advice is given. It does not consider whether tax rules are fair and ethical in themselves – although CFE and its member bodies can and do express views on these matters.

It is clear that there are growing societal expectations with regard to fairness and ethics, which on occasion confuse the distinct roles of those who set tax rules and those who provide advice on the basis of the rules. Our paper focuses on the provision of advice. Also outside of our scope is tax evasion, where illegal steps are taken through whatever illegal arrangements and fraudulent actions to evade tax liabilities. CFE condemns tax evasion unequivocally. Although the paper is focused on Europe, we would welcome its use wherever it can help public debate on ethics in tax advice.

The initiative to prepare this paper was taken before the COVID-19 pandemic – which has only made its objective even more relevant. The economic impact of the pandemic and the inevitable need that governments will have to raise revenue to fund the costs of current supports mean that there will be much discussion around tax in the months and years ahead. There will undoubtedly also be new societal expectations with regard to the tax rules which policy-makers set and the behaviour of all actors in the tax sphere, including, of course, tax advisers. The paper has also been prepared in the context of the longer-term evolution of policies to address aggressive avoidance, within which the most relevant recent EU measure is the Council Directive on reportable cross-border arrangements (“DAC6”). The Directive imposes a requirement on tax advisers (or taxpayers, where applicable) to report aggressive tax-planning arrangements of a cross-border nature to tax authorities. Our aim is to support policy-makers in achieving their overall aims while ensuring that regulation and reporting are proportionate and do not over-burden businesses or advisers, thereby undermining the policy goals of such initiatives and ultimately the post-pandemic economic recovery.

The paper consists of four sections:

Section 1 summarises the principal aspects of practices in tax planning over the last quarter of a century or so which gave rise to the policies that we have today to combat abusive tax arrangements based on manipulation and artificiality in tax planning. This serves as a broad introduction and is designed particularly for readers in the wider stakeholder community who may otherwise find key terminology,

legislation and technical issues somewhat inaccessible. Throughout this paper, we have sought to avoid debates over terminology and to focus on the substantive point of ethical professional judgment.

Section 2 considers a number of key issues impacting on tax advice across European countries today and likely to have a significant bearing in the future. They encompass taxpayer attitudes to tax and tax advisers, the degree of media and policy-maker interest, and the differing legal responsibilities placed on professional tax advisers. Developments with regard to professional codes, the impact of technology on tax services and the structure of tax advisory markets are also covered.

Section 3 first explains our rationale for an ethics quality bar and outlines how and why this can make a difference. We then set out five key questions which effectively constitute the quality bar. They are for tax advisers to reflect on when engaging with clients on tax planning, with the objective of promoting an appropriate level of ethical judgment when answering the question “If it is legal, is it acceptable?”. To help to understand their relevance, we use three illustrative examples drawn from legal and operational matters common in business contexts.

Section 4 sets out our main conclusions and our aspiration for a holistic approach involving all actors in the tax sphere and those interested in tax from a broader policy and societal perspective. Without this holistic approach within and across European markets, there is a risk of the problem of abusive planning avoidance simply shifting to those without any rules and obligations. In addition to this being to the detriment of the public interest, it also undermines public trust in tax advisers overall and the attractiveness of a career in tax advice.

The paper has been developed by the CFE Professional Affairs Committee, with input from a series of interviews with senior tax professionals in a number of European countries, to whom we are grateful for their contributions. We have also drawn inspiration from materials from the International Fiscal Association and the Canadian Tax Foundation and wish to express appreciation for these.

CFE intends to hold a series of outreach and stakeholder engagement events on the paper at European level and will welcome feedback from all interested parties. We also anticipate that CFE member bodies will use the paper to engage proactively with interested parties in their jurisdictions.

Section 1: Long-term change in practices and expectations

Attitudes and practices with regard to tax planning have changed very considerably in the recent past. Regulators, businesses, advisers and academics all acknowledge that many tax-planning arrangements which were common 25 years or so ago would generally be considered abusive by today's standards. This is to say that they involved manipulation and artificiality in the design of transactions, structures and arrangements beyond the substantive operations of the businesses and the lives of the individuals concerned, which were nevertheless considered acceptable as long as "the letter of the law" was respected. It is important to stress that individuals and businesses decided on their tax strategies, in the final instance, on the basis of their risk appetite – and they still do so today. But 25 years ago there was a very different perspective on what is abusive and therefore high risk – or, put simply in another way, what is acceptable. The question "If it is legal, is it acceptable?" did not present itself as it does today.

As is widely known, arrangements which today are regarded as abusive were put in place for individuals and corporates, especially those with sufficient scale for cross-border arrangements, who exploited so-called loopholes in a national tax system or across multiple tax systems. They took advantage of gaps and mismatches in terminologies for the purpose of reducing tax liability: for example, double deductions, where the same loss is deducted in both the state of source and the state of residence; and double non-taxation, where income is not taxed in the state of source and is exempt in the state of residence. Tax planning would focus on delivering savings to clients through the use of legal vehicles and financial transactions specifically established to exploit these technicalities.

The involvement of tax advisers was shaped by both permissive regulations and overall attitudes in economic life to what was generally acceptable. The context of such tax planning was also formed by the limited or non-existent transfer of information between governments and the fact that countries did not legislate to address mismatches. Societal expectations with respect to the ethics of tax advice

were largely non-existent, given low awareness of the functioning of tax systems and, perhaps most importantly, of the overall consequences with respect to national finances.

CFE acknowledges the change in attitudes and practices which has been driven by policy-makers since the 1990s. It has been achieved via cumulative steps at international level, particularly through the OECD and then through EU and national measures. They were undoubtedly bolstered by the need to respond to the 2008 financial crisis and its aftermath, which introduced austerity for many. Policy-makers were prompted by a dual concern: the revenue lost to national treasuries from such tax planning and the growing concerns among electorates about accountability for fair and equal treatment of taxpayers and the “societal contract” that exists between companies, their employees and the public services they avail of.

Against the backdrop of the general public disquiet, European policy-makers have employed a wide range of policy, law and enforcement measures against aggressive tax planning to try to tackle unequal treatment of market participants in the Single Market and to ensure that all pay their “fair share of tax”. Two major strands of EU activity are particularly relevant to the issues pursued in this paper with regard to aggressive avoidance, although only a brief summary can be included here.

The first strand involves changing tax law and how it relates to the Single Market and in turn to “third countries”. More specifically, EU efforts have centred on changing tax rules on the shifting of intra-group profits to low-tax jurisdictions, addressing loopholes within national tax systems and mismatches between national systems and establishing a Code of Conduct on Business Taxation for Member States to abide by when seeking to make their jurisdictions competitive and attractive to business. A corollary of these steps was the need to bring national tax administrations far closer together and to enhance the information sharing between them. In addition, the EU has pursued State Aid inquiries against multinational companies with reference to arrangements with certain Member States, but these are outside of the scope of this paper. It is appropriate just to note that these have attracted considerable media attention on account of the sums involved and that the length and complexity of the procedures add to the legal uncertainties in which tax advisers operate.

The European Commission’s 2020 Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy confirms that further work will be undertaken on tax laws. The aim is to “prevent losses to national and EU budgets” within the framework of globalisation, digitalisation and new business models, which “are creating new limits for tax competition and new opportunities for aggressive tax planning”. This further serves to underline that tax laws and their interpretation by the courts remain in constant evolution. The exercise of professional judgment is always to be assessed with respect to the tax law in place at the point at which tax advice is given.

The second strand of activity against aggressive tax avoidance involves targeting abusive tax planning directly. CFE welcomes the fact that individual-country initiatives and the dedicated focus in EC pronouncements, EU law and CJEU judgments have contributed to a better understanding of aggressive tax avoidance and how to address it.

In broad summary, the work of policy-makers to target aggressive avoidance has centred on abuse, as distinct from both tax evasion – where a taxpayer breaks the law by, for example, not reporting income or simply not paying taxes due – and tax avoidance – where a taxpayer’s obligations are minimised through the appropriate, i.e. non-abusive, use of tax deductions, tax deferral plans and tax credits. Policy-makers have focused on tax planning based on arrangements that are deemed manipulated or artificial where they are without economic substance but for the essential purpose of avoiding taxation and achieving a tax benefit which would not otherwise exist.

As per the general anti-abuse rule (GAAR) in the EU 2016 Anti-Tax Avoidance Directive (ATAD), the main target of the policy-makers is arrangements which defeat the object of applicable tax, are not genuine and are not put in place for valid commercial reasons which reflect reality. The OECD has also played a major role through its guidelines by stressing the importance of company compliance with “both the letter and the spirit” of the law, as well as through its comprehensive contribution on the allocation of profits within group structures and taxation thereof, which has played into EU initiatives.

Although the EU has adopted the ATAD, it is clear that definitions remain problematic at EU level. Neither EU primary nor secondary legislation defines the notion of “tax avoidance”, primarily due to the evolution of the concept over time and geography within the EU. Translation also generates

challenges: the Council Directive on the common system of taxation applicable to mergers establishes that a Member State may refuse to apply or withdraw the benefits of the Directive where the arrangement has as its principal objective or as one of its principal objectives tax evasion or *tax avoidance*. Notably, different language versions of the Mergers Directive translate the term avoidance as evasion, which is highly problematic, as it is widely understood that these are distinct concepts: for example, *tax avoidance* is translated as *evasión fiscal* (Spanish), *evasione fiscale* (Italian), *evaziunea fiscala* (Romanian) and *evasão fiscais* (Portuguese).¹

Overall, a lack of consensus among Member States on a common definition of aggressive tax avoidance has shaped the EU approach. Consequently, EU legislation operates with descriptive and explanatory language instead, as per Article 6 of the ATAD, setting out the European GAAR:

“For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

For the purposes of paragraph 1 [above], an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.”²

This use of descriptive and explanatory language was repeated to develop the so-called hallmarks in the Directive on reportable cross-border arrangements (“DAC6”). The Directive imposes a requirement on tax advisers – or taxpayers, where applicable – to report aggressive tax-planning arrangements of a cross-border nature to tax authorities where at least one Member State is affected. DAC6 states:

¹ Article 15 of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

² Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD).

“it would be more effective to endeavour to capture the potentially aggressive tax-planning arrangements through the compiling of a list of the features and elements of transactions that present a strong indication of tax avoidance or abuse rather than to define the concept of aggressive tax planning”.

The implementation of DAC6 has been delayed by the COVID-19 pandemic, and it remains to be seen what the degree of effectiveness of the reporting is – not least with regard to the capacity of tax authorities to consider and manage responses in relation to reports received. However, it is sufficient for the purposes of this paper to note that the EU approach to identifying aggressive avoidance is based on “a list of features and elements of transactions” to tackle manipulated arrangements which retain at their core artificiality, circumvention of legislation and form over substance. In turn, this reflects the settled case law of the Court of Justice of the European Union, which states that although the pursuit by a taxpayer of the tax regime most favourable to it cannot, as such, set up a general presumption of fraud or abuse, the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned.³

It is on the overall basis of this second strand of EU efforts to address abusive tax planning that the ethics quality bar put forward in this paper has been prepared.

³ *Cadbury Schweppes* C-196/04, paragraph 50, reiterated in *Danish Beneficial Ownership* C-115/16, C-118/16, C-119/16 and C-299/16.

Section 2: Key issues impacting on tax advice today and into the future

In the preparation of this paper, CFE gathered factual information, views and insights from its membership throughout Europe on the key characteristics of their national markets. These encompassed taxpayer attitudes to tax and tax advisers, media and policy-maker interest, and the responsibilities of professional tax advisers. We also considered developments with regard to professional codes and the impact of technology.

A notable insight with regard to taxpayer attitudes across Europe is the strength of the *contra natura* instinct against paying taxes among citizens. It is no secret, of course, that taxes are unpopular. On the basis of a discussion between CFE members, the *contra natura* instinct was described as being moderate, strong or very strong across the majority of countries. In no country was the *contra natura* instinct described as being very low, and in only a few as low.

A number of recurrent themes emerged in the discussion between CFE members to account for the moderate to very strong *contra natura* instinct among citizens: concerns about the high levels of taxation, a sense that the tax burden is not evenly shared – on account of the prevalence of cash payments via the black economy or the use of complex arrangements to benefit from international tax havens – the inadequacy of public services and the state’s seemingly insatiable drive to draw in more revenue. In the few cases where this instinct was described as low, a long tradition of high-quality state welfare and public expenditure was said to be an important contributory factor.

No doubt, there are many other attributable psychological factors, including the influence of peers, the reluctance to rectify earlier under-declarations for fear of the consequences, and hope that there may be an amnesty. However, it is sufficient to say that all who are interested in the functioning of our tax systems will do well to acknowledge that citizens not only instinctively dislike paying taxes but also very often feel self-justified in looking for ways to pay less, as they suspect that others are probably doing the same. For employees with tax taken at source and with VAT charged at the point of purchase,

opportunities are few. But beginning with the self-employed and extending to all those with greater potential control over their tax affairs, it is important to recognise that they are very likely to carry into their requests for advice a moderate or strong *contra natura* attitude to paying tax. And as a general rule, the higher the tax rate, the greater the propensity of individuals and companies to seek ways to achieve a lower tax burden. Where companies are concerned, scale can assist the pursuit of transnational arrangements with a tax benefit in mind.

The discussion between CFE bodies gave rise to the suggestion that EU and wider policy-making with respect to abusive avoidance would benefit from a deeper understanding of the obligations and responsibilities placed on tax advisers. In particular, consideration can usefully be given to key provisions in national law and court rulings, as well as the obligations included in contractual terms which reflect market practices. All of these elements shape the way in which tax advisers engage with clients and give detailed tax-planning advice. The picture across Europe is complex and varied. There are certain to be learnings for policy-making from an open exchange of experiences across countries.

To provide an indication of the type of issues which merit discussion, it is appropriate to start with the experience of a CFE member body, given that its national courts not only have confirmed on a number of occasions that avoidance within the parameters of the law is legal but also have found against a tax adviser for failing to provide advice which would have saved a client tax. Indeed, the court imposed an indemnity equal to the amount which could have been saved.

To draw from legislation in another country, an adviser not only is entitled but also is actually obliged to protect clients' rights using all legal means. In a further other jurisdiction, there are no obligations to protect the interests of clients within all legal means; rather, there is a duty to collect all relevant facts and to analyse the legal tax aspects so as to inform clients about all possible options. In the event that the most "aggressive" option is chosen by a client, the adviser is required to inform the client about the potential consequences, including with respect to compliance issues and possible litigation with the tax authority. Overall, it is clear that societal expectations, as well as policy-making, will benefit from a better understanding of the actual legal obligations and responsibilities, and in turn how these interact with market practices as expressed through contracts.

A further element in an open exchange of experiences across countries will be the potential for professional codes to make a difference. In one jurisdiction among the CFE membership, there is a specific professional code addressing ethics in tax advice. It was established in response to a challenge issued by government for the professional bodies to take a greater lead in professional standards in relation to tax advice. Notably, the challenge was framed in the context of protecting both the reputation of the professional bodies and the public good by addressing problems around planning arrangements. Specifically, the code is designed to stop the encouragement or promotion of arrangements which achieve results that are contrary to the intention of lawmakers, highly artificial or manipulated (“contrived” is the specific wording in the code) and that seek to exploit shortcomings in the legislation.

CFE member bodies across Europe are engaged in various efforts to draw their members’ attention to ethics in their mandatory professional training and other updates, as part of ongoing efforts to support high-quality work among their members in a way which provides confidence to the market and helps to distinguish them from other tax service providers. It should be noted that anti-money laundering (AML) rules are directed at all providers of tax advice, and there is considerable focus on AML matters at the current time. The initiatives of CFE bodies to support quality in the provision of tax services more broadly are largely independent of any attention in national media and policy circles to questions around abusive tax avoidance. Overall, it does not appear that there is great attention on these matters at national level across Europe as a whole, save for dedicated attention in some countries by some NGOs and individual policy-makers. And where there is media and policy-maker attention on tax matters, it is mostly focused on the high-profile cases of multinational companies and high-wealth individuals where the points of discussion are on the legality of the arrangements, rather than abuse as per the ATAD.

There is interest among CFE member bodies in the potential for professional codes to play a part in the future in promoting a quality bar for ethical professional judgment. CFE envisages that this can be usefully included in the stakeholder dialogue which CFE aims to promote through this paper. With specific reference to the professional body code addressing tax advice noted above, however, it is first important to understand the preconditions for its development with respect to national laws, the manner in which it is being implemented and, in particular, whether all tax advisers are intended to be

brought into its scope, which appears not to be the case today. It also seems premature to pursue international portability of the initiative without first considering the legal obligations and responsibilities, as well as contractual practices, in individual jurisdictions. All this being said, there will certainly be benefit in understanding the degree to which the code has impacted the professional behaviour of those falling under it and whether it could be used also with respect to advisers who operate outside of any professional affiliation.

In a similar way, CFE advocates further discussion of the evolving codes in the largest international accounting firms, the work on tax planning and related services by the International Ethics Standards Board for Accountants (IESBA), and any further initiatives among other professions – for example, the legal profession – with regard to ethics in the provision of tax advice. In relation to international accounting firms, it is understood that such codes have been developed since the early 2000s and are regularly updated as part of the overall conditions and requirements covering all service lines, which national member practices must respect, subject to internal quality controls. In particular, it will be useful to gain insights into the practical implementation of references in such codes to advising clients on the basis that arrangements and transactions have “substance required by law, as well as any business, commercial or other non-tax purpose required by law”. We note that the IESBA project on tax planning is ongoing, and CFE will welcome the opportunity to give input and receive updates.

CFE believes that it is essential for the envisaged dialogue to encompass the role of tax advisers who work outside of any professional affiliation and to consider the significant evolution of the tax services market in light of technological change. Historically, approximately half of all European countries have had no market access rules for tax advice; and in some countries, this appears to have been directly linked to the prevalence of aggressive practices, for example, the promotion of packaged, “off-the-shelf” schemes.

With respect to the impact of technology on tax services, it will be important to form a common understanding of where digitalisation starts and stops, and where the exercise of professional judgment with respect to ethical matters. Digitalisation is changing the way in which tax services are provided; tax technology is embedded in online tools and accounting packages.

Finally, CFE underlines the importance of having tax authority participation in the open dialogue. It will be beneficial to receive input on any areas where the initiative to raise the quality bar for ethics should place emphasis, and where relevant, how the quality bar could be pursued with respect to unaffiliated advisers. It could also address collaborative working to achieve efficiencies when addressing aggressive avoidance, for example, in the implementation of DAC6 and any subsequent evolution of this legislation. It will also be helpful to discuss the overall working practices of the tax authorities in the context of the broad characteristics of the tax environment with respect to taxpayer attitudes and expectations of tax advisers. This also links to wider questions regarding how to support a culture of voluntary compliance and remedy problems of specific non-compliance, where they exist, without undermining legitimate businesses and taxpayer activity. In these areas, CFE is supportive of the EC's pursuit of a Model Charter on Taxpayers' Rights.

Section 3: A quality bar for ethical judgment going forward

CFE believes that it is possible to make a substantive contribution to addressing the problem of abusive tax arrangements by setting a quality bar for ethical judgment in tax advice for all tax advisers in Europe. The focus of the quality bar is on the qualitative reflections of tax advisers when exercising their professional judgment. Taking into consideration the many differences in national contexts across Europe in relation to the roles and responsibilities of tax advisers, as well as the tax and legal systems and national cultures in which they operate, it is clearly not possible at this point in time to achieve a single, Europe-wide code or piece of professional guidance on ethical judgment in the provision of tax advice. However, the concept of a quality bar would be sufficiently agile as well as practically adaptable to make a real impact across different environments and over time.

CFE believes that a quality bar could help to ensure that ethics is appropriately considered in the exercise of professional judgment. Specifically, it can assist in relation to the question “If it is legal, is it acceptable?” by ensuring that the exercise of professional judgment is steered against advice which is abusive within legal parameters.

CFE envisages that this steering can be achieved via tax advisers’ asking themselves the following five key questions when preparing and providing advice to clients – on the basis that the advisers respond to the answers generated by the questions appropriately. The key questions will be particularly relevant in situations where client expectations of tax planning denote an enhanced risk of potentially abusive arrangements.

Setting an Ethics Quality Bar for Professional Judgment in Relation to Tax Planning

Five Key Questions for Tax Advisers to Reflect on When Preparing and Providing Advice:

- 1. Is there a genuine economic purpose for the tax planning apart from achieving a tax benefit, either now or in the future?**
- 2. Are the arrangements artificial or manipulated in a form-over-substance approach to achieve a tax benefit?**
- 3. Is the tax planning based on interpretations of applicable international and national tax law which are likely to be considered credible by the courts and informed stakeholders?**
- 4. Would the arrangement be implemented if the relevant tax authority had a full overview of every aspect of the planning?**
- 5. Are there any other potential reasons why the tax planning could be perceived by policy-makers and the general public as abusive?**

To help demonstrate the relevance of the key questions in the quality bar, we set out below three illustrative examples relating to both individuals and entities. They show how manipulated and artificial avoidance arrangements can be developed out of legitimate business and investment structures, routine tax reliefs, transactions, contractual arrangements and the like. We encourage stakeholders to consider how the key questions in the quality bar could have steered tax advisers away from abusive arrangements in these examples. It is important to bear in mind that these are short examples and that necessarily not all of the relevant details which would arise in real-life situations are included. Equally, it is important to recognise that the business and investment structures, tax reliefs, transactions and contractual arrangements do have legitimate use.

Example 1: Abusive arrangements to reduce employer and employee tax and social security obligations via misuse of personal services companies

A company and an individual enter into an understanding whereby the individual, while functioning in all other respects as a full-time employee, is engaged via a personal services management company rather than through a contract as an employee. This enables the conversion of some or all of the taxable employment income of the individual into other forms of reward, which achieves substantial reductions in the tax and social security obligations for both parties when compared to a contract as an employee. In the same vein, arrangements can be structured between the individual and the personal services company to further reduce taxes compared with employment: for example, by replacing income with interest-free “loans” from the company, which attract tax only on the benefit of free interest, not the loan capital advanced, and which bear no relation to conventional loan arrangements, there being no intention that the loans will be repaid.

Personal services companies can and do perform a very important function in modern economies, reflecting the need for flexible and short-term provision of services and enabling providers on a part-time basis to service different entities during the course of the year. Operating through a personal services company can have significant tax advantages in countries where employment income carries a higher tax burden than other forms of income: for example, where companies are taxed at a lower rate than individuals or where dividend income is taxed below earned income and replaces part of a salary.

The incorporation of individuals via a personal services company in situations where an individual functions in all respects as a full-time employee has raised and continues to raise policy-maker concerns in some European countries from an abusive tax-avoidance perspective. In other cases, high corporate tax rates have reduced the incentive to pursue incorporation, or there is tolerance with regard to the use of such arrangements on the part of national policy-makers and the tax authority on the grounds of delays to reforming tax and social security ceilings in employment contracts.

Example 2: Abusive arrangements within group structures to achieve tax reliefs via artificial debt financing and manipulation of the balance sheet

An EU parent company sets up a holding company in a foreign country. This holding company receives loans from other group companies in Europe and with those loans it buys other foreign subsidiaries in the same country. In this way, the holding company uses debt in EU companies to buy subsidiaries already belonging to group. Financing of the restructuring operation is undertaken with a loan with deductible expenses, such as interest. The deductible financial expenses within the tax group thereby create a negative tax base to be offset in the following years.

Similarly, a parent company pursues tax relief with respect to a subsidiary company through a complex series of lending and borrowing transactions and the use of a derivative instrument. The various transactions are designed solely to increase the debt of the subsidiary and reduce the value of its balance sheet, leading to a fall in the value of its shares. The investment in the subsidiary is treated as debt, and in this way the fall in share value is treated as tax-deductible.

In line with globalisation overall, an increasing number of companies have evolved international group structures as they have developed in scale to service customers in different markets and to source materials and the like. This widening of geography often involves subsidiaries, investors and diverse funding operations, as well as licensing and other intellectual property arrangements. Nevertheless, just as with the other examples, there is potential for the abusive exploitation of group structure arrangements where these are pursued outside of real economic substance and through manipulation and artificiality.

Many countries allow tax relief for interest on debt taken on to acquire business investments, including borrowing from related parties within arm's-length constraints. Corporate restructurings can therefore be used to provide tax benefits. Some tax regimes include a "purpose test" or equivalent, to limit interest relief where the borrowing is predominantly for fiscal reasons. If there is a lack of commercial reality behind such restructuring – i.e. no underlying economic purpose to it – the financing through

debt might be seen as an abusive action as part of a structure without economic justification, created solely for purposes of avoiding tax. Questions such as whether there is a reason (other than fiscal one) for the corporate restructuring and the financing arrangement appear relevant and would contribute to classification of a structure as abusive (such as in the example above by the highest (Supreme) court of one EU Member State) or legitimate and performed for commercial reasons.

Example 3: Abusive arrangements to avoid inheritance taxes via corporate vehicles, trusts, foundations and other entities for the management of family wealth (the example below is specific to trusts)

On the basis of tax advice specifically designed for circumstances in which an elderly family member is in poor health, arrangements are put in place to shelter family wealth from inheritance tax for financial advantage. The arrangements involve the reduction of the estate's value via subscription for shares in a new company and gifting shares to an employee succession trust. In theory, the transfer of cash from the elderly individual in poor health is for the benefit of employees of the trust. In fact, the business does not have or need employees, and the sole beneficiaries will be the bereaved family members.

There are considerable variations in the use of corporate vehicles, trusts and other entities for the management of family wealth across the generations where family members are genuine employees. Inheritance tax laws differ markedly across Europe and are subject to changes which, at least in some cases, are leading to changes in taxpayer behaviour. However, there is also the potential for manipulated and artificial arrangements for the sole purpose of avoiding inheritance taxes. Given demographic trends in Europe and the increasing costs of social care and health provision, there is likely to be growing discussion of inheritance tax across countries. It also seems likely that this could be an area where a close alignment between the work of tax advisers and societal expectations will be beneficial.

For the functioning of the market overall and in the public interest, CFE stresses the importance of ensuring that there are no gaps in the application of the quality bar. The bar, therefore, should be the

minimum common reference point for all advisers, of whatever affiliation and background. It is recognised that there will on occasion be only a very fine line between abusive and non-abusive advice, and in these cases there will likely be a need for recourse to tax authorities for further guidance and final decisions, as well as DAC6 reporting to tax authorities or similar. But in the overwhelming majority of cases, the quality bar can serve as a force for good, steering all advisers towards ethical professional judgment.

More specifically, CFE envisages that the quality bar could have a positive practical impact in two important respects. The first is with regard to the expectations of clients when liaising with advisers. Given what we know about the strong *contra natura* instinct of taxpayers overall, a quality bar could serve as a useful reference point from which to help advisers justify and explain the exercise of judgment to their clients. Crucially, however, it could function in this way only where it can credibly be said that a quality bar is effective for all advisers, not only in the specific jurisdiction of the adviser but also Europe-wide. The second positive practical impact relates to trust in the work of tax advisers held by policy-makers and tax authorities, as well as society more broadly. Again, critical to building this trust will be evidence that a quality bar is used across the whole spectrum of tax advisers, not just those within the CFE community.

CFE will proactively seek stakeholder views on the quality bar, the five key questions and the illustrative examples which have given rise to the key questions. In addition, CFE will welcome suggestions on further examples and areas of concern which could give rise to additional key questions and considerations for the quality bar. For example, CFE envisages that the following areas could potentially be considered, noting that in all cases they consist of topics through which arrangements are regularly pursued without abuse by individuals and companies: incentive schemes for charitable donations; valuations and transfer pricing between closely related companies; trading companies with reference to residency requirements; and government incentive or support schemes – potentially also in the context of COVID-19 assistance.

CFE believes that an effective quality bar will be most useful if it is maintained as a “live document” to ensure that it is relevant to developments in the market and the key ethical challenges which tax advisers regularly face. To this end, CFE seeks feedback from all interested stakeholders.

Section 4: Conclusions

CFE believes that tax advisers can and must play a key role in the efficiency of our tax systems to assist the recovery from the COVID-19 pandemic and that this role is, to a significant degree, contingent on how tax advisers exercise professional judgment. Trust in the work of tax advisers can undoubtedly help to maintain proportionality in the regulation of business with respect to tax transparency and reporting. CFE also believes that the continuing alignment of tax advice with societal expectations will increasingly be a factor in the attractiveness of the profession of tax adviser as a career for top talent.

The ethics quality bar and supporting key questions and considerations set out in this paper constitute a major opportunity for all tax advisers to proactively complement the range of EU and national measures taken to date to address abusive tax avoidance. Professional judgment will always be a critical part of the equation: it cannot be supplanted by legislation, reporting to tax authorities or digitalisation. CFE believes that the ethics quality bar could serve as a common reference point for all advisers, of whatever affiliation and background, capable of evolving with agility as tax systems and businesses change.

CFE calls for cooperation with all actors in the tax arena and those who take a direct interest from a broader societal perspective who are committed to the same goal of ethical professional judgment. We are fully open to comments on the proposed ethics quality bar or suggestions with respect to other initiatives designed to achieve the same objective.

To make a positive and sustained difference over time, it is critical to have an open dialogue between all interested parties. Specifically, the dialogue needs to address how the proposed ethics quality bar – or other, similar initiatives forged with the same objectives in mind – would interact with the major underlying features within and between national tax systems.

The dialogue needs to start with taxpayer attitudes towards tax within national cultures. It needs to encompass attitudes within business, addressing not only large multinational companies but also, crucially, owner-managed businesses where individuals find themselves for the first time in tax

circumstances beyond automatic deductions as employees. We also need to consider how these attitudes come together with the obligations in national law placed on tax advisers and current practices with respect to contractual terms between businesses and their advisers.

Attention is also required on the tax advisory market itself – both on the basis of long-standing rules on market access and in the context of new technology changing the way in which tax services are delivered, bundled with other services directly. In addition, there are key questions to be addressed on how an ethics quality bar could be implemented in national contexts across Europe where unaffiliated advisers are concerned, and where there is no capacity to shape and assess the degree of observance.

Finally, the dialogue needs to come full circle through the involvement of policy-makers and tax authorities: an ethics quality bar will ultimately be effective in individual interactions between tax advisers and their clients only if it can be credibly shown that the quality bar is effective within and across European jurisdictions.

CFE underlines that only a holistic approach and proactive initiatives to raise the ethical bar for all advisers would serve societal and stakeholder expectations well. Partial initiatives or those addressed solely at a single part of the tax advisory market, without sufficient consideration of the unaffiliated ones, in particular, would undermine policy goals and wider expectations. It is against this background that this paper and the quality bar seek to promote ethical professional judgment by all tax advisers across Europe.