



**Disincentives for advisors and intermediaries
for potentially aggressive tax planning schemes**

Short response by the General Council of the Bar of England & Wales

1. This is a short response by the General Council of the Bar of England and Wales (“The Bar Council”) to the European Commission’s early 2017 online public consultation on Disincentives for advisors and intermediaries for potentially aggressive tax planning schemes¹. In it we focus on two issues, the first the relating to competence, and the second summarising our concerns regarding the effect of mandatory disclosure rules on Legal Professional Privilege. Given the targeted nature of these comments, for ease of reference, we are providing them in a short paper rather than in the online questionnaire format. The Bar Council is registered on the EU Transparency Registry, and we are content for reference to be made to our remarks in the context of this consultation.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Objective of the Policy Initiative (Questionnaire Section 4.2)

4. The Bar Council is currently engaging constructively with the UK Treasury in its consultation on proposed legislation, due to be introduced during 2017, on the role of intermediaries in relation to failed tax avoidance arrangements in some circumstances. The Bar Council recalls that taxation, other than in relation to certain taxes which arise from legislation at EU level, is generally a matter reserved to Member State competence. That is emphatically the position in relation to personal income tax, which is the primary target of

¹ <https://ec.europa.eu/eusurvey/runner/intermediariestaxplanning>

much national and international policy on tax avoidance. We therefore urge the Commission, if it concludes that there is a policy case for legislative action at EU level, to consider very carefully the legal basis for any such action and to ensure that any resulting proposals fall demonstrably within EU competence.

Tax Transparency (Questionnaire Section 5.4)

5. One of the potential consequences of particular concern to the Bar Council is that any obligation to report, risks infringing the fundamental right of the citizen to obtain legal advice confidentially. In common law jurisdictions, the immunity from disclosure of communications made for the purpose of obtaining legal advice, is known as legal professional privilege (“LPP”); in most civil law jurisdictions, it forms part of the legal professional’s duty of confidentiality. But it is crucial to appreciate that in all Member State legal systems, and within the EU legal order itself, the protection of such communications is more than just a matter of a duty of confidentiality owed by a legal professional to his or her client. The right of the citizen to consult privately with a lawyer, and to prevent disclosure of such consultations to another party, including in particular, the State, is a fundamental safeguard in a society governed by the rule of law. The resulting “privilege” (in the sense of immunity from disclosure) belongs to the client and cannot be waived by the lawyer. In English law the privilege is lost only where the communication is made in furtherance of a criminal purpose. That is known as the “iniquity exception”. In the field of taxation, privilege is only lost where the purpose of the communication is unlawfully to evade taxes properly due. Where advice is given with a view to assessing or ensuring the lawfulness, or more precisely the legal effectiveness, of steps taken with a view to mitigating or minimising liability to tax, the privilege remains fully intact.

6. If the Commission decides to propose measures at EU level designed to increase or harmonise tax transparency by way of reporting, it is essential that the proposal contain express provisions protecting the scope of LPP as recognised in each Member State. That is, the proposal should make clear that the reporting obligation does not extend to any communication with a lawyer with a view to obtaining advice about taxation matters, except where there are sufficient grounds to believe that the communication is made in furtherance of the purpose of unlawfully evading taxes properly due, and where such evasion is a criminal matter under the law of the Member State in question.

7. The same approach should be taken to any mandatory disclosure requirement – see below at paragraph 8.

Mandatory Disclosure Obligations (Questionnaire Section 6.1.5)

8. We reiterate the observations made above in relation to legally privileged communications. Where the intermediary is a lawyer, there is an obvious risk that mandatory disclosure imposed on either the taxpayer or intermediary could catch legally privileged communications. If the Commission decides to make a proposal including a mandatory disclosure requirement, it is essential that the proposal contain express protective provisions along the lines suggested at paragraph 6 above.

Mandatory disclosure obligations in the United Kingdom (Section 6.1.2)

9. In the context of its ongoing preparation of the new Finance Bill 2017, referred to at paragraph 4 above, the UK Government has proposed a new regime that will impose penalties on “enablers” of defeated tax avoidance arrangements. The penalties will apply to abusive schemes defeated by HMRC and will be calculated by reference to the fees charged by the advisers.

10. The term “enabler” is intended to include anyone in the supply chain who benefits from an end user implementing tax avoidance arrangements which are later defeated. The focus will be on those who benefit financially from enabling others to implement tax avoidance arrangements which fail. Activities which constitute “enabling” will include designing, marketing and financing arrangements, or providing advice that is key to achieving the avoidance objective or implementing the scheme.

11. An arrangement will be “defeated” either when there is a final determination of a tribunal or court that the arrangements do not achieve their intended tax advantage or when there is agreement between the taxpayer and HMRC that their arrangements do not work. Whether an arrangement is an “avoidance” arrangement will be based on the General Anti-avoidance Rule (GAAR) test.

Bar Council
February 2017

For further information please contact:

*Evanna Fruithof
Consultant Director
The General Council of the Bar of England and Wales, Brussels Office
Avenue des Nerviens 85,
Brussels B-1040
Telephone: 00 32 486 561968
Email: evanna.fruithof@barcouncil.be*