



11 October 2022

For the attention of Jasna Voje
DG TAXUD
European Commission

Dear Jasna

Tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning

The Chartered Institute of Taxation (CIOT) and Institute of Chartered Accountants in England and Wales (ICAEW) are member bodies of Confédération Fiscale Européenne (CFE) and have already fed back comments to the CFE Professional Affairs Committee's response to the [Call for evidence](#) on the above initiative. However, given that some of the published evidence has referenced the regulatory regime in the UK we thought that, in addition to the CFE response, it would be helpful to the Commission if we provided some further feedback on the UK experiences.

We note that the call for evidence indicates that, despite all the measures taken by the EU and Member States in this area, tax evasion and aggressive tax planning continue to be substantial problems. We believe that, in order to assess the policy options, the Commission should continue to build a robust evidence base to establish the true extent of the problems.

In this regard, we note that a number of studies etc have been prepared to review the evidence base. These include a study published in July 2022 (at the request of the FISC Subcommittee) entitled [Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU](#). The study references the regulatory regime in the UK and we thought it would be helpful to the Commission to expand on some of the comments made in that study, in particular those on the Regulation of tax intermediaries via professional bodies (section 3.2) with particular reference to the UK position (section 3.2.1). We are also aware that the EU Commission publishes some data in this area, most recently in its 2022 [Annual Report on Taxation](#). This data is very helpful but, as far as we know, there is no systematic published evidence base at member state level which would provide a more accurate indication of the extent of tax evasion and aggressive tax planning across the EU. The UK revenue authority has published a detailed annual [measuring tax gaps](#) publication¹ which provides a helpful evidence base for decision making. The report was first published in 2009 and the growing statistical databank assists with policy formulation and in assessing the impact of measures to counter tax evasion and avoidance. We understand that some similar data may be available at the member state level but it may not be published or publicly available. If so, in the interests of transparency and working with stakeholders to address concerns in this area, the EU Commission might wish to consider encouraging member states to develop and publish detailed information on tax gaps in a consistent format.

¹ <https://www.gov.uk/government/statistics/measuring-tax-gaps>

A systematic tax gap analysis across EU member states of this nature would help to highlight other shortfalls in revenue such as errors and mistakes and therefore would assist in addressing other important concerns about the overall tax gap.

Tax evasion is illegal in the UK and throughout the EU and can be dealt with under criminal law in all jurisdictions. In terms of tackling aggressive tax planning, our experience is that formulating a suitable definition that tackles the abuses is challenging but, and as acknowledged in the study mentioned above, we faced similar challenges in the UK and we trust it would be helpful to the Commission to share these experiences.

As noted in the report, in March 2015 the UK Government challenged the regulatory bodies who police professional standards to “take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance”. As a direct result of this challenge, the seven largest professional bodies representing accountants and tax advisers in the UK responded by amending our professional rules and ethical code set out in our Professional Conduct in Relation to Taxation (PCRT). These amendments set out clearer ethical standards for our members when providing tax planning advice and have clarified what behaviours are expected of our members when advising on tax planning arrangements. The PCRT can be accessed on the CIOT website [here](#)² and the ICAEW website [here](#)³.

The five Fundamental Principles which were already explicit in our ethical code, namely integrity, objectivity, professional competence and due care, confidentiality and professional behaviour have now been strengthened by five additional Standards for tax planning which cover the following areas:

- Client specific
- Lawful
- Disclosure and transparency
- Tax planning arrangements
- Professional Judgement and appropriate documentation

The definitions in relation to each of these standards are set out in Appendix one to this document. Members of our respective bodies must meet the Fundamental Principles and Standards. The PCRT is supported by some Helpsheets and we also attach a copy of Helpsheet B: Tax Advice which provides further supporting information in relation to each of these Standards.

The Standards set out to clarify behavioural responses which in principle may be legal, but which do not meet the expected standards of behaviour from a tax professional. Rather than seek to define aggressive tax planning directly, instead we focused on the expected behaviours of a professional adviser and that the expected behaviours should not include providing tax advice in a way that was likely to be viewed as aggressive tax avoidance. Taken together, the aim of the Standards was to make it clear that our members should not be involved in the creation, encouragement or promotion of, broadly, ‘aggressive’ tax avoidance arrangements, for example because the application of the tax legislation does not achieve its intended purposes or because there has been use of highly contrived or artificial structures or where ‘mass market’ tax planning is recommended without reference to that particular client’s circumstances.

These changes became effective from 1 March 2017 (not May 2015 as stated in the above report) and we believe have bedded down with members with few problems – not least because although these expected standards of behaviour are now explicitly stated in the PCRT, they have largely clarified what was already implicit in the Fundamental Principles enshrined in the PCRT. A further outcome of these changes is that they have helped

² <https://ciotmktgprodeun.azureedge.net/professional-conduct-in-relation-to-taxation-pcrt>

³ <https://www.icaew.com/technical/tax/pcrt>

members in their dealings with clients who still want to engage in aggressive tax avoidance – because members can point to the Standards to demonstrate that any such activity would be a clear breach of our professional code.


Members failing to meet the PCRT Principles and Standards are potentially subject to disciplinary action and complaints can be brought in a number of ways, including by members of the public, by the UK tax authorities (including HMRC) or initiated by the bodies themselves.

We would encourage the EU Commission to review PCRT and consider this alongside the CFE work on the Ethical Bar and in relation to setting an ethical code for tax advisers with appropriate sanctions when tax advisers have not met these high standards. We recognise that strengthening professional codes must be considered within the wider tax system and is likely to be only a part, albeit an important part, of any solution to address the problems in this area. In addition to the PCRT the UK has legislation which seeks to prevent aggressive tax planning. This includes the Promoters of Tax Avoidance Schemes (POTAS) legislation. The effect of this legislation is that advisers should have procedures and processes in place so they stay clear of work which would be considered ‘aggressive’ tax avoidance, as defined by that legislation. There is also a separate penalty regime for enablers (as defined) of defeated tax avoidance. It would appear that the use of the word enablers has different meanings in different jurisdictions and we would therefore suggest caution in using this term without a very clear definition being provided.

Finally, it is important to ensure that any additional burdens are, as far as possible, targeted directly at those advisers who engage in such unprofessional activity and that any extra admin burdens placed on all advisers are reasonable and proportionate: otherwise this could potentially cause them to leave the market and thereby reduce the number of advisers available to assist taxpayers, or increase the cost of obtaining tax advice such that taxpayers decide to ‘do it themselves’ and get it wrong.

We trust our comments are helpful and would be happy to meet with you to discuss PCRT or other aspects of the UK tax system designed to address these problems. We look forward to your response.

Yours sincerely



John Cullinane

Director of Public Policy, Chartered Institute of Taxation



Frank Haskew

Head of Tax, Institute of Chartered Accountants in England and Wales



Appendix one – Definitions of the Five Tax Planning Standards

Client Specific - Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.

Lawful - At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients' attention to where the law is materially uncertain, for example because HMRC is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

Disclosure and transparency - Tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

Tax planning arrangements - Members must not create, encourage or promote tax planning arrangements or structures that

- i) set out to achieve results that are contrary to the clear intention of Parliament⁴ in enacting relevant legislation and/or
- ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

Professional judgement and appropriate documentation - Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements

⁴ The concept of considering the clear intention of Parliament is a UK specific concept

PCRT help sheet B: Tax Advice



Date of this help sheet: 1 March 2019

This help sheet provides guidance on the application of the PCRT Fundamental Principles and Standards for Tax Planning. This help sheet includes the Standards for Tax Planning, further discussion of the Standards, and FAQs which are designed to illustrate the practical application of the Standards.

The Standards for Tax Planning

1. As the Standards for Tax Planning are critical to any planning undertaken by members they are reproduced here for ease of reference.

Client Specific

Tax planning must be specific to the particular client's facts and circumstances. Clients must be alerted to the wider risks and the implications of any courses of action.

Lawful

At all times members must act lawfully and with integrity and expect the same from their clients. Tax planning should be based on a realistic assessment of the facts and on a credible view of the law. Members should draw their clients' attention to where the law is materially uncertain, for example because HMRC is known to take a different view of the law. Members should consider taking further advice appropriate to the risks and circumstances of the particular case, for example where litigation is likely.

Disclosure and transparency

Tax advice must not rely for its effectiveness on HMRC having less than the relevant facts. Any disclosure must fairly represent all relevant facts.

Tax planning arrangements

Members must not create, encourage or promote tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.

Professional judgement and appropriate documentation

Applying these requirements to particular client advisory situations requires members to exercise professional judgement on a number of matters. Members should keep notes on a timely basis of the rationale for the judgments exercised in seeking to adhere to these requirements.

2. Further discussion on these Standards for Tax Planning is set out below.

Client Specific

3. The risks referred to in this Standard are those which are directly attributable to the planning and could be reasonably foreseeable by the member. There would not normally be a duty to comment on, for example, the commercial risk of the underlying transaction. The obligations of the member to the client continue to be governed by the engagement letter.

4. Where wider risks should be highlighted, the member may either advise on them, or identify them as matters on which separate advice should be sought by the client, depending on the scope of the member's practice and of the engagement.

5. Generic opinions or advice that does not take into account the position of specific taxpayers (or a narrowly defined group of taxpayers such as a group of employees of the same company) pose particular risks. Members are entitled to make reasonable assumptions in giving advice (for example, where it would be reasonable on the facts to assume that the taxpayer(s) is/are UK resident), but assumptions should not be relied upon which are known to be unrealistic or unreasonable. If advice is generic, and/or depends on certain assumptions, this fact and the need for specific advice to be taken before acting should be highlighted with sufficient prominence to prevent any misunderstandings arising. For some suitably qualified members, this might, for example, include the preparation of standard wording for inclusion in contracts, Wills or other documents. Members should consider including in their advice the potential impact of a change in the assumptions made and/or the circumstances which might require specific or updated advice to be obtained.

Lawful

6. The requirement to advise clients on material uncertainty in the law (including where HMRC take a different view) applies even if the practical likelihood of HMRC intervention is considered low. Clients should be told what would be reasonable, at the time of the transaction, to expect HMRC to believe the application of the law to be (assuming HMRC was fully apprised of all the facts of the transaction). Where the likely view of HMRC is uncertain or not known, the member should include this fact as part of their advice.

7. The fact that the member may disagree with HMRC on a matter is not of itself indicative of behaviour that might breach these standards. A member may reasonably believe that an HMRC view is wrong in law but, if so, the client should be alerted to the fact that HMRC holds a different view of the law and should be advised of the risks and likely costs that might be incurred in order to determine any dispute.

Disclosure and transparency

8. Disclosure should be made whenever required by law and fuller disclosure must be recommended to clients wherever it is appropriate given a wider relationship or dialogue with HMRC relevant to that client. What is actually to be disclosed will inevitably reflect a professional judgement taking into account all relevant facts and law specific to the case in question and what the client consents should be disclosed.

Tax planning arrangements

9. Where a member has a genuine and reasonable uncertainty as to whether particular planning is in breach of this Standard, the member should;

- document the detailed reasoning and evidence sufficiently to be able to demonstrate why they took the view that any planning was not in breach of this Standard;
- include in their client advice an assessment of uncertainties and risks involved in the planning - see Standard Lawful above; and
- include in their client advice an assessment of the relevant disclosures that should be made to HMRC in order to enable it, should it wish to do so, to make any reasonable enquiries – see Standard Disclosure and transparency above.

Professional judgement and appropriate documentation

10. Members are not required to complete paperwork for its own sake, but they should be prepared to identify, support and where appropriate defend the judgements they made in applying these requirements to their work.

11. Where the judgements made are reasonable, notes taken on a timely basis are likely to be the most convincing way of demonstrating compliance with the principles after the event, to the benefit of the member and the client and to satisfy any wider public concerns.

Guidance

12. The paragraphs and the FAQs below provide guidance for members when considering whether advice complies with the Fundamental Principles and Standards for Tax Planning.

Tax evasion

13. A member should never be knowingly involved in tax evasion, although, of course, it is appropriate to act for a client who is rectifying their affairs.

Tax planning and advice

14. In contrast to tax evasion, tax planning is legal. However, under the Standard members ‘must not create, encourage or promote tax planning arrangements that (i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or (ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation’.

15. Things to consider:

- Have you checked that your engagement letter fully covers the scope of the planning advice?
- Have you taken the Standards for Tax Planning and the Fundamental Principles into account? Is it client specific? Is it lawful? Will all relevant facts be disclosed to HMRC? Is it creating, encouraging or promoting tax planning contrary to the 4th Standard for Tax Planning.
- How tax sophisticated is the client?
- Has the client made clear what they wish to achieve by the planning?
- What are the issues involved with the implementation of the planning?
- What are the risks associated with the planning and have you warned the client of them? For example:
 - The strength of the legal interpretation relied upon.
 - The potential application of the GAAR.
 - The implications for the client, including the obligations of the client in relation to their tax return, if the planning requires disclosure under DOTAS or DASVOIT and the potential for an accelerated payment notice or partner payment notice?
 - The reputational risk to the client and the member of the planning in the public arena.

- The stress, cost and wider personal or business implications to the client in the event of a prolonged dispute with HMRC. This may involve unwelcomed publicity, costs, expenses and loss of management time over a significant period.
- If the client tenders for government contracts, the potential impact of the proposed tax planning on tendering for and retaining public sector contracts.
- The risk of counteraction. This may occur before the planning is completed or potentially there may be retrospective counteraction at a later date.
- The risk of challenge by HMRC. Such challenge may relate to the legal interpretation relied upon, but may alternatively relate to the construction of the facts, including the implementation of the planning.
- The risk and inherent uncertainty of litigation. The probability of the planning being overturned by the courts if litigated and the potential ultimate downside should the client be unsuccessful.
- Is a second opinion necessary/advisable?
- Are the arrangements in line with any applicable code of conduct or ethical guidelines or stances for example the Banking Code, and fit and proper tests for charity trustees and pension administrators?
- Are you satisfied that the client understands the planning proposed?
- Have you documented the advice given and the reasoning behind it?

HMRC guidance

16. HMRC publications in respect of Tax avoidance and Tax evasion can be found on Gov.uk.

FAQs on tax advice

FAQ 1. My job is to advise clients on the law. Can I still do that under the Standards for Tax Planning?

Yes. The Standards for Tax Planning are designed to address behaviours which are damaging our profession, not to stop members from giving bona fide tax advice to clients based on an analysis of tax law as it applies to their situation, even if as sometimes may happen this might lead to surprising results.

The concern is over advisers who create schemes to exploit loopholes and frustrate the will of Parliament, or who promote them to clients, or encourage clients into them.

It is the behaviour of the adviser that is the focus of PCRT, not the tax outcome for the client.

FAQ 2. What if the situation is more borderline, don't I still have to advise my clients?

In any area where the results of tax analysis produce apparently surprising and/or beneficial results, the adviser needs to advise the client dispassionately, objectively and fully (including in relation to the costs and risks of HMRC challenge and any similarly foreseeable results). This would include exploring the substantive nature (or, at the opposite end of the spectrum, artificiality) of the arrangements proposed: balanced advice, which covers such risks, as distinct from encouraging the client into such arrangements, should not amount to the creation, promotion or encouragement of arrangements that are against the clear intention of Parliament or seek to exploit shortcomings in the relevant legislation.

FAQ 3. How would I know if the planning was contrary to the clear intention of Parliament is?

Discerning the intention of Parliament at the time that the legislation was enacted is likely only to be an issue where more complex or ground breaking planning is concerned. In such cases the legislation and any associated explanatory notes issued at the time of enactment should prove sufficient. Only rarely

should it be necessary to consult Hansard. If the intention of Parliament was genuinely unclear at the time of enactment then you would not be expected to second guess what was the clear intention of Parliament.

FAQ 4. Do I need to have an engagement letter in place to cover tax planning advice?

An appropriately worded engagement letter sets out the scope of any engagement and the responsibilities of both the tax adviser and the client. It protects both the client and the adviser and the Professional Bodies that subscribe to PCRT strongly recommend you have an engagement letter in place for all tax work.

You should understand your client's expectations around the tax planning advice and ensure that the engagement letter reflects your role and responsibilities, including limitations in or amendments to that role. The importance of this has been highlighted by the [Mehjoo case](#).

FAQ 5. I am considering introducing my client to another adviser's planning arrangement. What should I consider?

Before considering the other adviser's tax planning you need to ascertain whether the promoter is subject to a monitoring notice within the POTAS regime. If they are it is difficult to envisage any circumstance in which it would be appropriate for you to introduce their arrangement to your client.

Assuming the promoter is not a monitored promoter you should appraise the planning and form a view on its effectiveness and risk.

- Is it compatible with the Standards for Tax Planning? See also FAQ 11 below.
- Is it client specific rather than a generic packaged scheme?
- Is it lawful? Does it accord with your understanding of the law? The fact that HMRC may not agree with the legal position adopted is not of itself indicative of behaviour that would breach the standards. You may reasonably believe that an HMRC view is wrong in law but you should alert the client to the fact that HMRC holds a different view.
- Is the legal advice current?
- Is the promoter appropriately qualified?
- Have there been any recent challenges to similar planning?
- Might the GAAR apply?
- Does it look like a Spotlight scheme (see <https://www.gov.uk/government/collections/tax-avoidance-schemes-currently-in-the-spotlight>)?
- Are there any restrictions on full disclosure of the relevant facts to HMRC? Planning should not rely for its effectiveness on HMRC having less than the relevant facts.
- Is the planning highly artificial or highly contrived or contrary to the clear intentions of Parliament? See also FAQ 3 above.
- Do you wish to be associated with the planning both from a technical and a reputational perspective? If you do not have sufficient understanding of the proposed planning to enable you to alert the client to the risks, as well as the merits, you should make the client aware of the limitations of your advice. You should consider very carefully whether you are comfortable introducing a client to planning where you are uncertain of its effectiveness.

FAQ 6. If I do introduce my client to the planning arrangement in FAQ 5 above I will receive commission. Do I have to tell my client about this?

You must disclose and account for any commission received for making such an introduction in line with the rules of your professional body (See CIOT PRPG and ATT PRPG). You need to take care that by receiving commission you are not compromising your objectivity (see Fundamental Principles). See also FAQ 11 below.

FAQ 7. Can I receive commission if I am asked to give a second opinion on another adviser's tax planning arrangement?

You should not accept commission in these circumstances as that would compromise your objectivity. See also FAQ 11 below.

FAQ 8. What is my responsibility if a client wishes to engage in planning which I do not consider to be appropriate or does not sit comfortably with my business principles and ethics?

You do not have to advise on or recommend tax planning which you do not consider to be appropriate or otherwise does not align with your own business principles and ethics. However, in this situation you may need to ensure that the advice you do not wish to give is outside the scope of your engagement letter. If you owe a legal duty of care to the client to advise in this area, you should ensure that you comply with this by, for example, advising the client that there are opportunities that they could undertake, even though you are unwilling to assist, and recommending that they seek alternative advice. You should document any such discussions with your client.

Ultimately it is the client's decision as to what planning is appropriate having received advice. However, you should ensure that the client is made aware of the risks and rewards of any planning, including that there may be adverse reputational consequences.

FAQ 9. What is the position if my client tells me that they will go ahead with a tax planning arrangement without taking full advice from me?

You should make your client aware of the potential risks of proceeding without full advice and ensure that the restriction in the scope of your advice is recorded in writing.

FAQ 10. The tax planning arrangement my client is considering has Counsel's opinion which says the planning is effective. Can I/my client rely on that?

It should be noted that any legal opinion provided, for example by Counsel, will be based on the assumptions stated in the instructions for the opinion and on execution of the arrangement exactly as stated. HMRC and the courts will not be constrained by these assumptions.

Points to consider include:

- Does the opinion seem reasonable in your view? Does it accord with your understanding of the law?
- What is Counsel's reputation? Have they been associated with aggressive tax planning?
- Has their opinion been overruled by the courts in other tax planning cases?
- Has Counsel considered whether the GAAR could apply to the transaction?

The generic opinion given by Counsel may be based on an assumption that the participant in the planning is, for example, 'trading' in used cars or that a film lease partnership is trading or that a gilt strip investment is not part of a trading activity. As your client's adviser you will be familiar with their circumstances and be able to offer some insight as to whether the assumption held true in your client's circumstances.

FAQ 11. Would it be acceptable under the 4th Standard to make a referral to another adviser whom I know offers planning which could be considered to be highly artificial or highly contrived and seeks to exploit the shortcomings within the relevant legislation?

Under the 4th Standard a member must not 'create, encourage or promote tax planning arrangements or structures that are highly artificial or highly contrived and seek to exploit the shortcomings within the relevant legislation'. If you refer clients to another adviser expressly so that they can benefit from such planning it is quite probable that this behaviour would be considered to be 'encouraging' behaviour which is in contravention of the 4th Standard.

If you are uncertain whether the planning being offered by the other adviser is highly artificial or highly contrived and still decide to refer it to them you should make the client aware of the risks associated with aggressive planning, including probable challenge by HMRC and potential damage to reputation. You should document your reasons for making the referral.

FAQ 12. Unbeknown to me, my client has undertaken planning with another adviser and has now asked me to enter it on his tax return. What should I do if I am not sure whether the planning is effective or not?

You should not include within the tax return a claim for a tax advantage which you consider has no sustainable basis based on the information provided to you.

The questions at FAQ 5 should help you to assess whether there is a sustainable filing position and these can broadly be summed up in the following:

Do I believe I have sufficient understanding of the planning to be satisfied that there is a sustainable filing position, or do I need to take a second opinion? Is it so significant that I should caveat my compliance responsibility?

If the client provides inadequate information for you to form an opinion as to the sustainability of the filing position, then you should ask for further information. If no further information is forthcoming, you should not include a claim for a tax advantage on the tax return, document your decision and explain your reasons to the client.

If you do receive additional information but you are unable to draw a reasoned conclusion you should seek specialist support (either within your firm or externally) or recommend that the client obtains advice elsewhere.

FAQ 13. What is the position if the adviser responsible for the planning in FAQ 12 above is not a member of a professional body?

HMRC has issued its Standards for agents <https://www.gov.uk/government/publications/hmrc-the-standard-for-agents/hmrc-the-standard-for-agents> and if an adviser has breached those you could consider reporting them to HMRC <https://www.gov.uk/government/organisations/hm-revenue-customs/contact/tax-avoidance>. You would need to take care not to breach client confidentiality and report only the nature of the planning and not the client's name.

FAQ 14. What should I do if I believe the planning implemented by my client on the advice of another adviser constitutes evasion?

You cannot make a claim on the tax return. You should advise the client of your concerns and recommend that they take action to rectify matters. See Help sheet C: Dealing with errors. If the client refuses you should cease to act. You cannot inform HMRC because of client confidentiality but you will need to consider whether you have any AML reporting obligations in respect of the original adviser and the client. [Link to AMLGAS](#).

FAQ 15. What are the consequences if I create, encourage or promote tax planning which is contrary to the Standards for Tax Planning and the Fundamental Principles?

Each of the Professional Bodies that subscribe to PCRT deals with all complaints made against their members and students. If you were found to have breached the Standards for Tax Planning or the Fundamental Principles, the sanctions may range from a reprimand to exclusion.