

OECD Public Discussion Draft concerning BEPS Action 12: Mandatory Disclosure Rules

30/04/2015

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The OECD discussion draft refers to Action 12 of the [Action Plan on Base Erosion and Profit Shifting](#) and states that countries - when adopting mandatory disclosure rules - will need to decide whether or not they introduce a dual reporting requirement that applies to the promoter and taxpayer or whether they introduce a reporting obligation that falls primarily on the promoter. Where the primary reporting obligation falls on the promoter, the draft recommends that the reporting obligation switches to the taxpayer where (i) the promoter is offshore; (ii) there is no promoter; or (iii) the promoter asserts legal professional privilege.

Although terminology is not always clear in the OECD discussion draft, it seems that the draft encompasses lawyers when discussing different features of mandatory disclosure and this is why the CCBE has decided to reply to this consultation.

The CCBE would like to draw the OECD's attention to a number of issues relating to the legal profession which are of utmost importance when discussing issues such as mandatory disclosure:

- A lawyer is a "*person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters*".¹
- When advising and representing clients, **lawyers play a fundamental role in ensuring the protection of human rights and fundamental freedoms**.²
- The use of the term 'promoter' is misleading and can create false assumptions as far as lawyers are concerned. **Lawyers are not 'promoters'** (of tax schemes) - lawyers provide legal advice to their clients on different legal matters, including tax matters or defend clients, having regard to the laws and rules in force within a certain country.
- **European lawyers** - when advising and representing clients - **are subject to core professional principles**, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention of Human Rights.

¹ See introductory recitals to the [Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000](#).

² "In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society." See Article 1.1 of the CCBE [Code of Conduct for European Lawyers](#). See also: [Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000](#) and [United Nations Basic Principles on the Role of Lawyers](#).

- The **right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy³ is one of the core principles of the European legal profession.** Without the certainty of confidentiality there can be no trust. This has been recognised by European⁴ and international legal instruments⁵ as well as by jurisprudence both at European⁶ and national level. According to the European Court of Human Rights, it is a fundamental right of citizens enshrined in the European Convention of Human Rights which can be breached only in exceptional circumstances.
- **All European countries have provisions in order to ensure the protection of the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy.⁷** The countries differ in the methods by which this protection is achieved. In some states legal duties are expressly imposed upon the lawyer and corresponding rights are expressly conferred. In other states, protection is achieved by the creation of duties, rights or exemptions from the ordinary rules of law. The nature and extent of these rights, duties, and exemptions, vary from country to country. However, by whatever means protection is achieved, and whatever its nature and extent, its purpose is the same in all states. **The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his or her rights and liberty and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence⁸.**
- There is **no professional secrecy when the lawyer uses it for illegal purposes.**

The OECD discussion draft is largely based on terminology and concepts used in common law countries ('legal professional privilege'), thus ignoring the principles and concepts of continental Europe and civil law countries ('professional secrecy'). The CCBE would like to comment in particular on the following parts of the discussion draft:

- *"(...) the existing legislation recognises that legal professional privilege, as recognised under the UK and Irish law, may act to prevent the promoter from providing the information required to make a full disclosure (13). [Footnote 13: Except for those cases where litigation is in actual contemplation, legal privilege generally only applies to confidential legal advice given to the client by the professional adviser and does not extend to documentation prepared in the ordinary course of the transaction or to the identity of the parties involved.]⁹"*

It is important to note that in continental Europe and civil law countries, **professional secrecy goes beyond the so-called 'litigation privilege' and 'legal advice privilege' of common law countries**, covering also documentation prepared in the course of a transaction or legal advice. In these jurisdictions, the facts on which legal conclusions are drawn may be covered by professional secrecy, and may consequently not be disclosed to a tax authority. In some countries, in addition, the name of the client is protected by professional secrecy. Thus, the scope of professional secrecy is more extensive than that of legal professional privilege.

³ See CCBE [Charter of Core Principles of the European Legal Profession](#) of 24 November 2006, Principle b).

⁴ See [Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000](#): 6. All necessary measures should be taken to ensure the respect of the confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the rule of law.

⁵ See [United Nations Basic Principles on the Role of Lawyers](#): 22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

⁶ Judgments of the European Court for Human Rights have recognised a right to confidentiality of communications between a lawyer and his or her client on the basis of either Article 6 'Right to a fair trial' and Article 8 'Right to respect for private and family life' of the [European Convention on Human Rights](#): see for instance, [CASE OF S. v. SWITZERLAND](#), Application no. 12629/87; [13965/88](#), 28 November 1991; [CASE OF CAMPBELL v. THE UNITED KINGDOM](#), Application no. [13590/88](#), 25 March 1992; [CASE OF NIEMIETZ v. GERMANY](#), Application no. [13710/88](#), 16 December 1992; or [CASE OF PETRI SALLINEN AND OTHERS v. FINLAND](#), Application no. [50882/99](#), 27 September 2005.

⁷ The principle has different origins: in common law countries it has developed through case-law; in continental Europe and civil law countries, it is sometimes contained in the Constitution, criminal law, procedural laws or the laws governing the lawyers' profession / the Bars and Law Societies. It is also reflected in the different national codes of conduct for lawyers. See for more information: a) Report by D.A.O. EDWARD, Q.C., on '[The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community](#)' of 29 October 1976, b) [Update of the Edward's Report on the professional secret, confidentiality and legal professional privilege in Europe](#) of 30 September 2003 and c) the [Comparative Study on Governmental Surveillance of Lawyers' Data in the Cloud](#).

⁸ See report by D.A.O. EDWARD, Q.C., op. cit.

⁹ See page 27 of the OECD discussion draft.

- "(...) the client has the option of waiving any right to legal privilege (...)"¹⁰

Contrary to common law jurisdictions, **professional secrecy cannot always be waived by the client in continental Europe and civil law countries**, in which case the lawyer is unable to disclose information and documents provided by his or her client or forwarded by him or her to his or her client. Moreover in some European countries a breach of professional secrecy is a criminal offence. In some civil law countries, even if the client were to decide to waive professional secrecy, it is the lawyer who will need to decide in the last resort about disclosure taking into account the client's best interests.

- "The legal professional asserting legal privilege must advise clients of their obligation to disclose and must also advise the tax administration that the legal professional's obligation to disclose has not been complied with because of the assertion of legal professional privilege."¹¹

This implies that a lawyer would be required to advise the tax authorities that he or she was not able to disclose information because of the assertion of legal professional privilege or professional secrecy. This also implies that a lawyer would not remain independent of State authorities, which is contrary to the core principle of independence of the legal profession. A lawyer may not allow his or her independence to be compromised by a State authority or any other powerful interests. Hence a lawyer **cannot be compelled to tip off clients to tax authorities**. Besides, as stated above, in a number of European countries lawyers cannot give their client's name, as it is covered by professional secrecy, and thus, the lawyer is not authorised to provide any information to the tax authorities.

In conclusion, the CCBE urges the OECD to take into account these comments in future discussions and position papers. The CCBE, for the reasons indicated, strongly opposes any option that would put an obligation of disclosure of tax schemes on lawyers acting as legal counsel in tax matters.

¹⁰ See page 27 of the OECD discussion draft.

¹¹ See page 27 of the OECD discussion draft.