

Paris, September 25, 2015

OECD
2, rue André-Pascal
F – 75775 Paris

For the attention of:
M. Pascal Saint-Amans
Directeur du Centre de politique et
d'administration fiscale
M. Masatsugu Asakawa
Chairman of the Committee on Fiscal Affairs

Dear Sirs,

You will find attached a statement issued by two of the most prominent organizations of lawyers worldwide – the **Conseil des Barreaux Européens** (CCBE - Council of Bars and Law Societies of Europe) and the **Union Internationale des Avocats** (UIA – International Association of Lawyers) – with regard to the contents of **Action 12 (Mandatory Disclosure Rules) of the OECD Action Plan on Base Erosion and Profit Shifting**.

Both organizations strongly oppose any option that would place an obligation of disclosure of tax schemes on lawyers acting as legal counsel in tax matters, and thus in order to protect the fundamental principles of client confidentiality.

The CCBE and the UIA ask that their opinion be taken into account in the future negotiations to take place in October. Representatives of both the CCBE and the UIA remain at your disposal for prior consultations on the issues raised in the attached statement.

The CCBE and the UIA also kindly request that a copy of this letter and statement are distributed by Mr Asakawa to all members of the Committee on Fiscal Affairs.

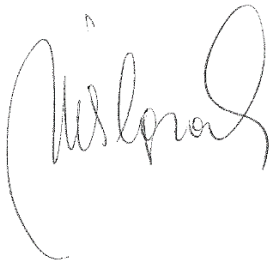
For your complete information,

- The Conseil des Barreaux Européens (CCBE - Council of Bars and Law Societies of Europe) has been representing, since 1960, 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 Union Internationale des Avocats (UIA – International Association of Lawyers), created in 1927, is the oldest professional association, with several thousand individual members, as well as more than 200 bar associations, organisations or federations (representing nearly two million lawyers) from over 110 countries.

They can be contacted on:

<p>CCBE Philippe BUISSERET Secretary General Rue Joseph II, 40 1000 Bruxelles T: +32 (0)2 234 65 10 F: +32 (0)2 234 65 11/12 ccbe@ccbe.eu</p>	<p>UIA Jean-Jacques UETTWILLER Vice-Président 25 rue du Jour 75001 Paris T : +33 (0)1 44 88 55 66 F : +33 (0)1 44 88 55 77 uiacentre@uianet.org</p>
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Yours sincerely,



Maria SLAZAK
President
CCBE



Miguel LOINAZ
President
UIA

September 15, 2015

OECD Base Erosion and Profit Shifting Action 12: Mandatory Disclosure Rules

Background

In March 2015, the OECD issued a [discussion draft](#) on BEPS Action 12 (Mandatory Disclosure Rules) of the [Action Plan on Base Erosion and Profit Shifting](#). This is part of the OECD's continuing action against tax avoidance and tax evasion.

The part of the discussion draft relevant to lawyers concerns the adoption of **mandatory disclosure rules for aggressive tax planning**. Countries would have to decide whether they introduce a dual reporting requirement that applies both to the promoter of the tax scheme and the taxpayer concerned *or* they introduce a reporting obligation that falls primarily on the promoter alone. If the reporting obligation falls on the promoter alone, the draft **recommends** that the reporting obligation should switch to the taxpayer where, among other grounds, the promoter asserts that, **as a lawyer, the transaction is subject to legal professional privilege**.

Issues of principle

The following issues are of key concern to lawyers:

- In relation to lawyers the use of the term 'promoter' is misleading. **Lawyers are not 'promoters'** (of tax or any other schemes). Lawyers provide legal advice to their clients on various legal matters, including tax, or defend clients in the framework of the laws and rules in force within a certain country.
- When advising and representing clients, **lawyers 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. The **right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy is one of the core principles of the legal profession**.

Comments on the language of the OECD draft

The OECD discussion draft is largely based on terminology and concepts used in common law countries ('legal professional privilege'), ignoring the usage in civil law countries ('professional secrecy').

One core principle is common to both systems, which is that the lawyer is independent from the state. As a result, a lawyer **cannot be compelled to tip off clients to tax authorities**, as suggested in the draft.

But paragraphs on page 27 of the draft ignore some of the differences in treatment of the confidentiality principle by the two systems, which can be explained as follows:

- in civil law countries, **professional secrecy goes beyond the so-called 'litigation privilege' and 'legal advice privilege' of common law countries**, and covers 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.
- unlike in common law jurisdictions, **professional secrecy cannot always be waived by the client in civil law countries**, in which case the lawyer may be unable to disclose information and documents. Moreover in some countries a breach of professional secrecy is a criminal offence. In some civil law countries, too, 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.

Conclusion

As a result, and in order to protect the fundamental principle of client confidentiality, we strongly oppose any option that would place an obligation of disclosure of tax schemes on lawyers acting as legal counsel in tax matters.