Tax Planning and Related Services—
Fact Finding Update

I. Introduction

1. This paper provides a summary of the Tax Planning and Related Services Working Group's (TPWG) preliminary views on insights gained from conversations with stakeholders during its outreach activities.

II. Background

2. The objective of the initiative is to:

   (a) Gather an understanding of regulatory, practice and other developments in corporate and individual tax planning by professional accountants in business (PAIBs) and professional accountants in public practice (PAPPs);

   (b) Identify and analyze the ethical implications of those developments and determine whether there is a need for enhancements to the Code or further actions; and

   (c) Develop a report and recommendations to the IESBA.

3. At the March 2020 CAG meeting, the CAG received an update on the TPWG's information gathering activities and its preliminary observations from its analysis and insights gathered from stakeholder outreach to date. Among other matters, the CAG was briefed on the inter-related impact of tax planning on compliance with each of the fundamental principles (FPs); the relevance of the concepts of "fairness" and "transparency;" the "complexity" risk associated with multi-faceted tax planning strategies and the increasing importance and value of professional judgment in addressing jurisdictional-level ethical dimensions in tax planning.

4. Using insights gained from conversations with stakeholders during its yearlong outreach activities in 2020,[1] the TPWG has drawn several observations from its analysis to date that it is now evaluating further in terms of what, if any, responses would be appropriate for the IESBA to consider.

5. These observations are discussed in the following paragraphs.

III. Tax Planning – Described Terms

There is no Clear Line Between Tax Planning and Aggressive Tax Planning

6. The IESBA received overwhelming support from stakeholders on its initiative to address the topic of tax planning.[2] There is an awareness that it is in the public interest, in light of the changing expectations of society, to address the matter of tax planning practices especially when they are perceived to be "aggressive" though not necessarily illegal.

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[1] Refer to Appendix 1 of Agenda Item D to sight the list of stakeholders.

[2] IESBA Strategy and Work Plan (SWP) for 2019-2023

7. Whilst there has not been one clearly delineated description for the term "aggressive tax planning[3]," the perception of aggressive tax planning practices varies from jurisdiction to jurisdiction and across professions, for example legal practitioners versus professional accountants (PAs).

8. The TPWG then sought to understand the varying views of aggressive tax planning practices. The TPWG learned that in some jurisdictions, aggressive tax planning can be portrayed as actively creating arrangements or structures that are by "opinion" subject to question. It is a universal theme amongst various stakeholders that aggressive tax planning practices are not necessarily illegal until it is established as such by the judiciary system, and what is aggressive represents a "matter of degree" that is rather subjective.

9. The general view expressed by stakeholders is that corporations and individual taxpayers should be able to abide by the letter of the law when planning their tax strategies. Due to complexity of the tax regimes across jurisdictions, there may be instances where a certain tax strategy is perceived as inappropriately "aggressive" as the courts have relied on the "spirit of the law" or the intention behind the letter of the law.[4]

10. Across all stakeholder discussions, there was a view that as long as "tax planning remains legal and does not impose the obligation of strict/narrow facts and interpretation, ethics and aggressive tax planning seem misnomers subject only to academic debate and specific jurisdictional viewpoints."

Unacceptable Tax Planning

11. The TPWG was also informed that jurisdictions may use several approaches to encourage legal compliance and to discourage <u>unacceptable tax planning</u> practices and/or behavior though such behavior is not necessarily delineated as *aggressive tax planning*.

12. In conducting its desktop review, the TPWG found that in several jurisdictions, there are tax regulations in place to deal with <u>unacceptable tax planning practices</u> such as the General Anti-Avoidance Rules,[5] and Targeted Anti-Avoidance and Mandatory Disclosure Rules,[6] though not necessarily to address *aggressive tax planning* practices.

13. During the March 2020 CAG meeting, the TPWG indicated that it would seek to understand the perceptions of stakeholders on tax planning, specifically whether legally effective tax planning is within the object and spirit of the taxing statute and thus inherently "acceptable," or if it is contrary to the law's object and spirit and thus "unacceptable." There is also a debate as to whether the absence of a prohibition is sufficient or even relevant to such a judgment.

14. The starting point in the analysis of acceptable versus <u>unacceptable tax planning</u> is that both in interpretation and in application, acceptable tax planning refers to both the legality and the economic substance of the transactions. The economic substance of a transaction will prevail over the form of the transaction when the form does not reflect, or is inconsistent with, the economic substance.

[3] The European Commission published a paper in 2017 to provide economic evidence of the relevance of aggressive tax planning (ATP) structures for all EU Member States. This paper also provided description of indicators for ATP structures.

[4] Hansrudi Lenz, 'Aggressive Tax Avoidance by Managers of Multinational Companies as a Violation of Their Moral Duty to Obey the Law: A Kantian Rationale' (2018), Journal of Business Ethics

[5] For example, in Australia, Canada, China, European Union, India, the Netherlands, New Zealand, United Kingdom etc.

[6] Frameworks such as DAC 6 in the European Union.

Unacceptable tax planning would be deemed to be any transaction that is inconsistent with its economic substance.

15. Stakeholders argued that in certain circumstances, whether tax planning is unacceptable is unclear in certain types of transactions that have both tax effects and other economic effects. As the body of knowledge around taxation practices continues to grow, it will yield more cases about whether a particular taxation arrangement or structure will be considered inconsistent with the law, and thus "unacceptable."

Working Group's Preliminary Views

16. After a yearlong series of outreach discussions with various stakeholders, the TPWG has come to the view that it is difficult to adequately define *aggressive tax planning* on a global scale. Global and regional organizations such as the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the European Commission (EC) are making a concerted effort to address the topic of tax planning as a matter of global importance. Whilst tax planning is a defined term in most jurisdictions, there is a lack of authoritative literature that clearly defines *aggressive tax planning.*

17. Across all jurisdictions, PAs may face serious penalties where an arrangement is considered inappropriately aggressive by the tax authorities. The TPWG agrees that PAs should not engage in unacceptable tax planning solely for the purpose of tax avoidance, for example via the creation of artificial transactions. At the end of the day, PAs have an ethical responsibility for safeguarding their involvement in a way that distinguishes acceptable tax planning from unacceptable tax planning on behalf of their employing organizations or clients.

18. The TPWG also acknowledges that absent a clear definition of aggressive tax planning, it may be challenging to develop ethics provisions on the topic tax planning for PAs. Instead, the TPWG has been advised to explore the notion of unacceptable tax planning practices and/or behavior and delineate indicators of unacceptable tax planning by PAs versus aggressive tax planning.

19. In pursuing this line of thought, the TPWG will explore the merit of a principles-based decision-making framework to guide PAs in their tax planning activities and assist them in identifying what would be deemed acceptable or unacceptable tax planning behavior. As part of this further analysis, the TPWG will also consider how rigor could be built into such a framework, such as through documentation of the PA's judgments in making decisions or reaching conclusions.

20. Finally, the TPWG notes that the influence of culture may merit some consideration as perceptions of what is acceptable in a given jurisdiction may be completely different across borders.

Matter for Consideration

1. CAG Representatives are asked to share any comments, questions or reactions to the TPWG's preliminary views above.

Transparency and Accountability

21. At the March 2020 CAG meeting, the TPWG introduced several themes that it found were of relevance when it conducted its desktop review of tax planning literature.

22. Specifically, while the focus of Phase 1 of this initiative centers on what involvement in tax planning means in terms of implications for a PA's **ETHICAL** behavior and responsibility to comply with the FPs, the TPWG observed that the frameworks used by international policy makers include considerations of **TRANSPARENCY** and **ACCOUNTABILITY**. For example:

    - OECD/G20's Inclusive Framework on Base Erosion and Profit Shifting (BEPS) and country by country reporting rules. The overarching goal behind the 15 BEPS action items was to strengthen the international tax system by removing egregious tax loopholes and ensuring that profits were taxed where economic activities were transacted and value was created.
    - The EU Council adopted new rules to increase transparency to deter aggressive cross-border tax planning practices (known as "DAC 6").
    - Principles for Responsible Investment (PRI)[7] worked with global investors on corporate tax responsibility to produce its Engagement guidance on corporate tax responsibility in 2015. In 2017, the PRI and the investors worked together to supplement the guidance with the Investors' recommendations on corporate income tax disclosure .The publication is a set of disclosure recommendations developed by investors to strengthen corporate income tax disclosure across tax policy, governance and risk management areas.[8]
    - The Global Reporting Initiative (GRI), a sustainability standard setter, issued its first global standard for public reporting on tax, GRI 207: Tax 2019, setting out requirements for greater levels of tax transparency reporting. It is calling on global businesses to use the framework to provide detailed public information about their tax practices.

23. In its recent report titled *Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes*, the OECD mentioned that "professionals offer various legitimate business services to clients such as legal and accounting advice. They may also be experts on finding legal loopholes giving room for the creation of 'tax-avoidance' strategies. These strategies operate in the so-called 'grey areas of the law', allowing professionals to use the inadequacies or ambiguities of a jurisdiction's legal framework to maximize the tax outcomes for their client. The possibility of using 'grey areas of the law', while not technically illegal, should be limited by jurisdictions through the enhancement of their tax legislation and by fostering international co-operation. This is an area in which the OECD has been active over the years through the OECD/G20 Inclusive Framework on BEPS."[9]

[7] The PRI is independent. It encourages investors to use responsible investment to enhance returns and better manage risks but does not operate for its own profit. It engages with global policymakers but is not associated with any government. It is supported by, but is not part of, the United Nations (https://www.unpri.org/pri/about-the-pri).

[8] https://www.unpri.org/tax-avoidance

[9] The OECD/G20 Inclusive Framework on BEPS has over 135 countries committed to tackling tax avoidance, improving the coherence of international tax rules and ensuring a more transparent tax environment.

24. As highlighted in conversations with stakeholders who operate in the non-governmental[10] and nonprofit[11] space, there is an increased push towards organizations being more publicly transparent about their tax affairs. There is a general view that voluntary transparency in respect of tax affairs can improve public perceptions of these organizations when employing a certain tax strategy. As they pursue such transparency, organizations are also encouraged to give greater consideration to the ethical dimension of their tax planning and compliance strategies to ensure alignment with current legislation[12].

25. The TPWG was also briefed on the importance of enhanced transparency with tax authorities and how it is viewed as a cornerstone of co-operative compliance.[13] The general concept of cooperative compliance was initially referred to as "enhanced relationships," but was rebranded as cooperative compliance in 2013 by the OECD. The concept is broadly viewed as an exchange of greater upfront transparency by the taxpayer in return for more certainty from the tax authorities. The general view is that reduced compliance costs and efficiencies often result due to the better utilization of resources by both parties.

<u>Working Group's Preliminary Views</u>

26. The OECD/G20 BEPS Initiative as well as the current fairness-oriented[14] public discussion regarding the taxation of multinationals highlight the importance of the tax planning topic and the complexity of today's business models. Whether PAs are operating in compliance or advisory services, stakeholders[15] commented that PAs play a vital role in supporting and advancing the effort of the global initiatives as mentioned above.

27. Based on its desktop review, the TPWG considered how and at what level the concepts of transparency and accountability interact with the Code. These themes are further discussed in the following section.

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[10] BBVA, Iberdrola

[11] ActionAid, Oxfam (EU)

[12] Accountancy Europe

[13] Co-operative compliance is an initiative for promoting better tax compliance developed by the OECD Forum on Tax Administration. It sets out expectations for transparency and good tax governance by the taxpayer in order to give a high degree of reassurance as to the control of tax risks and the absence of aggressive tax planning.

[14] OECD's initiative on improving tax morale investigates the factors which drive individuals' and businesses' intrinsic willingness to pay taxes, and hence how to improve compliance with tax policies. The OECD re-analyzed the results of a survey of business perceptions on tax certainty to identify the constraints and concerns businesses face in paying in taxes around the world. The study is amongst a few which examine the relevance of tax morale to explain the level of tax compliance versus tax evasion, and its implications on fiscal policy implementation. In its press release, the OECD said that "increasing tax morale offers an important contribution to achieve sustainable growth in tax revenues in developing countries."

As noted by the OECD, "tax morale of businesses is difficult to measure and there is little research conducted to this day." Whilst the TPWG acknowledges that tax morality may influence the behavior of PAs in carrying out their professional taxation services, it is an area that sits outside the scope of this initiative.

[15] Accountancy Europe

IV. Ethical Behaviors of Professional Accountants in Tax Planning

Professional Accountants and the Ethical Principles

28. Stakeholders concur with the observation that there is not "one set" of global ethical principles applicable to PAs across jurisdictions which is enforced by professional bodies upon their members. Where the Code is adopted, the ethical behavior expected of PAs performing tax planning services is the same across the conceptual framework (CF) and five FPs in an interrelated manner.

29. Whilst there is no perceived lack of a general framework or fundamental principles of ethics applicable to tax planning activities,[16] the TPWG was informed that there is a lack of guidance on how PAs can identify, evaluate and address ethical risks related to tax planning.

30. As noted from discussions with certain professional accountancy organizations[17] (PAOs), there are standards/guidance they have provided to their members who perform tax planning services. Where the expected ethical behavior of PAs carrying out tax planning activities is based on the IESBA Code, there is consensus that the five FPs are interrelated. This view was also shared by practitioners[18] who confirmed that their firms' policies and procedures follow the principles of the Code.

The Five Fundamental Principles

31. As discussed at the March 2020 CAG meeting, the TPWG is of the view that the behavior expected of PAs performing tax planning services is the same for all PAs across the five FPs in an interrelated manner. As a result, missing or not fully understanding the threat to compliance with one FP might create a risk of non-compliance with another FP.

32. The TPWG presented the following option(s) to address the inter-related nature of the impact of tax planning on the FPs in its discussions with stakeholders.

    Option A

    Develop overarching material[19] in the Code that will assist PAs comply with the FPs and apply the CF.

    The TPWG considered the suitability of this material addressing the ethical considerations relating to tax planning activities.

    Option B

    Develop material under one or more specific FPs, such as objectivity and professional competence and due care, to explain the expected behavior of PAs performing tax planning activities.

    With respect to developing material for one or more FPs, the TPWG is of the initial view that such an approach would contradict stakeholders' views and its own view that the expected behavior of PAs performing tax services is the same for all PAs across the five FPs in an interrelated manner.

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16 Respondents to the IESBA's SWP 2019-2023 consultation paper have raised concern about creating additional standards on this topic due to its complexity and the difficulty of achieving consensus at the global level.

17 AICPA, UK professional accountancy bodies

18 KPMG, PwC

19 In this instance, the WG has yet to establish if there is a need for new requirements and/or application material and will make a recommendation in the final report to the Board.

Option C

Develop material outside the Code (such as staff Q&As or case studies) on the types and magnitude of the threats that are created when PAs perform tax planning activities.

The TPWG has heard from stakeholders who recommended this approach, cautioned against adding more material to the Code and suggested guidance would be more beneficial.

33. With regards to proposed options on the way forward, the TPWG noted equal split of support among stakeholders for Options A and C. The TPWG found that the equal split of views for either Option A or Option C relates directly to the type of ethical codes in place for each jurisdiction.

34. Where the local jurisdiction has adopted a rules-based approach, the preference is for Option A as the stakeholders feel that any guidance outside the Code would not suffice in assisting regulators enforce the ethical requirements. It was argued that avoiding ambiguity in determining what is acceptable versus unacceptable tax planning practice would help eliminate perceived gaps in the Code.

35. Conversely, stakeholders who preferred Option C are predominantly from jurisdictions which have adopted a more principles-based approach. These stakeholders' welcome guidance materials that would help PAs navigate real-life ethical dilemmas they may experience in providing taxation services.

36. The TPWG also noted that stakeholders' views varied based on their professional backgrounds. Stakeholders who operate within the profession (e.g., professional bodies and practitioners) welcome Option C as these stakeholders have in place frameworks to guide their members or themselves in the provision of tax services.[20] These stakeholders encourage the development of guidance materials with real-life examples. Conversely, stakeholders outside the profession, such as regulators and nonprofit organizations, encourage Option A to enhance transparency, accountability, uniformity and compliance across the profession.

37. As for option B (develop material under one or more specific FPs, such as objectivity and professional competence and due care, to explain the expected behavior of PAs performing tax planning activities), the TPWG received little to no support as the stakeholders viewed that the complexity and diversity of the tax issues pervade all the FPs. They felt that the adoption of this option may inadvertently create gaps in the Code as the view is that the behavior expected of PAs performing tax planning activities is the same for all PAs across the five FPs in an interrelated manner.

38. In addition to the above, the TPWG was encouraged to provide further insight into the issue of confidentially versus societal need for transparency. Whilst the Code establishes the principle of confidentiality, as discussed in Section IV above, there has been a shift in public perception that PAs have a duty to act both in the public and their employing organizations' or clients' interests.

39. There is a strong argument towards greater governance over tax practices and advice provided by PAs on behalf of, and to, their employing organizations or clients. Whilst PAs are required to maintain confidentiality in carrying their professional activities, the stakeholders argued that PAs will need to be reminded to be transparent regarding any transactions that the tax authorities may have doubts about in terms of tax impacts.

[20] The TPWG found that in most instances, the professional bodies and practitioners have referred to the IESBA Code as the basis for putting together a framework for PAs providing taxation services. The TPWG also found that there are varying levels of granularity in those frameworks.

Complexity Risk

40. As various stakeholders[21] have also shared, the subject of tax planning is fraught with complex questions, from the differences in the tax treatment of like transactions across jurisdictions to grey areas of interpretation of tax laws and regulations, rapidly evolving rules and changing societal expectations in today's economic climate.

41. As discussed at the March 2020 CAG meeting, the TPWG reflected on whether the IESBA should consider any new category of threat such as "complexity" threat, or address this potential gap in the Code via some other means. The TPWG acknowledges that the types of threats to compliance with the FPs as currently defined in the Code do not clearly capture the "complexity" risk.

42. As noted by the Technology Working Group (TWG) during the September 2020 Board meeting, PAs have regularly dealt with complicated situations in the past, but are now increasingly dealing with complex situations. The TWG detailed how complexity could impact PAs' compliance with multiple fundamental principles such as objectivity and confidentiality.

Working Group's Preliminary Views

43. The TPWG appreciates that Option A could be viewed as being restrictive and prescriptive due to the shifting goalpost of what is deemed to be acceptable versus unacceptable tax planning as well as the complex nature of the topic. The TPWG is also of the view that it is undesirable to take a rules-based approach as this may foster a 'check-box' mentality.

44. In addition, the TPWG understands the importance of having requirements that are capable of being readily adopted and implemented globally. This includes requirements which will serve the greater public interest and not only PAs' interests.

45. In relation to the provision of tax services, the TPWG notes that the IESBA has recently approved revisions to the Code as part of the Non-Assurance Services project which include a prohibition on an audit firm or network firm to provide a tax service or recommend a transaction to an audit client if the service or transaction relates to marketing, planning, or opining in favor of a tax treatment initially recommended by the firm or network firm and a significant purpose of which is tax avoidance, unless the firm is confident that the proposed treatment has a basis in applicable tax law or regulation that is likely to prevail. The TPWG notes that this new prohibition covers only an aspect of auditor independence and not the broader considerations of PAs' ethical behavior in relation to tax planning.

46. In considering the role of PAs as ethical leaders, the IESBA has also included new provisions in Subsection 115, *Professional Behavior*, as part of its Role and Mindset project which specifically require PAs to behave in a manner that is consistent with the profession's responsibility to act in the public interest.

47. The TPWG will further explore whether, and if so how, the Code can be positioned to play a greater role in assisting PAs assess and contextualize the ethical and complexity risks relating to tax planning activities and thereby contribute towards strengthening public trust in PAs. In doing so, the TPWG will coordinate closely with the Technology Task Force in terms of how best to address the issue of the complexity risk.

[21] AICPA, MICPA/MIA, UK Professional Accountancy Bodies, Accountancy Europe

Matter for Consideration

2. CAG Representatives are asked to share any comments, questions or reactions to the TPWG's preliminary views described above.

V. Criticality of Professional Development in Assisting the PA's Exercise of Professional Judgment

48. At the June 2020 Board meeting, the TPWG shared views from stakeholders who have cited the increasingly important role of professional judgment expected of PAs as businesses evolve in a world of complex business structures brought about by the borderless ecosystem of e-commerce.

49. As the influences of "complexity" risk and changing societal perceptions of tax planning practices intensify, the criticality and value of professional judgment will increase.

50. For PAs, in carrying out their obligations under the Code, they will use their training to make an informed judgment when faced with an ethical dilemma. For example, the TPWG heard from some stakeholders that there is a greater need for PAs to keep up with changes in tax legislation and interpretations of tax law by the tax authorities and the courts, as well as to be sensitive to the perceptions of the public.

51. A key message from several stakeholders is that any training provided to PAs in the area of tax planning should be approached in a manner that provides real-life examples of current business practices and day-to-day realities, for example clear examples of unacceptable tax planning practices.

52. From stakeholders' feedback,[22] it was noted that it is important for PAs to maintain their competencies via continuous professional development. PAs should not view the training activities as a compliance exercise but rather as a critical need to ensure that they do not breach the FPs of Integrity and Professional Competence and Due Care when carrying out tax planning activities:

    - The PA must have the appropriate competencies and skills to sufficiently understand and evaluate the business and legal aspects of tax planning. When advising an employing organization or client, the PA has a duty to serve the employing organization's or client's interests within the applicable national professional standards, laws or regulations.
    - If the PA knew the PA lacked the expertise to at least ask the right questions, then this demonstrates a lack of fair dealing or *integrity* on the part of the PA.

53. Overall, there are views that efforts to reform international tax policy in recent years are a positive step forward to combat unacceptable tax planning practices and associated unethical behavior. The efforts could be complemented by, and enhanced with, adequate education for PAs and elevation of the importance of ethics in the area of tax planning.

<u>Working Group's Preliminary Views</u>

54. The TPWG concurs with the views of the stakeholders that ethical awareness is important given the real-world ethical crossroads PAs may face in the field. Increasingly, PAs are expecting support from

[22] AICPA, MICPA/MIA

their professional bodies to provide adequate and timely education and training on navigating through both complex and complicated issues of tax legislation and related developments.

55. As the TPWG further develops its proposals, it will seek to find opportunities to share relevant information with professional bodies where such information would be critical in advancing understanding regarding pressing ethical dilemmas experienced by PAs in carrying out tax planning activities.

Matters for Consideration

3. CAG Representatives are asked to share any comments, questions, or reactions to the TPWG's preliminary views above.

4. CAG Representatives are also asked for views on possible approaches to share information with professional bodies that might be of relevance to them in the area of tax planning.

VI. Other Matters for Further Consideration

56. Other matters that the TPG will consider in Q2 and Q3 of 2021 include:

- Consideration of Aggressive Tax Planning Indicators as published by the European Commission.
- The fundamental principles as set out in the UK guidance Professional Conduct in Relation to Taxation (PCRT).
- IFAC Guide for PAOs – Developing Good Practices for Members Providing Tax Advice.