Attn Mr Gerassimos Thomas
Director General
DG TAXUD
European Commission
1049 Bruxelles
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12 October 2022

Subject: PwC response to the European Commission's public consultation 'Tax evasion & aggressive tax planning in the EU – tackling the role of enablers' (Securing the Activity Framework of Enablers - SAFE)

PwC International Ltd (PwC), on behalf of the PwC network, welcomes the opportunity to respond to the public consultation 'Tax evasion & aggressive tax planning in the EU – tackling the role of enablers'.

Introduction

In an increasingly complex tax environment, the role of tax intermediaries is essential to the administration of the tax system, particularly as taxpayers must comply with increasingly complex reporting requirements in a globalized environment. The 2008 OECD Study into the Role of Tax Intermediaries illustrated the importance of tax intermediaries by proposing a simple question "would compliance with tax laws improve if tax advisers did not exist"?[1] In line with the OECD conclusions, we can see no context in which the answer to that question would be yes. Therefore, it is key for any policy response adopted under the SAFE proposal to recognise a positive role for tax intermediaries to play in the tax-ecosystem.

This submission aims to constructively contribute to the discussion and is based on extensive research which can be found in the Annex to this letter. In particular, we have analysed the extensive literature which considers the feasibility of defining and applying a concept of "aggressive tax planning". We have set out in this submission our view (based on this analysis) that it is not feasible to define or apply the concept of aggressive tax planning and that any solutions based on this concept will not be effective or proportional.

The objective

The stated objective of the call for evidence "is to prohibit enablers who design, market and/or assist in the creation of tax arrangements or schemes in non-EU countries that lead to tax evasion or aggressive tax planning for the EU

[1] OECD, Study into the Role of Tax Intermediaries (2008), p. 14

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Member States". Even though the statement articulates certain policy concerns, a much clearer definition of the objective, including the terms employed, is required.

The creation of tax arrangements in non-EU countries

The call for evidence suggests that this initiative is a follow up to the "Unshell proposal". The statement of policy objectives indicates that the goal is to prohibit enablers who create tax schemes or arrangements in non-EU countries (which may include the use of non-EU shell entities).

Despite this stated focus on non-EU enablers, the policy alternatives presented cover "all enablers" (Options 1 and 3), or "enablers that provide advice or services of a tax nature to EU taxpayers or residents" (Option 2). It is unclear whether the intention is to include both EU and non-EU tax intermediaries in scope.

The assumed need for further action

We note that the tax compliance and tax planning landscape has already evolved substantially with the OECD BEPS Reports in 2015, followed by the subsequent adoption of the minimum standards, common approaches and best practices set out therein (e.g. via ATAD1 and ATAD2). These legislated changes have had a significant impact on approaches to tax planning.

We suggest that before enacting a new legal framework, the effectiveness of these existing measures (BEPS, ATAD, etc.) should be analysed. As such data is not yet available, the Commission is suggested to pursue a systematic approach to start collecting the necessary data in line with the Action 11 BEPS-report in order to determine the effectiveness of the rules over an appropriate time period, in order to develop a proportionate policy approach.

Tax planning in a fragmented (tax) world

Unless countries were to give up much of their sovereign right to tax and move towards completely harmonized tax systems, mismatches will continue to exist, and therefore necessity and opportunities for tax planning will continue to exist.

The deputy-director of the Center for Tax Policy and Administration of the OECD, Ms. Perez-Navarro, recently described the dilemma very clearly: "I also agree companies must engage in tax planning. This ensures they are complying with the law. But that does not mean going as low as you can go".[2] Given the important role of tax planning in a fragmented (tax) world, it is key to ensure that this initiative does not overburden all tax intermediaries who provide tax planning advice.

[2] Speech at the congress of the International Fiscal Association in Berlin on 5 September 2022, see the comments summarized here.

Areas where more clarity is needed

Defining Aggressive Tax Planning

The initiative is based on a stated need to strengthen the measures curbing tax evasion and "aggressive tax planning". It is crucial that a clear line is drawn between tax evasion and aggressive tax planning. Tax evasion is illegal and should be curbed with all means available. Aggressive tax planning, however, lacks a clear definition. Aggressive tax planning, which for lack of a definition may be labeled tax planning that governments have agreed is undesirable from a tax policy perspective, may be addressed through specific rulemaking (e.g. like this was done with hybrid mismatches in the Action 2 BEPS-report and in ATAD2).

In the Annex, an analysis is offered of the most relevant attempts of defining aggressive tax planning, be it by the European Commission, the OECD, governments or academia. The research shows that there is no single definition of the term and that many controversies surround it. Therefore, the use of the term aggressive tax planning as a trigger for any of the envisaged policy alternatives is very challenging, also having regard to the principle of legality.

Instead, it would be beneficial to rely on the well-developed concepts of abusive tax avoidance covered by the General Anti-Avoidance Rules (GAAR in the EU Anti-Tax Avoidance Directive), the Principal Purpose Test in bilateral tax treaties (based on the OECD Model Tax Convention 2017) and on specific tax avoidance as targeted by various Specific Anti-Avoidance Rules (SAARs).

Tax intermediaries in scope

The term "enablers" has recently been used by the OECD in the context of tax evasion and white collar crime.[3] It would be preferable to use the term "tax intermediary"[4] to restrict the terminology and align it to previous regulatory efforts, in order to avoid confusion.

Additionally, tax advice is given by quite a diverse group that is not limited to the large professional services firms and would include accountants, lawyers, in-house tax professionals, banks, and insurance companies. Therefore, consideration should be given to the specific circumstances of each group. In particular, the regulation of the legal profession in many countries may require attorneys to be treated differently. This would create a concern regarding the level playing field between the various groups. Additionally, many tax advisors need to comply with their own tax codes of conduct, codes of conducts of professional associations (NOB Tax principles, PCRT). In some countries, the profession of tax advisor is regulated. In many, if not all, countries the accounting profession is regulated because of their public duty obligation.

Comments on the policy options

Due diligence (Policy Option 1)

[3] OECD, Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, 2021.
[4] OECD, Study into the Role of Tax Intermediaries (2008)

The first policy alternative presented would require "all enablers to carry out a test to check whether the arrangement or scheme they are facilitating leads to tax evasion or aggressive tax planning". As it pertains to tax evasion, the proposal would largely overlap with AML and KYC standards that are already in place, creating unnecessary duplication of effort by a wide range of stakeholders. As for ATP, we reiterate the uncertainty that the use of this threshold could create. Moreover, the resource constraints of smaller advisers would need to be taken into account if additional due diligence requirements were to be considered, particularly in view of the potential adverse effects on competition.

Registration (Policy Option 2)

The second policy alternative incorporates the same elements as Option 1 and adds a requirement of registration in order to provide tax services to EU taxpayers. While registration in itself might be workable, it is unlikely to solve the problem on a standalone basis if any advisor or group of advisors can register. Registered advisors could still provide tax advice that is regarded undesirable. Furthermore, it is questioned if the EU can force intermediaries in third countries (i.e. non-EU countries) to register.

A Code of Conduct for the tax profession (Policy Option 3)

The third policy alternative "involves the requirement for all enablers to follow a code of conduct that obliges enablers to ensure that they do not facilitate tax evasion or aggressive tax planning". It would be relevant to consider the existing regulation of the tax profession and the existing (voluntary or regulatory) Codes of Conduct.[5]

Currently, there is no standard that unifies the various Codes of Conduct applicable to the tax profession. Tax advice is given by a quite diverse group (see above). As a consequence, many tax advisors need to comply with various standards, including their own tax codes of conduct, codes of conducts of professional associations and applicable legal regulation. As pointed out by a recent study commissioned by the European Parliament on the regulation of intermediaries,[6] there is reason for concern with over-regulation.

Regarding voluntary initiatives, PwC's longstanding Global Tax Code of Conduct has been highlighted, which provides a framework to help our professionals ensure that our advice is holistic, e.g by taking into account stakeholder perspectives. Specifically, it provides that advice must be supported by a credible basis in tax law, recognizing that the final position is defined by the client within the principles of their own tax strategies.

As for regulatory initiatives, the efforts currently undertaken by the International Ethics Standards Board for Accountants (IESBA) in designing an ethical framework for professional accountants regarding tax planning are very relevant. Ultimately, the objective is to enshrine revisions in the International Code of Ethics for Professional Accountants.[7] The relevance of the project is underscored by its global reach and wide coverage of professional accountants - though not all tax intermediaries are in scope, notably the legal profession.

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[5] E.g. PwC Tax Code of Conduct, Professional Conduct in Relation to Taxation, NOB Tax Principles. See Annex.
[6] Mulligan et al., Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU. Publication for the Economic and Monetary Affairs' Sub Committee on Tax Matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament (2022).
[7] IESBA, Approved Project Proposal - Tax Planning and Related Services, 2021. Available via this link (accessed September 28, 2022).

A unifying Code of Conduct could be beneficial to the tax profession, which currently operates under a fragmented framework. Ideally, the creation of any new Code of Conduct would be developed closely in line with, or at least coordinated with, other relevant initiatives and in particular, IESBA's aforementioned project. If the tax profession is already regulated in a Member State, it has to be carefully analyzed what benefit an additional Code of Conduct could bring. Contrary to the due diligence alternative of Options 1 and 2, this approach would reduce complexity and reduce distortions in the tax advisory market.

Increased transparency over non-EU participations (Policy option 4)

In addition to the policy responses targeted towards tax intermediaries, there is a fourth policy option provided in the SAFE proposal that would require taxpayers in the EU to declare in their annual tax returns certain participations in non-listed companies located outside of the EU. This alternative targets taxpayers themselves and, as such, is disconnected from the target group of the SAFE proposal. If this measure is to be considered, we suggest it be enshrined in a specific proposal.

Finally, we would like to mention that the Call for Evidence doesn't discuss how the enforcement of the chosen policy option would be carried out. We envisage that this is no small task and should be considered from the outset as part of the policy options.

Closing remarks

For any clarification on this response, please contact me or any of the contacts below. We look forward to discussing any questions you have on the points we raise above. We would welcome the opportunity to contribute to the discussion.

Yours sincerely,

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Annex

In this Annex, an analysis is offered of the role of intermediaries, including an overview of (self-) regulation regimes in the EU, work of the OECD on the role of intermediaries, and the various client due diligence procedures already in place. In the second chapter a brief analysis is given with respect to the lack of systematically collected data in order to measure effectiveness of anti-avoidance legislation. In the third chapter, an extensive analysis of the concept of Aggressive Tax Planning (ATP) is provided, including the legal strengths and weaknesses of the various concepts, indicating the challenges they may pose to legal certainty.

1. Role of intermediaries and (self-) regulation of the sector

Tax intermediaries play a central role in promoting tax compliance, especially given the increasing complexity of tax legislation in a globalised environment. Tax intermediaries can also play a role in tax policy development, working alongside policymakers to bring important insights and practical experience to the attention of policy decision-makers.

Some practices pursued by a limited number of intermediaries, related to tax evasion and the aggressive promotion of tax "products" and the facilitation of certain tax avoidance, have been identified and addressed at the domestic and international level through various initiatives (e.g. mandatory reporting). Governments have looked to regulate certain aspects of the profession, and in addition there is increasing self-regulation by professional bodies of tax advisers. Because developments in the US on 'tax shelters' may have created momentum for the discussions at the OECD level, this is addressed in the first paragraph. After that, various OECD initiatives regarding the role of tax intermediaries are discussed, followed by the study on the regulatory landscape of tax intermediaries commissioned by the European Parliament and an overview of the various initiatives to (self-) regulate the sector (including a brief overview of already existing KYC and CDD procedures). IESBA is working on globally consistent guidance in relation to tax planning which is addressed separately. Lastly, an overview and initial appreciation of the UK POTAS-regime is provided.

This backdrop led to an increasingly regulated environment for tax intermediaries. Since their impact on tax evasion and avoidance is not yet well documented (e.g. DAC 6), it is also not clear whether new measures are necessary.

1.1. US Background

Since the 1970s, the so-called "tax shelters" have been perceived as a serious problem in the US. While initially concentrated on individual taxpayers making use of false or fraudulent representations, the issue soon spread to the corporate world in a "technical" variant, meaning that the structures could "be supported by a technical reading of the Code".

In this context, concerns with the role of tax advisors were raised. Not only were the standards for issuing legal opinions regarded as underdeveloped, the seemingly successful strategies also would be replicated multiple times to be distributed as "products", rather than addressing the tax planning issues of a single taxpayer. Tax advisors (or, in this case, "promoters") would often require non-disclosure agreements from their clients, delaying the discovery of the scheme by other parties, including competitors and the Treasury. Additionally, the risk for taxpayers would often be limited by contingent or refundable fees and rescission or insurance arrangements.

In 2003, a US Senate Subcommittee investigated the tax shelter industry, with a particular focus on the role of accountants, lawyers, and financial professionals. The issue was not with "*routine tax planning services*", but with "*generic tax products that had been affirmatively developed by a firm and then vigorously marketed to numerous, in some cases thousands, of potential buyers*". The US has implemented a series of measures in response to the tax shelter debate, including tax shelter and reportable transactions regulations (similar to DAC6 in the EU) as well as rules on uncertain tax positions.

1.2. OECD initiatives regarding the role of tax intermediaries

In 2006, the heads of 35 tax administrations issued the Seoul Declaration, aimed at confronting the issue of tax law non-compliance at the international level (e.g. through the use of offshore shell companies). The group expressed concerns i.a. with "*the role of tax advisors and financial and other institutions in relation to non-compliance and the promotion of unacceptable tax minimization arrangements*". As one of the various resulting initiatives, the OECD committed to "*[e]xamining the role of tax intermediaries (e.g. law and accounting firms, other tax advisors and financial institutions) in relation to non-compliance and the promotion of unacceptable tax minimization arrangements with a view to completing a study by the end of 2007*".

The results of the initiative were published in 2008. The study stated that tax intermediaries represent the supply side of aggressive tax planning, as they would be involved in the design, promotion and advice related to this type of transaction. While historically revenue bodies had "*responded to aggressive tax planning by developing strategies to address the demand, or taxpayer, side of the market*", more recently strategies had been developed to tackle the supply side of the issue. The study offered a review of initiatives related to (i) registration and regulation; (ii) advance disclosure; (iii) compliance agreements; and (iv) penalties and other sanctions. However, no blanket recommendation was made with regard to these strategies – countries were recommended to develop their own strategies, based on their own realities.

At the same time, however, the study also underscored the positive contributions of tax intermediaries, who "*help taxpayers to comply with the requirements of existing tax codes and to understand the complexity of legislation, particularly in the context of global businesses*". Accordingly, in addition to initiatives aimed at curbing the supply of aggressive tax planning, the Study Team believed that "*there is the potential for a form of enhanced relationship to develop in appropriate circumstances between tax advisers and revenue bodies*". Revenue bodies would benefit from "*greater understanding of how tax advisers go about their business, what drives their business practices, how they can be equitably influenced and, most importantly, what impact they have on the decisions made by their clients in relation to tax*" (commercial awareness). As for advisors, the relationship with revenue bodies would enhance their "*ability to predict which transactions and issues the revenue body will want to be disclosed*", for instance, in the context of tax control frameworks or enhanced relationships (policy awareness).

Despite these high ambitions, the symbiotic relationship between revenue bodies and tax advisors did not fully develop. The 2015 OECD report on Tax Administration surveyed the services and support provided by revenue bodies to support tax intermediaries and did identify promising initiatives. Overall, however, only 25% of revenue bodies reported offering a "comprehensive" range of services to intermediaries; and "*over half of revenue bodies were unable to report, or even estimate, the proportion of PIT and CIT returns prepared by tax intermediaries, suggesting limited focus by the revenue body on their operations*". Therefore, the report concluded that "*there is likely to be considerable potential for many revenue bodies to strengthen this aspect of their administration*".

1.3. The need for a separate approach dealing with "enablers" of tax crime

The call for this positive relationship does not extend to the entire population of tax intermediaries. In 2021 the OECD published a report recognising the need to crack down on professionals who enable tax and other white collar crimes. These crimes would be facilitated by a small number of *"lawyers, accountants, financial institutions and other professionals*" who "*use their skills and knowledge of the law to actively promote, market and facilitate the commission of crimes by their clients*" (often through "*legal and financial structures seen in complex tax evasion and financial crimes*"). To address the issue, a number of recommendations were made, including to "*[e]nsure the law provides investigators and prosecutors with sufficient authority to identify, prosecute and sanction professional enablers, so as to deter and penalise those found to be professional enablers of tax crime*".

However, the approach proposed was focused on the so-called "enablers" of tax crimes, who should be differentiated from "*[t]he majority of professionals [who] are law-abiding and play an important role in assisting businesses and individuals to understand and comply with the law and helping the financial system run smoothly*". Additionally, the report differentiates tax evasion from tax avoidance strategies, which "*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 maximise the tax outcomes for their client*". While acknowledging that tax avoidance "*should be limited by jurisdictions through the enhancement of their tax legislation and by fostering international cooperation*", as actively pursued by the OECD, the report recognizes that tax evasion should be dealt with separately: the "*report focuses on the situations when the services and advice provided by professionals go beyond the interpretation and search for legal loopholes, and reach the point where professionals enable the commission of tax fraud and tax evasion through active support and participation*".

1.4. Study on the regulatory landscape of tax intermediaries

The targeted approach to tax crime was recently echoed by a study on the regulatory landscape of tax intermediaries, commissioned by the Economic and Monetary Affairs' Subcommittee on Tax Matters (FISC) of the European Parliament. The report suggests that, consistently with responsive regulation theory, the focus of new initiatives should be on "*targeted approaches*" aimed at the "*small number of enablers of tax crime who appear to be substantially outside the reach of the professional bodies*", rather than "*more regulations for all*". As for the general population of tax advisors, the report highlighted that "*tax intermediaries operate in an increasingly regulated environment (soft and hard forms)*". However, given that many initiatives have been implemented recently (e.g. DAC 6), their impact on tax evasion and avoidance is not yet well documented and there is reason for concerns with over-regulation of law-abiding intermediaries. Therefore, "*[r]estraint from adopting further rules governing the activities of tax intermediaries and relating to disclosure requirements, without an empirical understanding of the costs and effect of those currently in place is highly recommended*".

1.5. Anti-Money Laundering, KYC and CDD procedures

The focus on addressing tax crime is currently pursued in connection with the Financial Action Task Force's (FATF) standards – creating a potential overlap of policy option 1 and already existing procedures. Over 200 jurisdictions are committed to implementing the FATF's standards on anti-money laundering (AML). In the EU, for instance, legal professionals, including tax advisors, fall in scope of the AML Directive when participating in financial or corporate transactions, where there is the greatest risk of the services of those legal professionals being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing. Recital 8 of this Directive

explicitly notes that "'tax crimes' relating to direct and indirect taxes are included in the broad definition of 'criminal activity' in this Directive, in line with the revised FATF Recommendations". It is commonly agreed that tax evasion, which is illegal, is covered by the Directive. As a result, the risk of tax evasion is integrated into AML procedures – Know Your Customer (KYC) and Customer Due Diligence (CDD).

The practical implications can be exemplified by PwC's experience. As a global network, PwC complies with many different AML regulatory requirements. Currently, our Network Risk Management Policy requires PwC firms to perform know your client checks before entering into a business relationship with the client in accordance with local regulations. We are in the process of rolling out Network Know Your Client (KYC) Minimum Requirements which will provide a baseline Standard for KYC and will be applicable to all PwC firms, in addition, the Network Risk Management standard on anti-money laundering requires all PwC firms to assign responsibility for compliance with the standard to a relevant individual at a sufficient level of seniority. It also requires that PwC firms implement procedures for their partners and staff to inform this individual of any knowledge or suspicion of money laundering they encounter during the course of client work.

The various KYC processes and requirements ensure that we know who our clients are and understand their business activities. Client Due Diligence is part of KYC and consists of onboarding, event driven and periodic review, client screening and offboarding. Based on the information collected, PwC needs to perform a customer risk assessment of the client and assign a final risk rating. The risk indicators that are taken into account can be grouped in Geography Risk, Product Risk, Client Risk and Industry Risk.

1.6. (Self) regulation of tax intermediaries

As mentioned, the profession of tax intermediaries is already subject to a wide range of regulations – at times set forth by law (e.g. Austria, Croatia, Czech Republic France, Germany, Hungary, Italy, Poland, Portugal, Slovakia) and at times implemented by professional bodies on a voluntary basis (e.g. Ireland, the Netherlands, UK). Even though their substance varies, a survey of 9 (draft) regulations (Annex) enables the identification of common threads:

- Standard of advice: all regulations recognize, at a minimum, that tax advice must fall within the bounds of the law - and as such advice on tax evasion is ruled out. In addition to that, 7/9 regulations set forth that tax advice should be supported by credible basis (or analogous standard).
- Full disclosure of facts: 7/9 regulations explicitly recognize that tax advice must assume that the tax authorities are aware of all relevant facts, thus ruling out advice regarding the so-called "audit lottery". The remaining two regulations are not explicit in that regard, but do indicate that tax advisors may not be associated with false or misleading information.
- Specific to the facts and circumstances: 5/9 regulations explicitly require that the tax advice should take into account the taxpayers specific facts and circumstances. 2/9 regulations make explicit reference to the additional risks of generic advice.
- Consideration of broader non-tax risks and/or public interest: 7/9 regulations make reference to the need for tax advice to take into account non-tax risks and/or the need to safeguard the public interest.
- Advice options: 4/9 regulations explicitly indicate that the tax advice may discuss all options available to the taxpayer. 1/9 regulations explicitly indicates that the tax advisor is not precluded from discussing the reasons for not finding a credible basis.
- Economic substance and legislative intent: 4/9 regulations require tax advice to consider the economic substance of the transaction, and 3/9 require consideration of the legislative intent.

1.7. IESBA Guidance on tax planning

The International Ethics Standards Board for Accountants (IESBA), an independent global standard setting board, sets ethical standards, including International independence standards, for all professional accountants.

In late 2019, the IESBA started an initiative to (a) gather an understanding of the regulatory, practice and other developments in corporate and individual tax planning by Professional Accountants (PAs) in Business and in Public Practice and (b) identify and analyse the ethical implications of those developments and determine whether there is a need for enhancements to the Code or further actions. In September 2021, the Working Group submitted its final report and recommendations to the IESBA. On the basis of this report and the related recommendations, the IESBA launched a standard-setting project on the topic of tax planning and related services ("tax planning" or "TP"). This project is on-going and an Exposure Draft is expected to be disseminated to stakeholders for comment during the first quarter of 2023.

The IESBA believes that developing an ethical framework in the Code to guide PAs' behaviours and actions in relation to tax planning can go a long way toward protecting the profession's role and reputation in tax planning. Such a framework can help enhance ethical decision making in tax planning engagement by providing ethical guidance to support PA's judgements and actions as they navigate the often-thin dividing line between what is acceptable and unacceptable tax planning. Equally, acting in accordance with such an ethical framework can indirectly assist PAs in influencing their employing organisations' or clients' behaviours.

The objective of the project is to develop a principles-based ethical framework, leveraging the Fundamental Principles and the Conceptual Framework in the Code, to guide PAs' ethical conduct when providing tax planning and related services to employing organisations and clients, thereby maintaining the Code's robustness and relevance as a cornerstone of public trust in the global accountancy profession.

The provisions being developed will be incorporated in IESBA's International Code of Ethics for Professional Accountants and, as such, will set out standards for adoption by members of the International Federation of Accountants (IFAC), or for use by such members as a basis for their codes of ethics. Ultimately, the final addressees are individuals who are members of an IFAC member body and their firms. This covers "180 member organizations in 135 jurisdictions-representing more than 3 million professional accountants worldwide". PwC, and many other firms have voluntarily adopted the IESBA code and vow to use best efforts to enforce it within their organisations. All of our tax advisors are considered PA's for the application of the IESBA International Code of Ethics, regardless of whether they are accountants.

Additionally, the intended changes will apply to PAs in business whether acting for individual and corporate taxpayers (from small- and medium-sized enterprises to large publicly traded multinational entities) and all PAs in public practice and firms. At a principles level, the provisions will be equally applicable to public interest entities (PIEs) and non-PIEs. However, the distinction between PIEs and non-PIEs might be a relevant factor for a PA to consider when assessing possible actions to take, such as communication with those charged with governance.

This project will not address the issues of tax morality, tax fairness and tax justice.

Key elements of the proposed framework include:

- Complying with the fundamental principles and addressing the threats to such compliance that might be created when carrying out TP activities.
- Exhibiting the mindset and behaviour expected of PAs consistent with the Role and Mindset provisions of the Code. This includes having the strength of character to act appropriately when facing pressure or other challenging circumstances, having an inquiring mind when carrying out TP activities, and meeting the expectations set out in the Code for PAs to promote an ethics based culture within their employing organisations and to uphold the profession's reputation.
- Reviewing the relevant tax laws and regulations, the economic purpose and substance of the transaction or arrangement, and, where necessary, the legislative intent behind the tax legislation
- Exercising professional judgement to establish a credible basis for the TP advice in circumstances of uncertainty.
- Consulting internally or externally with appropriate experts, which might be part of specific actions to address identified threats.
- Communicating relevant matters or concerns with the individual client, management, or those charged with governance, including as part of an escalation process where necessary.
- Evaluating the need for transparency. This includes the circumstances in which disclosure (subject to confidentiality) would be appropriate or justified, to whom disclosure might be made and when, and the matters that might be disclosed.
- Developing appropriate documentation throughout the process to substantiate PAs' judgements, decisions, and actions.
- Responding to suspected non-compliance with laws and regulations (NOCLAR) when PAs encounter information that suggests TP might have "stepped over the line" into an actual or suspected breach of tax laws and regulations.

1.8. POTAS and the UK experience

The Promoters of Tax Avoidance Schemes (POTAS) regime which was introduced in 2014 in the UK is targeted at promoters who might be at high risk of promoting tax avoidance schemes, as well as other very concerning behaviours. Whilst all tax advisers are in principle within the scope of the regime, it is targeted at the most egregious behaviour. Combined with other developments impacting tax advisers (e.g. the Disclosure of Tax Avoidance Schemes (DOTAS) rules), those impacting taxpayers (e.g. GAAR, BEPS-related changes, disclosure of tax behaviour in tendering for public contracts and disclosure or discussion of uncertain tax positions) and the evolution of codes of ethics applicable to members of professional bodies, there has been a marked change in the tax service market over the last 10-15 years in the UK. All of these changes have been alongside a continued focus of the Revenue authority on 'collaborative compliance', encouraging and incentivising more engaged and less risky taxpayer behaviours. This multi-faceted approach could therefore offer a workable model for the Commission to consider both in terms of limiting the tax gap and improving the efficiency of tax collection.
Broadly, the POTAS regime uses a series of "threshold conditions" to identify promoters that might be high risk. If one or more of these threshold conditions are breached, HMRC has discretion to be able to issue conduct notices imposing certain conditions on the promoter. If the promoter breaches a requirement in a conduct notice, HMRC may issue a monitoring notice which can place severe restrictions on the way the promoter conducts its business.

In addition, if HMRC suspects a person of promoting certain arrangements, it may issue a stop notice requiring the person to stop promoting those arrangements.

Failure to comply with notices issued by HMRC under POTAS may result in substantial financial penalties.

The definition of "promoter" is wide enough to include most activities carried on by tax advisers; however the "threshold conditions" are tightly drawn. The regime only applies to the most egregious behaviours and most abusive tax arrangements. It does not seek to introduce a free-standing definition of aggressive tax planning; rather it leverages from existing measures targeting abusive tax planning (e.g. the GAAR and Targeted Anti-Avoidance Rules (TAARs)). More specifically, the threshold conditions comprise:

- Dishonest tax agents.
- Losing a GAAR case.
- Banks breaching the Code of Practice.
- Not cooperating with HMRC.
- Professional misconduct.
- Failure to appropriately administer the tax avoidance disclosure regimes (DOTAS and DASVOIT).
- Three "relevant defeats" - where the tax adviser has been a promoter in relation to at least three arrangements which were subject to anti-avoidance measures (e.g. GAAR, TAARs, etc) and which have been successfully challenged by HMRC.

In addition to the POTAS regime, in 2017 the UK introduced another regime targeting those who "enable" abusive tax arrangements (the 'Enablers' regime). This regime in the UK imposes financial penalties plus potential public naming of enablers of defeated abusive tax arrangements. The term 'enablers' is not limited to promoters and tax advisers, but also includes other parties who enable the taxpayer to enter into the abusive avoidance arrangements. There are five categories of enabler:

- Designers of arrangements,
- Manager of arrangements
- Marketers of arrangements
- Enabling participants (ie someone other than the taxpayer who was involved in the arrangements, and whose involvement was essential to the effectiveness of the arrangements)
- Financial enablers (someone providing finance to enable the arrangement).

In each case there is an exclusion for anyone who did not know that the arrangements were abusive tax arrangements. The enablers rules were introduced to tackle all aspects of the marketed avoidance supply chains, complementing existing anti-avoidance measures already in place.

POTAS seems to have allowed HMRC to dedicate their resources effectively on what they view as the most offensive advisers. From the view of the tax profession there is concern that POTAS does not take the size of the firm into account and that some of the thresholds are beyond control of the advisor. The sanctions give HMRC much potential discretionary power.

2. Effectiveness of recently introduced legislation against tax avoidance

The Commission, in the SAFE questionnaire and the Call for Evidence for an Impact Assessment, observed that "establishing appropriate procedures and compliance measures in order to effectively tackle tax evasion or aggressive tax planning" is needed because "the estimated tax revenue losses of EU Member States remain high" as a result of tax evasion and tax avoidance, despite existence of many anti-tax avoidance and anti-tax evasion rules. In that respect the Commission refers to various data which should indicate revenue losses of EU Member States.

The Call for Evidence for an Impact Assessment, in which the Commission refers to a number of studies, seems to be based on the assessment that anti-tax avoidance rules that are in force in EU Member States are not effective enough to prevent tax avoidance. As a consequence, new legislation would be needed, in particular rules that would prevent tax enablers from "designing arrangements or schemes that lead to tax evasion and aggressive tax planning and that undermine the capacity of Member States to finance their public policies that provide benefits for their citizens."

We see a temporal misalignment between this assessment and the data on which the studies are based, as it does not cover a period after adoption of ATAD (1&2) and DAC6 by the EU and their provisions by the EU Member States. This backdrop highlights a need to improve the methodology (in line with the Action 11 BEPS Report) to systematically collect relevant and timely data.

3. Defining aggressive tax planning (ATP)

3.1. Introductory remarks

In part B of the document "Call for Evidence for an Impact Assessment", the Commission states that "[t]he overall objective of this initiative [SAFE] is to prohibit enablers who design, market and/or assist in the creation of tax arrangements or schemes in non-EU countries that lead to tax evasion or aggressive tax planning for the EU Member States." This implies that a clear definition of aggressive tax planning (ATP) is very important for SAFE insofar as it delineates the scope of application of that initiative and thus influences its actual objectives and most likely consequences. Indeed, the Commission indicated that the "proposal will include **clear and objective criteria for defining the forms of aggressive tax planning that are prohibited**" (emphasis added). Yet, as follows from the comprehensive and in-depth analysis undertaken, it is impossible to draw a sharp line between ATP, non-abusive tax planning and abusive tax avoidance. With the principle of the rule of law in mind, ATP should in our view not:

- be blurred with tax evasion, because they are legally clearly separated;
- undermine the relevance of the pivotal legal premise of (abusive) tax avoidance, i.e. defeating the object or purpose of the applicable tax law;

ATP cannot be clearly articulated with existing legal concepts and might undermine the rule of law, which is one of the main foundations of EU Treaties.

At most, it can be identified alongside the object and purpose of the law, as reflected first and foremost in the wording of the law. Hence, a further reliance on the notion of "the spirit of the law" complicates demarcating between legitimate tax planning and ATP. Therefore, we suggest exploring the approach of relying on the concept of abusive tax avoidance, as sanctioned in the CJEU's case law and EU secondary law.

3.2. Most relevant developments in defining ATP

The analysis below draws from the report of the US Department of Treasury on Corporate Tax Shelters, the OECD's documentation and the works of the Commission. We will present the most important points stemming from our observations in the foregoing sections.

3.2.1. The US Department of Treasury's document on Corporate Tax Shelters – a historical point of departure

The term "aggressive tax planning" arguably originated in the early 1990s in the US to identify tax planning schemes or structures that **formally comply with the letter of tax law but are contrary to the spirit or purpose of tax provisions**. A report by the US Treasury in 1999 (the so-called US Tax Shelter Document) was instrumental in generating interest in and awareness of ATP globally. The term subsequently came into use worldwide, leading to the OECD trying to legitimise its use in the 2006 Seoul Declaration to develop "the directory of aggressive tax planning schemes so as to identify trends and measures to counter such schemes". The OECD, in its "Study into the Role of Tax Intermediaries" in 2008, explicitly referred to the practice of "'mass-marketed' or 'off-the-shelf' aggressive schemes". The US Treasury's work on corporate tax shelters has been referenced by the OECD "in relation to the spread of aggressive tax planning marketed by some tax intermediaries (e.g. law and accounting firms, other tax advisers and financial institutions)."

A few observations from the US Tax Shelter Document are worth sharing here.

The US Tax Shelter Document opens up with the following statement:

> "*The proliferation of corporate tax shelters presents an unacceptable and growing level of tax avoidance behavior. Over the past several years, Congress and the Administration repeatedly have provided targeted responses to specific shelters as they have come to light. The Administration believes that* ***a generic solution to curb the growth of corporate tax shelters must be fashioned****, as opposed to the current after-the-fact, ad hoc approach. This, admittedly, is not an easy task. Unlike the individual tax shelters of the 1970s and 1980s,* ***corporate tax shelters*** *may take several forms and do not rely on any single Code section or regulation. For this reason, they* ***are hard to define****. "(emphasis added)*

The purpose of the US Tax Shelter Document was to **deter taxpayers from buying, and tax advisors from selling, corporate tax shelters**. The following points from that Document shed more light on the use of the adjective "aggressive":

> "*The American Bar Association, in an appearance before the House Ways and Means Committee, noted its "growing alarm [at]* ***the aggressive use*** *by large corporate taxpayers*

> ***of tax 'products'*** *that have little or no purpose other than the reduction of Federal income taxes," and its concern at the "**blatant, yet secretive marketing**" of such products.*
>
> *The New York State Bar Association, in testimony before the Senate Finance Committee, stated: "We believe that there are serious, and growing, problems with **aggressive, sophisticated and**, we believe in some cases, **artificial transactions designed principally to achieve a particular tax advantage**."*
>
> *Many tax shelters are designed today so that **they can be replicated multiple times for use by different participants, rather than to address the tax planning issues of a single taxpayer**. This allows the shelter "product" to be marketed and sold to many different corporate participants, thereby maximizing the promoter's return from its shelter idea"* (footnotes omitted and emphases added).

This indicates that the adjective "aggressive" did not refer to "tax planning" *per se* but to "sales tactics to market tax products", which increased the level of tax avoidance in the US by corporate taxpayers. In other words, the problem seems less qualitative than quantitative. This is further evidenced by the US Senate Subcommittee investigation on "US Tax Shelter Industry":

> "*The Subcommittee investigation perceives **an important difference between selling a potentially abusive or illegal tax shelter and providing routine tax planning services**. None of the transactions examined by the Subcommittee derived from a request by a specific corporation or individual for tax planning advice on how to structure a specific business transaction in a tax-efficient way; rather all of the transactions examined by the Subcommittee involved generic tax products that had been affirmatively developed by a firm and then vigorously marketed to numerous, in some cases thousands, of potential buyers. **There is a bright line difference between responding to a single client's tax inquiry and aggressively developing and marketing a generic tax shelter product**. While the tax shelter industry of today may have sprung from the former, it is now clearly driven by the latter" (emphasis added).*

Indeed, the adjective "aggressive" always explicitly points to an aggressive development and marketing of generic (rather than aimed at a specific taxpayer) tax shelter products. Similar observations apply to the US Tax Shelter Document.

According to the US Tax Shelter Document, although corporate tax shelters are difficult to define with a single formulation because they take many different forms and utilize many different structures, one of their most important characteristics is the lack of any significant economic substance or risk to the participating parties. That is to say, the participants in a corporate tax shelter insulate themselves from any economic risk through "hedges, circular cash flows, defeasements and the like". The investments by participants in corporate tax shelters typically generate little or no pretax return. The after-tax return, however, is more significant. The only rational justifications to participate in such transactions are the significant tax benefits. The Document also says that corporate tax shelters involve transactions specifically designed to exploit a provision of the law in unintended ways. This all falls squarely within the definition of the term "tax avoidance transaction" in that Document:

> "*any transaction in which the reasonably expected pre-tax profit (determined on a present value basis, after taking into account foreign taxes as expenses and transaction costs) of the transaction is insignificant relative to the reasonably expected net tax benefits (i.e., tax benefits in excess of the tax liability arising from the transaction, determined on a present value basis).*"

Consequently, the term "corporate tax shelter" in the US Tax Shelter Document equates to "tax avoidance". Even though the term "aggressive tax planning" occurs several times in that Document, it has never been defined there. In fact, it does not appear to have a standalone meaning. Rather it is identified with the terms "aggressive" or "abusive corporate tax shelters" or just "tax shelters" which in turn are used interchangeably with the term "tax avoidance" (abusive tax avoidance).

3.2.2. The OECD's documentation

The OECD released several documents, which to various extents use the term ATP. Here we select those that are of vital relevance such that they reveal the context and help us to understand the evolution of the term ATP according to the OECD.

3.2.2.1. The 2008 Report on the Role of Tax Intermediaries

The Report entitled "Study into the Role of Tax Intermediaries" is one of the first and most important initiatives of the OECD in which the term ATP has a central role. In this Report, the OECD considered the tripartite relationship between revenue bodies, taxpayers and tax intermediaries, whereby the latter represent the supply side of ATP. ATP appeared in this report as one of the central problems insofar as it constitutes one of the risks tax authorities have to manage in collecting the correct amount of tax due under their tax systems. Interestingly, the OECD noted that the best solution to deal with ATP in the mentioned tripartite relationship is to make this relationship more constructive (enhanced). Such a relationship requires tax authorities to "operate using the following five attributes when dealing with all taxpayers: understanding based on commercial awareness; impartiality; proportionality; openness (disclosure and transparency); and responsiveness." The OECD surmised that this "should encourage large corporate taxpayers to engage in a relationship with revenue bodies based on co-operation and trust" and presumably also discourage them from engaging in ATP.

In this context, the OECD defined the ATP as a notion which refers to two areas of concern for revenue bodies:

> ***"Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences****. Revenue bodies' concerns relate to the risk that tax legislation can be misused to achieve results which were not foreseen by the legislators. This is exacerbated by the often lengthy period between the time schemes are created and sold and the time revenue bodies discover them and remedial legislation is enacted".*
>
> ***"Taking a tax position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law****. Revenue bodies' concerns relate to the risk that taxpayers will not*

disclose their view on the uncertainty or risk taken in relation to grey areas of law (sometimes, revenue bodies would not even agree that the law is in doubt)".

This description of ATP is very indeterminate and wide-ranging. A main source of its indeterminacy appears to be hybrid financing, both in the form of hybrid financial instruments and hybrid entities, i.e., hybrid mismatches were a clear example of ATP in the discussed Report. Beyond this example, ATP could be hardly identified in practice. It appears to be impossible to determine in advance what are "unintended and unexpected tax revenue consequences" or results unforeseen by the legislators. Accordingly, the cited definition does not allow one to clearly distinguish between ATP and legitimate tax planning or (abusive) tax avoidance.

Besides, such a wide definition of ATP runs the risk of mixing the legislative powers of parliaments and executive powers of revenue authorities. With regard to the definition of ATP, scholars noted that "the fact that revenue consequences of a transaction are not those that the revenue authorities expected does not mean that they are not those that the legislature acting as a body expected and, moreover, that the test of whether tax planning is <<acceptable>> should be what the legislation says as interpreted by the courts and not what the tax authorities suppose it was intended to say." Indeed, the OECD's definition of ATP could be read as giving more weight to the expectations of tax authorities than the intentions of legislators, a result which would not be tenable under the rule of law.

Although ATP re-appears in various reports of the OECD following the 2008 Report, the importance of that term in shaping the new international tax system after 2008 has declined significantly. Still, it is worthwhile to briefly consider developments concerning ATP in subsequent OECD reports. The analysis below aims to dissect the essence of the term ATP and to clearly see the evolution of its role before, during and after the BEPS agenda reached its peak.

3.2.2.2. The 2013 Report on Aggressive Tax Planning based on After-Tax Hedging

In the OECD's Report on "Aggressive Tax Planning based on After-Tax Hedging" released in 2013, attention was given to ATP schemes based on after-tax hedging. The document's approach to ATP takes into account specific characteristics of derivative financial instruments that are prone to lead to asymmetrical results (gain or loss) for tax purposes, i.e. gains on the hedging instrument are not taxed while losses are deductible. This is a "deduction without inclusion" tax effect which constitutes one of the main concerns of hybrid mismatch arrangements, further explored by the OECD under BEPS Action 2.

Although in the 2013 Report on ATP the OECD primarily focused on the mechanical asymmetrical outcome of financial derivatives, it further refers both to "the commercial reasons underlying the transactions, and the intent of the applicable domestic law" in order to draw "a line between acceptable and non-acceptable after-tax hedging". In that regard, the OECD emphasised that drawing this line is difficult and circumstantial, and detecting ATP based on after-tax hedging is difficult especially in relation to cross-border schemes. Detection strategies include mandatory disclosure rules, while preventive measures focus on denying or limiting the tax benefits for which the after-tax hedging ATP schemes were used "by invoking the general anti-avoidance provision, by introducing specific anti-avoidance legislation or by applying the arm's length principle." It seems that these preventive measures are now in use in (at least) all EU Member States as a result of the implementation of relevant BEPS Actions and ATAD 1 and 2.

3.2.2.3. BEPS and post-BEPS Reports

In the 2013 Report "Addressing Base Erosion and Profit Shifting", the term ATP is used mainly in connection with disclosure of aggressive tax schemes. The focus of that report is on "base erosion" and "profit shifting", not ATP, and ATP does not seem to have a standalone meaning in that Report. ATP is partly identified alongside tax avoidance, since the OECD pointed out that anti-avoidance strategies "focus on deterring, detecting and responding to aggressive tax planning." Further observations of the OECD strengthen the argument that ATP at least partly constitutes tax avoidance and beyond that does not have a legal meaning:

> *"Considering the difficulties in precisely identifying the dividing line between what it is aggressive and what is not,* ***domestic and treaty-based anti-avoidance provisions constitute the benchmark against which to decide whether a given strategy should be implemented*** *(from the perspective of the taxpayer)* ***or should be challenged*** *(from the perspective of the revenue authorities). Further,* ***situations which cannot be tackled under the existing rules****, but that still generate concerns at the level of the revenue body, should be brought to* ***the attention of tax policy officials*** *in order to determine whether changes to the current rules need to be introduced".*

Therefore, ATP seems to be identified by the OECD with tax avoidance as covered by domestic and treaty-based and anti-tax avoidance provisions.

In the "Action Plan on Base Erosion and Profit" that was also released in 2013, the OECD mentioned ATP only on three occasions: (i) the need for governments to cooperate in tackling harmful tax practices and ATP; (ii) a lack of relevant tools by tax auditors for the early detection of ATP; and (iii) BEPS Action 12 "Mandatory Disclosure Rules" which seems to effectuate the two previous aims of the OECD and is the only Action specifically referring to ATP in the original BEPS Action Plan. Thus, the only role initially attributed to ATP was the demarcation of the scope of mandatory disclosure obligations. In that regard, BEPS Action 12 indicates that "[m]andatory disclosure regimes are intended to obtain early information about aggressive (or potentially abusive) tax planning which often takes advantage of loopholes in the law or uses legal provisions for purposes for which they were not intended." In this sense, it seems that ATP is regarded as a form of international tax avoidance rather than a standalone, new legal concept.

Thus, ATP did not constitute any standard underpinning the BEPS Project. The following "BEPS guiding principle" is the driving force behind the project:

> "BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place. *No or low taxation is not per se a cause of concern, but it becomes so when it is associated with practices that* ***artificially segregate taxable income from the activities that generate it****. In other words, what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed*." (emphasis added).

Hence, although the cited BEPS standard (or the BEPS guiding principle) and ATP share "the same old search for substance and common points of agreement between different international tax systems", the former completely replaced ATP as a driving force of the BEPS Project.

Indeed, the BEPS narrative appears to replace the terminology referring to ATP with terminology referring to international tax avoidance resulting from artificial arrangements that are used to exploit the differences between tax systems of different countries. Such arrangements artificially segregate taxable income from the activities that generate it, meaning that they do not have an adequate level of economic substance or that they have insufficient nexus with the country of establishment or residence.

Therefore, it seems that the term ATP in the BEPS Project was used as a tool to select and justify anti-BEPS policy goals, reach practical agreements and work towards a common goal of designing and implementing anti-BEPS measures. However, the OECD has never actually tried to define ATP in a clear and objective way such that it would establish a legal meaning and effect of that term by its Member Countries.

3.2.3 The Commission's analyses

3.2.3.1. Recommendation on ATP

The Commission Recommendation of 6.12.2012 on Aggressive Tax Planning (2012/772/EU) is not only one of the first EU documents in which the term ATP appears but also the most relevant insofar as it explicitly provides some guidance regarding how to understand and to prevent ATP from occurring. The meaning of ATP can only be inferred from the preamble to the Recommendation on ATP and from recommended anti-ATP provisions.

The very first relevant parts of the preamble state that:

> *"(1) Countries around the world have traditionally treated tax planning as a legitimate practice. Over time, however, the tax planning structures have become ever-more sophisticated. They develop across various jurisdictions and effectively, [sic] shift taxable profits towards States with beneficial tax regimes. A key characteristic of the practices in question is that they* ***reduce tax liability through strictly legal arrangements which however contradict the intent of the law****.*
>
> *(2) Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include* ***double deductions*** *(e.g. the same loss is deducted both in the State of source and residence) and* ***double non-taxation*** *(e.g. income which is not taxed in the source State is exempt in the State of residence)". (emphasis added)*

Recital (1) constitutes a point of departure on the perception of ATP by the Commission. It shows that the Commission does not seem to tolerate the sophisticated tax planning structures that lead to shifting profit to "beneficial tax regimes" even though they are "strictly legal". However, it is difficult to determine how strictly legal tax planning

structures may "contradict the intent of the law". During legal interpretation, the intent of the law is decoded first and foremost from the wording of the law, as analysed with the use of all relevant interpretative means, including the context and the purpose of the law. If a tax planning structure is strictly legal, it means that it is strictly in line with the wording of the law and thus the intent of the law, as reflected in its wording. Logically it then follows that strictly legal tax planning structures cannot contradict the intent of law precisely because they are strictly legal.

The only clear example of ATP stems from the recital (2) of the preamble which refers to two forms of ATP: (i) double deductions and (ii) double non-taxation. If such practices stem from "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability", they may be considered ATP. Nevertheless, in light of the further wording of the Recommendation on ATP, it is difficult to determine whether an investigation of the intent of the law is needed to identify ATP.

The entire preamble mainly expresses the need for introducing a GAAR by EU Member States, since SAARs, according to the Commission, are often ineffective in prevention of ATP. The recital 8 is telling in that regard:

> *"As tax planning structures are ever more elaborate and national legislators are frequently left with insufficient time for reaction, specific anti-abuse measures often turn out to be inadequate for successfully catching up with novel aggressive tax planning structures. Such structures can be harmful to national tax revenues and to the functioning of the internal market.* ***Therefore, it is appropriate to recommend the adoption by Member States of a common general anti-abuse rule****, which should also avoid the complexity of many different ones. In this context, it is necessary to take account of the limits imposed by Union law with regard to anti- abuse rules". (emphases added)*

*R*ecommendation 4.1 specifically says that a GAAR is needed to "counteract aggressive tax planning practices which fall outside the scope of their specific anti-avoidance rules". This implies that ATP covers all structures that fall within the scope of SAARs that are currently in force and a GAAR, as proposed by the Commission in the Recommendation on ATP. Recommendation 4.2 contains the following wording of the GAAR:

> *"An artificial arrangement or an artificial series of arrangements which has been put into place for* ***the essential purpose of avoiding taxation*** *and leads to a tax benefit shall be ignored. National authorities* ***shall treat these arrangements for tax purposes by reference to their economic substance"****. (emphases added)*

In addition to factors allowing the determination of whether the arrangement or series of arrangements is artificial in recommendation 4.3 (an inconsistency between legal form and substance, transactions offsetting each other, the lack of reasonable business conduct), recommendation 4.5 further clarifies how to identify "the purpose of avoiding taxation". It says that:

> "the purpose of an arrangement or series of arrangements **consists in avoiding taxation where, *regardless of any subjective intentions of the taxpayer*,** it defeats the object, spirit and purpose of the tax provisions that would otherwise apply" (emphasis added).

The Commission further recommended (4.6) that the purpose to avoid taxation is essential if:

> **"any other purpose that is or could be attributed to the arrangement or series of arrangements** appears at most negligible**, in view of all the circumstances** of the case." (emphasis added)

A very similar approach (structure and wording) against tax avoidance practices can be found in the GAAR in ATAD (Art. 6), the PPT in MLI/2017 OECD Model and UN Models 2017, and the CJEU case law giving rise to the general principle of an abuse of rights under EU law.

Notably, a common denominator of all of those anti-tax avoidance measures is that the identification and the prevention of tax avoidance practices requires the identification of a tax benefit (e.g. double deduction) that contradicts the object and purpose of the relevant tax provisions (the premise of contradiction). This is the case in instances of abusive tax avoidance. Only if the premise of contradiction is established, the GAAR proposed by the Commission in 2012 may be activated by the tax authorities to prevent tax avoidance. It takes place via recharacterizing the private law arrangements to which the tax law should be adopted, or applying some degree of analogical interpretation, "by reference to their economic substance". On the opposite side of the spectrum of economic substance is artificiality, which is typically associated with (abusive) tax avoidance via most GAARs (e.g. explicitly in Art. 6 ATAD and implicitly in PPT) and some SAARs (e.g. CFC rules). Artificiality is also associated with ATP.

This analysis suggests that the term ATP in the Commission's Recommendation on ATP means abusive tax avoidance, as covered by the proposed GAAR, and all other types of ATP that do not equal abusive tax avoidance in general but specific types of tax avoidance targeted by SAARs. This is also in line with the understanding of ATP by the US Department of Treasury and the OECD, which do not actually distinguish between (abusive) tax avoidance and ATP.

Additionally, artificiality appears to be the main premise of ATP. Indeed, as seen in the context of BEPS and post-BEPS endeavours of the OECD and the Commission, ATP does not encompass all tax planning (tax reduction) activities that *exploit inconsistencies between at least two systems of tax law*, but only those which are based on artificially segregating taxable income from the activities that generate it. In that sense, the artificiality test aims to detect ATP just as it does so to detect (abusive) tax avoidance.

3.2.3.2. Tax Evasion and Avoidance: Questions and Answers

In the Memo "Tax Evasion And Avoidance: Questions and Answers" released by the Commission on 6 December 2012, the Commission described ATP in the following way:

> *Aggressive tax planning is when individuals or companies exploit legal technicalities of a tax system or mismatches between national tax systems with a deliberate intent to minimise the tax they pay. For example,* ***aggressive tax planners may "treaty shop"****, using the DTCs between different countries to escape taxation in any of these countries. Aggressive tax planning is usually done within the letter of the law, but* ***does not respect the spirit of the law****. It tends to stretch the interpretation of what is "legal" to the maximum extent,* ***and minimise the taxes paid by the "planner" to a level below what could be seen as a fair share****.*

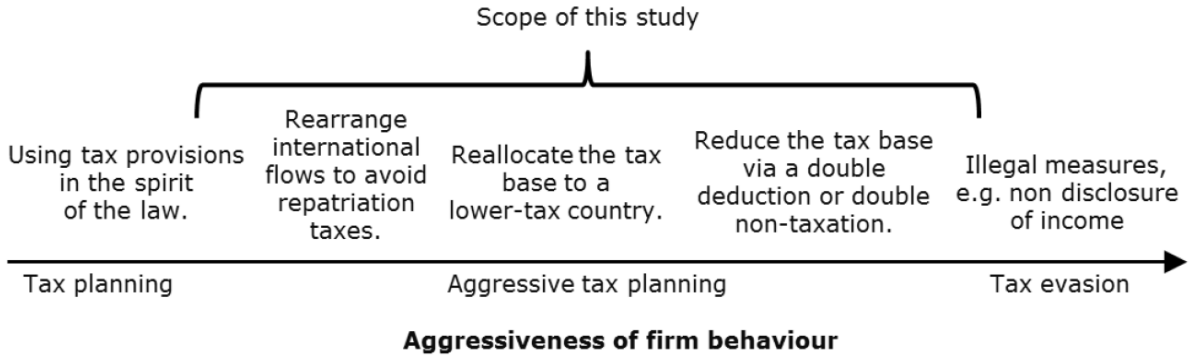
The differences between the cited explanation of what ATP is in the Memo on 6 December 2012 and in the Recommendation on ATP on 12 December 2012, for instance the reference to "treaty shopping" and to "fair share", demonstrate the complexity in defining ATP.

3.2.3.3. Final Report on ATP indicators (2017)

In further developing the meaning of ATP, the Commission steered away from a legal analysis towards a kind of moral value judgement of what is right or wrong with tax planning and tax competition. This was principally done by replacing the contradiction test with the test regarding 'the spirit of law' and an undefined notion of 'fair share of taxation', as synchronised with the economic-factual approach in detection of ATP with an undefined notion of economic substance. As a result, a border between illegitimate and legitimate tax planning in the EU is becoming increasingly blurred.

In a nutshell, it is noteworthy that the 2017 Final Report on ATP indicators, as prepared by a consortium of research institutions for the Commission, acknowledged that drawing "a line between acceptable tax planning and aggressive tax planning" is "theoretically possible" but its boundaries are in reality "somewhat blurred". The 2017 Report presents a "firm behaviour on a continuum of tax aggressiveness" somewhere in between tax planning – considered as reducing tax burdens "clearly in the spirit of the law", and tax evasion – recognized as reduction of tax burdens which is "clearly illegal". As Figure 1 below shows (replicated from the Report, p. 23), although the boundaries between tax planning and tax evasion are clear, a demarcation between acceptable and unacceptable tax planning is far from clear.

Figure 1: Boundaries of ATP definition



Following this continuum, the Report acknowledges the challenges of identifying reliable ATP indicators:

> "Since we rely on publicly available information and are not always able to fully identify the underlying causes of reallocations or reductions of the corporate tax base, the proposed indicators are most likely to partly include non-ATP behaviour. That said, the current analysis provides a partial analysis of ATP, since **we are necessarily excluding relevant issues in international taxation** (e.g. lack of reliable coverage of permanent establishments in publicly available information), **due to data constraints**. In this light, **the results of the study should be interpreted with some caution"**. (emphasis added)

The Report demonstrates that even a robust, scientific approach to detect ATP would be over-inclusive and otherwise inaccurate due to the lack of a clear definition of ATP and serious data constraints. The Report also highlights that the continuum of aggressiveness of firm behaviour does not include tax avoidance. Instead, a broad and unclear spectrum of ATP is located between legitimate tax planning and tax evasion. This implies that, functionally, ATP is hardly distinguishable from tax avoidance. As a result, the use of this term adds a lot of confusion to the discussion about effective and comprehensive prevention of unacceptable reduction of tax burdens in the EU.

The Report added to the debate by providing evidence that the ATP is practically impossible to clearly determine and thus precisely detect.

3.2.3.4. SAFE Questionnaire and Call for Evidence for an Impact Assessment

In the SAFE Questionnaire from July 2022, the Commission says that ATP

> "involves means to decrease the overall tax liability of companies and individuals by taking advantage of differences between national legislations of different jurisdictions; or (ii) by using loopholes in national laws and/or tax treaties; **while not being explicitly illegal it is against the spirit of the law and legally is thus in a grey zone**. *Addressing the use of complex structures set up by enablers for the purpose of tax evasion and aggressive tax planning* **is crucial as the estimated tax revenue losses of EU Member States remain high"**. (emphasis added)

It is noted that replacing the contradiction test with the spirit test significantly deprives a definition of ATP of a legal dimension. Furthermore, the joint presentation of ATP and tax evasion suggests an association between them, as if they would occur together, or would be otherwise mutually reinforcing, or, at least, would be both key end products of tax enablers.

The SAFE Questionnaire also contains questions about the level of relevance of the following factors that should be taken into account in determining ATP:

- The main business rationale/purpose behind the company structure;
- Other business rationale/purpose behind the company structure;
- Minimum economic substance of the entities used in the structure;
- Tax advantage obtained;
- Use of preferential tax regimes/tax treaties/mismatches in national legislations across countries involved in the structure.

This list indicates that the detection of ATP hinges on the non-tax business rationale in conjunction with the minimum degree of economic substance. This is a combination of factual (business purpose) and economic (economic substance) approaches without reference to a legal analysis that typically must be undertaken under the contradiction test (missing in the above list).

In the below, three observations are provided to improve the approach to define ATP.

First, the Commission appears to replicate the methodology from the Unshell Proposal, criticized by academics and practitioners, through introducing the presumption of ATP based on the lack of minimum economic substance of the entities used in the structure (presumably shell entities). Direct references to the Unshell Proposal by the Commission in the Call for Evidence for an Impact Assessment confirms the mentioned observation. It is thus likely that once the presumption of ATP arises, taxpayers will need to establish the main non-tax business purpose (i.e. the main purpose is not to obtain tax advantage) behind the company structure in order to escape the qualification of ATP. This methodology may create enormous compliance burdens to the taxpayers affected. Moreover, this methodology seems to shift the burden of proof from the tax authorities to the taxpayer in relation to the business purpose (commercial rationale) and the lack of tax intentions from the very beginning. This does not corroborate the part of the mechanism of the PPT/GAAR and the CJEU case law on the abuse of tax law, which grants the right to taxpayers to rebut a *prima facie* abuse of tax law's claim of the tax authorities by delivering the business purpose (the commercial rationale) behind an arrangement or a transaction. However, just as the Unshell Proposal requires 'much more than proving the existence of a commercial rationale' from the taxpayer to avoid the consequences of a shell classification, the SAFE initiative will likely follow suit and therefore create tensions with EU primary law. A definition of ATP would benefit from a clear distinction of burden of proof between tax authorities and taxpayers. Only once the tax authorities first establish the main tax purpose of the arrangement or the transaction, could the burden to prove to the contrary be shifted to the taxpayers.

Second, the Commission has never defined the concept of economic substance. In the Unshell Proposal, in turn, some of the economic substance criteria proposed by the Commission are not related to abusive tax avoidance, although the overarching purpose of that legislative initiative is to "tackle situations where taxpayers evade their obligations under tax law or act against the actual purpose of tax law by misusing undertakings that do not perform any actual economic activity." Consequently, it is not inconceivable that the Commission in the SAFE initiative would follow suit and provide the same or similar criteria for the economic substance to those included in the Unshell Proposal, irrespective of their irrelevance for a detection of ATP (assuming its clear definition). The close context of the SAFE initiative in that regard (i.e. the Unshell Proposal) casts serious doubts that the criteria of economic substance would be submitted by the Commission in a precise and proportionate way to detect and prevent ATP. In any event, considering the CJEU case law and the Unshell Proposal, it seems that the Commission in the SAFE initiative will rely on the objective criteria for economic substance such as the existence of premises, staff and equipment suitable for exercising the activities of the company structure in question. The US-styled economic substance' concept based on the purpose and effect of the transaction in question will therefore not constitute a part of the economic substance' test *per se* in the SAFE initiative. However, the question whether a given company structure makes commercial sense, absent tax considerations, appears to be the part of the overall examination of ATP. In other words, the economic substance test, both in the EU and the US, appears to be the decisive test for detecting ATP in the SAFE initiative. By contrast, the legal analysis of obtaining a tax advantage in accordance with the object and purpose of the relevant tax provisions is not applicable. The Commission will need to precisely delineate borders for denying tax benefits to taxpayers engaged in ATP. It will be difficult to do so in accordance with EU primary and secondary law considering that the definition of ATP will be deprived of the contradiction test. Most likely, a new justification will need to be developed and accepted by the CJEU, e.g. the need to prevent ATP. The current justification of the need to prevent abusive tax avoidance - combatting wholly artificial arrangements aimed to avoid tax - is not enough to sanction the prevention of ATP in line with EU law.

Third, the absence of the contradiction test (also known as the "objective element" of domestic GAARs and the PPT) and a reliance on "economic substance" suggests that there is an objective to make it easier for tax authorities to deny

tax benefits than would be permissible under the current anti-tax avoidance legislation. Such an approach to cross border arrangements and transactions is problematic, not least because they are usually accompanied by a detailed legal analysis while the economic substance test requires mainly economic and factual analysis, without or with a minor degree of legal analysis. Thus, an application of a vague and broad concept of economic substance without the contradiction test does not seem to be adequate for determining tax avoidance and ATP and may lead to far-reaching uncertainty in the application of tax law to cross border arrangements or transactions. This approach also fits to the notion of "fair share of tax" which is more of a result of moral and political judgement than a legal determination and establishment of the essential elements of taxes and the tax system as a whole. Indeed, the scholarship analysing case law on domestic GAARs in an international tax context reveals a common risk in anti-tax avoidance or anti-ATP rules based on "economic substance" without the contradiction test (i.e. essentially focusing on "artificiality" exclusively) that the tax authorities applying such rules

> "may have the temptation to replace their own personal judgement about what is good and bad, permitted or prohibited, without really making a reasonable effort to interpret the legislation or tax treaty being applied. As commented, the objective element of (some) GAARs and the PPT works as a guarantee to the taxpayer".

Even if the contradiction test could be *ipso facto* decoded from the economic substance test, its absence in the anti-tax avoidance or anti-ATP rules will clearly work in favour of tax authorities. Legally, they will not be required to establish that obtaining a tax benefit was contrary to relevant tax provisions. As a result, the taxpayers will lose a guarantee that they can effectively obtain tax benefits as long as this is in line with the language, object and purpose of relevant tax provisions. To put it differently, an anticipated definition of ATP under the SAFE initiative will add the economic substance requirement to every tax provision which confers a tax benefit. Since the notion of economic substance is associated by the tax authorities with the notion of "fair share of tax", there is a risk that the definition of ATP will function as a tool to reverse revenue consequences of an arrangement or transaction in line with the expectations of the tax authorities. The Commission will need to ensure that such consequences, clearly escaping the rule of law, will not be possible under the definition of ATP and rules targeting that phenomenon.

3.3. Conclusive remarks

The above analysis shows that the Commission's more recent attempts to define ATP significantly deviate from the origin of that term in the US, which was used interchangeably with (abusive) tax avoidance. The adjective "aggressive" was, in turn, mainly related to marketing techniques of tax intermediaries rather than tax planning. Similar observations stem from the analysis of the OECD's materials on ATP, i.e., ATP did not mean anything more than (abusive) tax avoidance. In fact, this term has never gained much traction in the OECD BEPS project and it was never meant to get a standalone legal meaning.

In light of the foregoing, we would like to draw the attention of the Commission to the overarching aspects related to the task of defining ATP in a clear and objective way. On a very fundamental level, every constitution ensures that taxation is based on the rule of law. In light of that constitutional principle, tax provisions have to be clear, precise, accessible and reasonably intelligible to all users, as well as being amenable to disputes in public courts. Tax provisions must also be at least subject to express and clear legal safeguards to protect taxpayer rights, and civil servants will have to be shorn of any discretionary powers (related to tax provisions) that may lead to arbitrary decisions. Hence, a taxpayer cannot be legally deprived of the possibility to reduce taxation without an explicit and precise statutory regulation that meets the mentioned criteria, even if the tax authorities and other executive bodies,

such as the Commission, argues that the proposed law aims to prevent tax avoidance. So far, the Commission's approach to defining ATP and trying to propose anti-ATP rules does not seem to fully acknowledge the mentioned importance of the division of powers between the legislatures and the tax authorities. It needs to be avoided that any proposed anti-ATP rules may give too much discretion to the tax authorities and take from the taxpayers too many rights to plan tax consequences of their cross-border company structures. An approach in which tax evasion and ATP are put on the same footing might create an impression that anti-ATP rules will not be proportionate to achieve their purposes. Rather they run the risk of being overinclusive to the detriment of fundamental freedoms and the Single Market.

Taking into account all problems and controversies associated with defining ATP, the Commission may need to rely on the current, well-developed concepts of abusive tax avoidance covered by the GAAR (the ATAD) and the PPT (the MLI/OECD Model) and on specific tax avoidance as targeted by various SAARs. New SAARs based on the economic substance criteria in concert with references to activities that exploit inconsistencies and mismatches between at least two systems of tax law could be proposed. This, however, in order for the measures to be proportionate, would only be justified if there would be deficiencies in recently introduced legislation against tax avoidance.

Appendix: The present survey offers a summary of 9 (draft) regulations of the tax profession. The relevant provision is indicated between brackets. The URLs were accessed on August 25th, 2022.

Code/ Principle	PwC tax code of conduct	CFE Ethics quality Bar (discussion paper) [summary adapted from questions of the discussion paper]	ETAF Charter of Regulated European Tax Advisers	Code of Ethics for Professional accountants developed by IESBA (NOT tax specific)	IESBA Framework on Tax Planning. Project is ongoing and the inputs herein are based on the proposed amendments to the Code, PAs in Business - available here	Professional Conduct in Relation to Taxation	NOB Tax Principles and NOB Code of Conduct	US IRS Circular 230	Australian Tax Advisory Firm Governance: Best Practice Principles (developed by Deloitte, EY, KPMG and PwC Australia, with input from the Australian Tax Office)

Credible basis	Tax advice must be supported by a credible basis in tax law [item 1]	Is the tax planning based on interpretations of applicable international and national tax law which are likely to be considered credible by the courts and informed stakeholders? [key question 3]	Tax advisers may advise a client in relation to tax planning only if such planning leads to a legal reduction of taxes [item II.2]	Professional accountants should always comply with relevant laws and regulations [110.1 A1 (e)]	If a professional accountant is involved in advising on a tax planning arrangement, the accountant shall only do so if the accountant has established a credible basis in laws and regulations. What is a credible basis will vary from jurisdiction to jurisdiction [280.12; 280.12 A2]	Tax planning should be based on (...) a credible view of the law. A member who has reason to believe that proposed arrangements are, or may be, tax evasion must strongly advise clients not to enter into them [3.2]	Tax positions adopted must at least be defensible (pleitbaar) [Tax Principles, 3]	Requirements for written advice: a practitioner giving written advice will apply a reasonable practitioner standard. With respect to tax returns and documents a practitioner may not willfully, recklessly advise a client to take a position that lacks a reasonable basis. A practitioner may not advise a client to take a position on a document submitted to the IRS unless the position is	Recommended positions or advice provided should be at least reasonably arguable, based on the law as it stands at the time and the known facts [Principle 2.5.1]

								not frivolous [Para 10.37; 10.34]	
Full disclosure of facts	No tax advice relies for its effectiveness on any tax authority having less than the relevant facts [item 2]	Would the arrangement be implemented if the relevant tax authority had a full overview of every aspect of the planning? [key question 4]	Tax advisers must not be associated with any communication or statements that contain untruthful or misleading information [item I.4]	A PA shall not knowingly be associated with information that is (a) false or misleading; (b) reckless; or (c) contains omission or obscurity [R111.2]	Actions to establish a credible basis include: considering how likely the proposed arrangement would be accepted by the relevant tax authorities if all the relevant facts and circumstances were disclosed [280.12.A2]	Tax advice must not rely for its effectiveness on the tax authority having less than the relevant facts [3.2]	Members do not perform work where the advice relies on or results in information knowingly being withheld from the relevant tax authorities [Tax Principles, 5]	For written advice, the practitioner must not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit [Para 10.37; 10.21]	The firm has procedures aimed at preventing it from knowingly or recklessly advising on arrangements when providing advice on Australian federal taxation laws which involve: (b) a lack of disclosure to the ATO for their effectiveness [Principle 1(b)]

Specific to facts and circumstances	Tax advice is given in the context of the specific facts and circumstances as provided by the client concerned and is appropriate to those facts and circumstances [item 3]					Tax planning must be specific to the particular client's facts and circumstances. Generic advice pose particular risks. Members are entitled to make reasonable assumptions in giving advice, but assumptions should not be unrealistic or unreasonable. If advice is generic, this fact and the need for specific advice should be highlighted with sufficient	Tax advice must be based on a realistic assessment of all relevant and known facts and on defensible interpretations of the applicable national and international tax legislation and regulations [Tax Principles, 1]	In the case of an opinion the practitioner knows will be used by a person other than the practitioner in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax, the Commissioner will apply a reasonable practitioner	Tax advice should be based on a comprehensive view of relevant facts, and where appropriate, relevant and reasonable assumptions [Principle 2.3.1]

						prominence [3.2]		standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances [Para 10.37]	
Broader risk/ stakeholder consideration	Tax advice involves discussion of the wider considerations involved, as appropriate in the circumstances, including economic, commercial and reputational risks and consequen	Are there any other potential reasons why the tax planning could be perceived by policymakers and the general public as abusive? [key question 5]	Tax advisers represent their clients, but have also the obligation to exercise their profession in due consideration of the general public interest. Tax advisers play a key role in the	A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. A professional accountant's	In determining whether to proceed with the advice or recommendation, the PA shall consider the reputational, commercial and wider economic risks and consequences arising from the way stakeholders	The work carried out by a member needs to be trusted by society at large as well as by clients and other stakeholders [2.1]	Advice must also, where relevant, explicitly take economic, business and reputational risks, as well as the interests of the client's internal and external stakeholders, into account		The Principles should also build further confidence and trust amongst wider stakeholders, including clients, the wider community, regulators, governments and other agencies

	ces arising from the way stakeholders might view a particular course of action [item 4]		proper functioning of the tax collection process, which lies in the general public interest [item I.3]	responsibility is not exclusively to satisfy the needs of an individual client or employing organisation [11.1 A1]	might view the arrangement. This includes prolonged dispute with the relevant tax authorities, adverse publicity, costs, fines or penalties, loss of management time. An awareness of the wider economic risks and consequences might take into account the impact of the tax planning arrangement on the tax base of the jurisdiction, or the relative impacts of the arrangement on the tax bases of multiple jurisdictions [280.13, A1, A2]		[Tax Principles, 9]		[Foreword]

Advice on options	PwC firms advise clients of appropriate options available to them under the law having regard to all of the principles contained in this code [item 5]				If the tax planning arrangement does not have a credible basis in laws and regulations, the PA is not precluded from explaining to the accountant's immediate superior or other responsible individual within the employing organisation the accountant's rationale [280.12 A1]	A member must explain to their client the material risks of the tax planning or tax positions and the basis on which the advice is given. [2.6]	These Tax Principles do not restrict members from discussing all defensible tax positions with clients. A request for advice may even result in members having to provide information to their clients on the various possible options, with due observance of these principles. Details of any objections members may have to one or more of the options included in their advice will be		In the course of advising a taxpayer, it is to be expected that various positions may be considered or discussed, some of which may not be reasonably arguable, prior to providing the advice. However, recommended positions or advice provided should be at least reasonably arguable [Principle 2.5.1]

							included in the advice [Tax Principles, 10]		
Economic substance		Is there a genuine economic purpose for the tax planning apart from achieving a tax benefit, either now or in the future? Are the arrangements artificial or manipulated in a form-over-substance approach to achieve a tax benefit? [key questions			The PA shall comply with anti-avoidance rules, in the case of jurisdictions that incorporate those in their laws and regulations. // In establishing the credible basis for the tax planning arrangement, the PA might review the relevant facts and circumstances, including the economic purpose and	Members must not create, encourage or promote tax planning arrangements or structures that are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation [3.2]	Members must ensure they are aware of the real economic objective of the transactions to which their advice relates. If a real economic purpose is not sufficiently plausible and achieving a tax benefit is the primary aim, members		

		1 and 2]			substance of the arrangement [280.6 // 280.12 A2]		must discuss the broader societal aspects in their advice		