

EU Commission launches public consultation on measures restricting the role of tax 'enablers' (advisors)

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In brief

The European Commission (EC) launched on 6 July a [public consultation](#) on measures to address the role of “enablers that facilitate tax evasion and aggressive tax planning” in the European Union (Securing the Activity Framework of Enablers - SAFE). In short, the EC is asking for feedback on possible measures with regard to intermediaries that provide tax advisory services (the 'enablers') on complex structures that could lead to tax evasion or an aggressive tax structure. The options under consideration address the challenges linked to non-EU shell entities and include an obligation to adhere to a Code of Conduct; a requirement to undertake dedicated due diligence; and potential mandatory registration in the European Union. The consultation also raises questions about measures such as monetary penalties and loss of registration, and addresses questions on taxpayers facing a new registration requirement for certain non-listed participations located outside the European Union.

In detail

Background

In recent years, the EC has been ramping up action aimed at tackling tax evasion and aggressive tax planning. In this regard, the public consultation document mentions the Anti-Tax Avoidance Directive (ATAD), the sixth stage of the Directive on Administrative Cooperation (DAC 6) and the proposed Directive laying down rules to prevent the misuse of shell entities for tax purposes within the EU (the 'Unshell proposal').

Despite these efforts, the EC argues that tax evasion and avoidance remain pervasive. The Call for Evidence for an Impact Assessment ('[Call for Evidence](#)'), which is attached to the public consultation, cites research sources estimating the amount of [European revenues lost to corporate tax avoidance](#) to be between 35 and 70 billion EUR (this research paper was published before the final BEPS-reports in 2015).¹ It further estimates the [European revenues lost to personal tax evasion](#) by wealthy individuals at 124 billion EUR. In addition, the document refers to the work of the International Consortium of Investigative Journalists (ICIJ), in particular the Panama and Pandora Papers, to link the issue of tax evasion and aggressive tax planning to the activities of tax enablers.

Against this backdrop, the Call for Evidence document suggests that the outcome of this initiative would impact those providing tax advice, those receiving tax advice and tax administrations. The initiative should have an impact on Member States' tax revenues and level the playing field in terms of competitiveness.

The measures proposed

The Call for Evidence indicates that the policy purpose of the measures *“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”*. The policy options contemplated to achieve this objective include:

- Measures targeting enablers:
 - Option 1: enablers would be prohibited from assisting with the creation of arrangements abroad that lead to tax evasion or aggressive tax planning. A dedicated due diligence procedure would be required to demonstrate compliance;
 - Option 2: in addition to Option 1, enablers that provide advice to EU taxpayers would be required to register in a Member State in order to be able to provide tax advice. Alternatively, the registration could be optional and give access to certain benefits (e.g. submitting tax returns on behalf of clients);
 - Option 3: enablers would be subject to a Code of Conduct that obliges them to ensure that they do not facilitate tax evasion and aggressive tax planning.
- Measures targeting taxpayers: EU taxpayers (individuals or legal persons) would be required to declare in their tax returns any participation over 25% in any non-listed company located outside the European Union.

The public consultation also opens the discussion about the potential sanctions to deter enablers from facilitating tax evasion and aggressive tax planning. The option of monetary sanctions is presented with three alternatives: calculated as a proportion of the enabler's fees, as a proportion of the amounts evaded on behalf of clients, or as an absolute fixed number. Additionally, preventing enablers from providing further services is also considered as a possible deterrent.

Observations:

1. The Call for Evidence recognizes the lack of clear and objective criteria for defining aggressive tax planning. Therefore, it indicates that the proposal will clearly and objectively define the forms of aggressive tax planning that are prohibited. At the same time, the public consultation document requests input on the extent to which the following elements could indicate that a company structure results in aggressive tax planning: (i) the main business rationale/purpose behind the company structure; (ii) other business rationale/purpose behind the company structure; (iii) minimum economic substance of the entities used in the structure; (iv) tax advantage obtained; (v) use of preferential tax regimes/tax treaties/mismatches in national legislations across countries involved in the structure.
2. An analysis if and to what extent the recently introduced, existing anti-avoidance rules, including ATAD I and ATAD II, BEPS and the MLI (notably the principal purpose test and the limitation on benefits test), and judicially developed anti-avoidance doctrines, would be robust enough to address the particular use of non-EU shell entities, is not provided.

3. The number and variety of entities and arrangements, contractual or corporate, with or without legal personality, is significant. Generally, the various types cater for a specific personal, societal, investment or business need. If a particular use of an entity or arrangement has tax consequences, the aim should be that these are aligned with relevant tax policy objectives, including those pertaining to tax avoidance. It is not clear to what extent the EC intends to analyze to what extent the particular use of those entities and arrangements would violate existing tax policy objectives and, if so, whether existing anti-avoidance rules would potentially be applicable to address the issues.

Legal basis

The Call for Evidence indicates that the measures could be proposed on the basis of article 115 of the TFEU (as a Council Directive requiring unanimity). The document also raises the option of relying on article 50(2)(g) of the TFEU (subject to the ordinary procedure), though this possibly would be appropriate only for the portion related to the proposed taxpayer reporting requirements. Additionally, the public consultation document suggests that soft law (e.g. voluntary codes of tax advisors) measures may also be considered.

Next steps

The public consultation will remain open until 12 October 2022. The EC plans to publish a legislative proposal in the first quarter of 2023.

The takeaway

With this initiative the Commission also responds to longstanding calls for action by the European Parliament to 'regulate' the profession of tax advisers. In the past, the Commission's point of view was that such regulation is a responsibility of the Member States and not of the European Union. With this consultation, the EC is assessing whether there is now wider support for an EU-led initiative. It is not clear how the Call for Evidence relates to other EC policy goals that aim to increase the competitiveness and resilience of the single market for professional services by de-regulation.²

It is notable that existing codes of conduct are already applicable to many tax professionals, also within the EU, such as the PwC [Global Tax Code of Conduct](#), the ICAEW [Professional Code in Relation to Taxation \(PCRT\)](#), the [Tax Principles](#) of the Dutch Association of Tax Advisors, CFE's [Ethics quality bar](#), and the ongoing work of IESBA on tax planning and related services.³ It is not known to what extent the EC will consider these existing codes of conduct as part of their analysis.

The proposed measures seek to restrict 'enablers' in their ability to provide tax advice in cases that could lead to the characterization of tax evasion and aggressive tax planning. This raises questions about the responsibility of the intermediaries for their clients' structures, as well as about the difficult line to be drawn between acceptable and 'aggressive' tax planning. The proposed measures will not only affect enablers, but also businesses and individuals that use entities to cater for a specific personal, societal, investment or business need. It is therefore important that the public engages with the public consultation to ensure that the measures are effective and proportional.

Let's talk

For a deeper discussion of how the proposed policy options might affect your business, please contact:

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¹ Reference is also made to estimations of the [worldwide loss of revenue to corporate tax avoidance](#) at between 90 and 240 billion USD.

² https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3404

³ <https://www.ethicsboard.org/consultations-projects/tax-planning-and-related-services>