



Position Paper
on a planned Proposal for a Council Directive to tackle the
role of enablers that facilitate tax evasion and aggressive
tax planning in the EU

(Securing the Activity Framework for Enablers – SAFE)

Abstract summary

The European Tax Adviser Federation (ETAF) would like to thank the Commission for the opportunity to comment on its planned proposal for a Council Directive to tackle the role of enablers that facilitate tax evasion and aggressive tax planning.

In this position paper, ETAF formulates the following core messages:

1. Before releasing new measures, existing regulation should be thoroughly evaluated first.
2. Regulated tax professionals are not “enablers”; they are rather “preventers” of aggressive tax planning.
3. Regulated tax professionals have to be excluded from the scope of SAFE.
4. To tackle the core of the problem, the material scope must stay limited to complex structures in non-EU countries.
5. Clear definition of aggressive tax planning is crucial for the daily work of tax professionals.
6. An EU register would only make sense for non-regulated tax professionals.

Our comments are based on the information available in the [call for evidence](#) and the [public consultation questionnaire](#) published by the Commission.

Introduction

On 6 July 2022, the European Commission invited the public and stakeholders to comment on the preparation of a proposal for a directive “*to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the European Union*” planned for the first half of 2023.

Politically, the Commission is relying on the revelations of the International Consortium of Investigative Journalists (ICIJ), in particular the Panama Papers and the Pandora Papers. These revelations showed, according to the Commission, that enablers worked out “*complex tax structures*” that led to tax evasion and “*aggressive tax planning*”. Therefore, the Commission sees the need for another Directive to address the role of these intermediaries in facilitating tax planning.

The European Tax Adviser Federation (ETAF) recognizes that the dubious abusive tax avoidance arrangements jeopardize the States’ revenues and are unfair to the vast majority of European taxpayers and tax advisers who fully comply with the tax laws.

Representing the voice at EU level of 215 000 regulated tax advisers, ETAF would like to offer its support and full cooperation to the European Commission to look for reasonable solutions in this complex and challenging matter. To that end, it formulates the following preliminary comments.

1. Assessing existing regulation first

On the risk of overlapping and overregulation

First of all, it should be noted that the EU has already adopted several pieces of legislation in recent years to fight tax evasion and “abusive tax avoidance”, in particular:

- the 2016 Anti-Tax Avoidance Directive (ATAD), which, with a General Anti-Abuse Rule (GAAR) in Article 6, is directed against all arrangements which are created “for the main purpose [...] of obtaining a tax advantage that defeats the object or purpose of the applicable tax law” and which are “*not genuine having regard to all relevant facts and circumstances*”;
- the EU Directive on cross-border tax arrangements (DAC 6), which imposed a disclosure obligation for “reportable cross-border arrangements” and the use of “hallmarks” to determine whether a tax planning in question is reportable (without providing a separate definition of “aggressive tax planning”);
- the proposal for a Directive to prevent the misuse of shell entities for tax purposes (UNSHELL) of December 2021, which is currently still in the legislative process and focuses exclusively on companies established for tax purposes that do not pursue any real economic activity or other economic purpose.

Today, the Commission seems to consider all these measures insufficient. However, these initiatives are yet not fully assessed or even not assessed at all.

→ To avoid any potential overlapping and overregulation, we believe that, before releasing any new measure, the Commission should thoroughly evaluate the existing legislation in this field.

On the Commission's justification

Furthermore, one of the Commission's arguments is that the legal consequences of the ATAD and the DAC 6 Directive are fundamentally directed at the taxpayers, but not at "intermediaries" involved in tax planning.

This justification of the need for additional regulation must be questioned. A study ordered by the FISC Subcommittee in March 2022¹ showed that neither the ATAD nor the DAC 6 Directive had achieved the effects anticipated by the Commission.

With regard to the DAC 6 Directive, the study states that, in practice, it still remains unclear what exactly needs to be reported, as the introduced hallmarks are too vague. As a result, Member States added their own definitions in some cases with the result that different information regarding quality and quantity is being reported and exchanged.

¹ HASLEHNER, W., PANTAZATOU, K., 2022, Assessment of recent anti-tax avoidance and evasion measures (ATAD & DAC 6), Publication for the Subcommittee on tax matters (FISC), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

According to the study, the amount of reported information created by such a fragmented implementation does not only overburden the tax authorities but can even affect legitimate transactions.

Concerning the ATAD, the study finds that there are uncertainties in the interpretation and practical application of its complex provisions. As the directive allows too many options for fighting tax avoidance, a greater fragmentation of the internal market is to be expected, according to this study. Moreover, the Commission's 2020 Implementation Report showed significant differences in the implementation of the various options. Therefore, taxpayers are still able to take advantage of existing legislative gaps in the Member States, according to the study.

It seems therefore difficult to follow the Commission's observation that the reason why the DAC 6 Directive and the ATAD fall short of expectations is that they are not directly addressed to "intermediaries". There are mainly other reasons for this, as demonstrated above.

→ ETAF would welcome a more differentiated view by the Commission on the effectiveness of DAC 6 and the ATAD. ETAF therefore recommends a thorough revision of both, DAC 6 and the ATAD.

2. Regulated tax professionals: preventers, not "enablers"

In ETAF members, the profession of tax adviser is an independent and liberal profession, which must serve the implementation and enforcement of tax law. This means that a tax adviser is not only obliged to serve the interests of the client, but also the common good.

As advisers and representatives of taxpayers, tax professionals have the task of supporting their clients in the fulfilment of their obligations under tax law and of protecting their clients – who are often not familiar with the law – from wrong decisions to their detriment and the danger of a loss of rights. This also includes corresponding duties of disclosure to the client.

It is to be recalled that a regulated tax professional must always act within the limits of criminal law, tax law and professional law. These provide the necessary but sufficient legal framework that prohibits them from assisting or participating in illegal arrangements – otherwise he or she would be guilty of aiding and abetting to a crime.

Tax professionals help companies pay their fair share of taxes and thus contribute to the tax revenues of the Member States. This mediating function should not be neglected when it comes to the overall objective of the European Commission to curb abusive tax avoidance.

Against this background, regulated tax professionals in ETAF members are acting as "preventers" of tax evasion and aggressive tax planning. They are in fact the opposite of "enablers".

Such a qualification would create an undue reputational damage to a big part of the profession which is acting in line with tax laws and tax compliance requirements.

→ ETAF firmly rejects the Commission's reductive portrayal and general suspicion of an entire profession as "enablers" of aggressive tax planning and urges the Commission to correct this generalisation.

3. Targeting non-regulated tax professionals

For all the above-mentioned reasons, ETAF is of the opinion that the Commission should start by identifying the small pool of advisers who enable undesirable tax avoidance instead of targeting a whole profession which contributes significantly to the Member States' tax revenues.

The professionals who are regulated in their Member States and who prevent the behaviour considered as undesirable should not be burdened with additional requirements. These would possibly be incompatible with the national regulations or even have a counterproductive effect due to the additional administrative burden they would entail.

For that purpose, the regulated tax professionals have to be excluded from the scope if they meet the following requirements:

- a high level of access qualifications,
- continuous compulsory professional training,
- compulsory membership of a professional organisation with sanctioning powers, and
- guarantees for independent professional practice.

In combination with the already existing anti-abuse provisions in tax law, this constitutes a strong, regulation-intensive legal framework that can be enforced with sanctions, leading to a high quality of tax advisory services and thus making an effective contribution to fight tax avoidance.

As recognized in a study ordered by the FISC subcommittee of the European Parliament published in August 2022², *"given that the majority of promoters of tax avoidance schemes are specialist tax advisers often outside the ambit of the professional bodies, it might seem counter-intuitive to continue to increase the legislative burden of law-abiding intermediaries without tightening entry to the tax advisory market"*.

ETAF strongly agrees with this statement and is, for this reason, advocating to make tax advice a reserved activity everywhere in the EU. The system of reserved activities protects companies, organisations and consumers from the consequences of poor advice given by less qualified people.

²Mulligan, E., Basse, E., De Widt, D., Greggi, M., Kiesewetter, D. and Oats, L., 2022, 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, Luxembourg.

→ It would be better to target non-regulated tax advisers instead of increasing the legislative burden of law-abiding tax professionals. Regulated tax advisers should therefore be excluded from the scope of the envisaged Directive.

4. Restricting the scope to complex structures in non-EU countries

The scope of the planned initiative is not entirely clear. In the call for evidence, the Commission seems to limit the material scope of the initiative to complex structures in non-EU countries. When it published its UNSHELL proposal to combat the misuse of shell entities in the EU, the Commission also explicitly announced a follow-up initiative to respond to the challenges linked to non-EU shell entities.

In other parts of the text, however, the Commission uses the term “creation of arrangements *abroad*” without specifying it, which makes it unclear if “abroad” refers to another Member State or to outside the EU.

From ETAF’s point of view, oversea tax havens, complex offshore structures or profit shifting by companies to tax havens are undoubtedly the core of the problem.

However, some elements in the call for evidence and the questionnaire, including the title of the initiative “*Directive to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the European Union*”, make it unclear if the Commission intends to maintain this restriction to complex structures in non-EU countries.

The inclusion of tax service providers situated *within the EU* in the scope – especially small and medium sized practitioners – would be disproportionate because they have neither the knowledge nor the corresponding client structure to carry out this kind of tax planning.

→ To tackle the core of the problem and avoid disproportionate bureaucracy, the material scope must stay strictly limited to complex structures in non-EU countries.

5. Definition challenges

On tax planning in general

Tax planning is in principle legal and legitimate. It is about introducing problem-solving proposals from a tax point of view into the structuring of entrepreneurial activity within the framework of the legally permissible possibilities.

According to the obligation of a tax adviser to achieve the “best possible solution” for the client, it is only logical that it belongs to the daily business of a tax adviser to elaborate tax planning which is in full compliance with the applicable tax laws.

Moreover, tax legislation in general is often used as a steering tool in order to achieve certain economic objectives. EU Member States leave different options for taxpayers to legitimately

plan their taxes. In addition, taxpayers are entitled to tax structuring through the use of options. Such choices are fully intended by the legislator. If the taxpayer makes use of them, he acts in full compliance with the applicable tax laws.

Several national courts in EU Member States³ have repeatedly ruled that every taxpayer is free to conduct his affairs in such a way that he has to pay as little tax as possible. On EU Level, the European Court of Justice's Advocate General Poiares Maduro has recognised "*the freedom to opt for the least taxed route to conduct business in order to minimise costs*" as a basic principle⁴.

→ ETAF is therefore critical of any definition which would generally include classic tax planning and thus interfere with the daily work of tax professionals.

On the Commission's pre-definition of "aggressive" tax planning

In the questionnaire, the Commission proposes a circumscription of "aggressive" tax planning which reads as follows: "*aggressive tax planning involves means to decrease the overall tax liability of companies and individuals by taking advantage of differences between national legislations of different jurisdictions; or 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*".

As a general remark, ETAF urges the Commission to avoid by all means seeking refuge in general catch-all provisions, which might create legal disputes later on.

In particular, referring to the "spirit of the law" cannot be a suitable criterion. Such a criterion would constitute an indeterminate legal concept and thus violate the principle of legal certainty. It is the task of the legislator to exclude loopholes in the legislation which later turn out to be undesirable by means of clearer legislation. Shortcomings in legislation must not be passed on to taxpayers and their tax advisers.

ETAF is concerned that such an abstract definition of the term "aggressive" tax planning would create uncertainty for tax professionals in their daily work to decide if a tax plan is appropriate or not. Any tax service provider would have to walk a thin line between the insufficient circumscription of the term "aggressive" tax planning and the obligation to provide the best possible advice to his or her clients. It is also important to provide enough legal and planning certainty to taxpayers in order to maintain confidence in tax systems.

Furthermore, in the call for evidence, the Commission states that "*the proposal will include clear and objective criteria for defining the forms of aggressive tax planning that are prohibited*". These criteria, by their very nature, will be the key issue of a possible Commission proposal. The full scope of the impact of such a ban can only be assessed on the basis of these criteria.

³ Established case law of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG): BVerfGE 9, 237 (250); main principle of Belgian tax law: Belgian Court of Cassation (Hof van Cassatie/Cour de Cassation): Cass. 6 juni 1961 inzake Brepols, Pas., 1961, I, p. 1082.

⁴ Joined opinion of the Advocate General Poiares Maduro in the cases C-255/02, C-419/02 and C-223/03, 7 April 2005, EU:C:2005:200

As they are still missing, an assessment is difficult at this stage with the limited information available.

Instead of having to deal with questionable definitions, a possible solution could lie in the introduction of a list of tax arrangements to be regarded as aggressive tax structuring. Such a list could partly be based on the notified cross-border tax arrangements according to DAC 6 as far as the arrangements cover complex structures in non-EU-countries.

→ Referring to the “spirit of the law” to determine what is aggressive tax planning is unsuitable. Tax advisers and taxpayers need absolute clarity for such a definition.

On the differentiation between tax evasion and “aggressive” tax planning

Finally, it is very unfortunate that tax evasion and “aggressive tax planning” are mentioned in the same breath in the title of the initiative: “*Tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning*”. This combination is used throughout the entire text.

Tax evasion is a criminal offence and is punishable by law in all Member States with severe sanctions while aggressive tax planning is legally legitimate, although it might be ethically doubtful. Both cannot remain undifferentiated in the future proposal.

→ ETAF appeals to the EU legislators to strictly separate these two terms for the sake of legal clarity.

6. On the Commission’s options

Prohibition to facilitate aggressive tax planning

Under Option 1, the Commission is considering a “*prohibition on enablers*” from assisting in the creation of tax arrangements in non-EU countries that lead to tax evasion or aggressive tax planning for the EU Member States.

Apart from the fact that the full scope of such a measure cannot be assessed at this stage, it can already be warned that it would also deter legitimate tax arrangements.

Furthermore, it is questionable why only the support or assistance to aggressive tax planning would be subject to a prohibition whereas the main act of the taxpayer executing aggressive tax planning would remain permitted. It is the task of the tax law to tackle the problem and not of the operators applying the law.

→ ETAF is critical of any measure that would prohibit legitimate tax planning.

Self-assessment test

Option 1 also foresees the requirement for all enablers to carry out “due diligence procedures” or a “test” to check whether the arrangement or scheme they are facilitating leads to tax evasion or aggressive tax planning. Enablers would have to maintain records of these due diligence procedures in all cases.

ETAF warns about the danger of any procedure that would lead to uncertainty. A situation where tax professionals would have to ask themselves several times a day in their daily advisory work if they are participating in a prohibited tax arrangement and possibly have to expect relevant sanctions is disproportionate and undifferentiated. Such an uncertainty can only lead to a deterioration in the quality of tax advice.

→ An obligation to carry out a self-assessment test would be unsuitable to achieve the objective of preventing aggressive tax planning.

EU register of enablers

Under Option 2, the Commission adds to the elements of Option 1 the obligation to register in an EU Member State. According to this scenario, only registered enablers would then be able to provide advice or services of a tax nature to EU taxpayers or residents. Here again the wording used by the Commission is unclear, changing from “register in an EU Member State” in the call for evidence to “an EU register” in the questionnaire.

In ETAF Member States, the competent chambers, institutes or “ordres” of tax advisers and associations of tax experts are already in charge of relevant registers. ETAF is in favour of maintaining the registration at national level.

However, we see little added value to introduce an EU register to fight enablers facilitating aggressive tax planning in non-EU countries. On the contrary, ETAF fears a risk of a counter-productive levelling down of qualified tax experts if any tax service provider would have the right to register on the same level as regulated tax professionals.

Any registration in an EU register must under no circumstances authorize tax service providers to grant market access in any Member State. Instead, market access must remain under the competence of the Member States.

This option also entails several important – yet unanswered – questions such as: who should be registered? The entity providing the tax advice or the tax adviser himself? And who would be sanctioned in case of non-compliance?

The only added value of such an option would be to introduce an EU register for non-regulated tax professionals or for enablers outside the EU, because it would allow tax authorities to know exactly who provide tax advice to EU taxpayers, even if these professionals are not part of professional bodies.

→ ETAF strongly opposes the introduction of an EU register for all tax professionals. Such a measure could only make sense either for non-regulated tax professionals or for enablers outside the EU.

Code of conduct

Option 3 would involve the requirement for all enablers to follow a code of conduct which ensures that they do not facilitate tax evasion or aggressive tax planning.

In principle, ETAF sees the development of an EU Code of conduct as an interesting option. In the same spirit, all ETAF Members signed a [“Charter of Regulated European Tax Advisers”](#) which outlines basic principles concerning the role and status of regulated tax advisers in the tax collecting process, lays down guidelines in the exercise of the profession and introduces appropriate control measures.

To be effective, however, this code would have to be binding for all tax intermediaries in a similar manner as it is already binding for regulated professions and its enforceability would have to be guaranteed worldwide. Furthermore, it would have to be based on existing best practice examples, so that tax professionals who already obey to a national Code of conduct don't have to follow redundant or inconsistent principles.

→ ETAF would support the development of a binding EU Code of conduct, taking into account the existing best practices.

Conclusion

The above-mentioned considerations clearly show that a solution finding is not easy – ranging between the considerations about the legal certainty and the rule of law on the one hand, the need for action on the other hand and the possibilities which the professional law has to offer in a third place.

In general, ETAF is critical of any further measure which would:

- deter legitimate tax planning practices,
- be accompanied by a general suspicion of abuse,
- create legal uncertainty for tax advisers and taxpayers,
- make it difficult for honest tax advisers to do their work.

Because their professional laws already require them to provide tax advice in line with tax compliance, regulated tax advisers should be excluded from the scope of SAFE.

At the same time, it is of utmost importance that Member States should be able to keep or to introduce stricter regulations in this area. Any regulatory approach must therefore under no circumstances affect or suspend existing tax compliance regulations in the Member States, in particular professional regulations.

ETAF remains convinced that professional regulation guarantees a high quality of tax advice and that in order to achieve the Commission's goal of effectively curbing tax evasion, it would be a much more effective tool.

Notes

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About ETAF

The European Tax Adviser Federation is a European umbrella organisation for tax professionals whose activities are regulated by law. It is set as an international not-for-profit organisation (AISBL) governed by Belgian law, based in Brussels and was launched on 15th December 2015. ETAF represents more than 215,000 tax professionals from France, Germany, Belgium, Romania, Hungary and Austria.