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Proposal for a Council Directive to tackle the role of enablers that facilitate tax evasion and aggressive tax planning in the European Union (Securing the Activity Framework of Enablers - SAFE

Fields marked with * are mandatory.

1
Introduction

Complex structures, which typically include cross-border arrangements that could result in tax evasion or aggressive tax planning may be designed by some intermediaries that provide tax advisory services. These intermediaries are commonly labelled as enablers. Tax evasion involves means to evade paying taxes and is a criminal offense as defined under the national law. 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 (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.

Several actions have been taken by the EU over recent years to tackle tax evasion and aggressive tax planning, including Anti-Tax Avoidance Directive (ATAD) as amended, Council Directive (EU) 2018/822 amending the Directive on Administrative Cooperation in the field of (direct) taxation (DAC6) and recently proposal Directive laying down rules to prevent the misuse of shell entities for tax purposes (UNSHELL). However, the enablers are still designing, marketing or assisting in the creation of tax schemes that erode the tax base of Member States. This initiative will focus on, establishing appropriate procedures and compliance measures in order to effectively tackle tax evasion or aggressive tax planning.

The questionnaire takes about 20 minutes to complete. The questionnaire aims to capture views from all stakeholders on the role of enablers in contributing to tax evasion and aggressive tax planning and on the magnitude of the problem. The replies will also help identify the main risks as perceived by stakeholders, as well as the priorities for policy actions.

You can submit your responses in any official EU language, and you may upload additional documents

2 About you

* 2.1 Language of my contribution

- (○) Bulgarian
- (○) Croatian
- (○) Czech
- (○) Danish
- (○) Dutch
- (◉) English
- (○) Estonian
- (○) Finnish
- (○) French
- (○) German
- (○) Greek
- (○) Hungarian
- (○) Irish
- (○) Italian
- (○) Latvian
- (○) Lithuanian
- (○) Maltese
- (○) Polish
- (○) Portuguese
- (○) Romanian
- (○) Slovak
- (○) Slovenian
- (○) Spanish
- (○) Swedish

* 2.2 I am giving my contribution as

- (○) Academic/research institution
- (○) Business association
- (◉) Company/business organisation
- (○) Consumer organisation
- (○) EU citizen
- (○) Environmental organisation
- (○) Non-EU citizen
- (○) Non-governmental organisation (NGO)

- ○ Public authority
- ○ Trade union
- ○ Other

* 2.3 First name

Anthony Paul

* 2.4 Surname

Gisby

* 2.5 Email (this won't be published)

paul@accountancyeurope.eu

* 2.9 Organisation name

255 character(s) maximum

Accountancy Europe

* 2.10 Organisation size

- ○ Micro (1 to 9 employees)
- ◉ Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ○ Large (250 or more)

2.11 Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

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* 2.12 Country of origin

Please add your country of origin, or that of your organisation.

This list does not represent the official position of the European institutions with regard to the legal status or policy of the entities mentioned. It is a harmonisation of often divergent lists and practices.

- ○ Afghanistan
- ○ Åland Islands
- ○ Djibouti
- ○ Dominica
- ○ Libya
- ○ Liechtenstein
- ○ Saint Martin
- ○ Saint Pierre and Miquelon

- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
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- Bermuda
- Bhutan
- Bolivia
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
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- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

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* 2.14 **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- ○ **Anonymous**
  Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.
- ◉ **Public**
  Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions

2.15 In case of follow up questions in the context of this project, would you agree to be contacted via the email address you indicated above?

- ☑ Yes, you can contact me by email to follow up in the context of this project if needed
- ☐ No, I don't want to be contacted by email in the context of this project.

3 Problem Definition

3.1 Despite all measures taken by the EU and Member States in this area, tax evasion and aggressive tax planning continue to be a substantial problem in the European Union. To what extent to do you agree with this statement?

- ☐ I strongly agree
- ☑ I agree
- ☐ I am neutral
- ☐ I disagree
- ☐ I strongly disagree
- ☐ I don’t know

3.2 Please explain your reply.

The impact of aggressive tax planning and evasion are matters of crucial importance to governments, especially in view of the potential impact that recent and current global crises will have on tax yields and government spending.

We have no empirical evidence of our own to provide on this topic but the European Commission's Annual Report on Taxation (https://op.europa.eu/en/publication-detail/-/publication/22508340-1149-11ed-8fa0-01aa75ed71a1/language-en/format-PDF/source-262413960) states that EU revenue lost to international tax evasion was 124 billion euro in 2018 and the VAT gap was 134 billion euro in 2019. Estimates of the EU tax revenue lost annually to corporate income tax avoidance are up to 37 billion euro, and royalty flows towards zero or low tax jurisdictions could cost up to 11.9 billion euro per annum. These estimates indicate that tax evasion and aggressive tax planning are a substantial problem in the European Union.

However, these figures are estimates and the potential impact of many forms of tax avoidance and evasion on specific taxes is not well researched. Determining the impact of aggressive tax planning on Member States' economies is also complicated by the lack of a harmonised definition of the term.

The comments immediately below relate to both this question and the questionnaire as a whole.

Tax evasion and aggressive tax planning are not the same and should not be conflated. Tax evasion is illegal (OECD: "A term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored"), and most countries have established laws and procedures for identifying, prosecuting, and punishing such illegal acts. Aggressive tax planning is not illegal, although it does exist in the grey zone of legality and there are ethical and social responsibility issues with developing and promoting tax structures that exist in this grey zone.

Furthermore, there is no common approach to defining such activities and legislating against them. Unless otherwise stated, our responses refer to aggressive tax planning only.

This distinction is important as it directly impacts the questions in this survey on policy options on such issues as penalties. Fighting tax evasion and aggressive tax planning also require different tool kits – to fight tax evasion authorities require investigation and discovery tools. To fight aggressive tax planning, disclosure tools are effective if supported by tax officials with the appropriate technical skills.

We refer to 'tax intermediaries' in this survey - by which we mean any individual or organisation involved in advising on, implementing, and facilitating tax services. It would include accountants, lawyers, notaries, banks, and company service agents, for example, and this list is not exhaustive. All tax intermediaries involved with tax services that take place within the EU must be included in any proposed measures to ensure a level playing field. This includes tax intermediaries that are not members of professional bodies or otherwise regulated.

3.3 The issue of tax evasion or aggressive tax planning has continued to increase recently. To what extent do you agree with this statement?

- ☐ I strongly agree
- ☐ I agree
- ☐ I am neutral
- ☐ I disagree

- ☐ I strongly disagree
- ☑ I don't know

3.4 Please explain your reply.

The points mentioned in our response to question 3.2 apply equally to this question.

In addition, we would also highlight that this survey gives no clear indication of which taxes are under discussion.

Over the last ten years policymakers' focus has very much been on corporate income tax. In respect of corporate income tax, we would be very disappointed if aggressive tax planning had continued to increase recently despite many high profile national, transnational, and international initiatives to combat aggressive tax planning during this period. These include the OECD's anti-BEPS work and the EU's ATAD, DAC 3, DAC 4 and DAC 6. It would be extremely worrying if these initiatives had failed to have an impact on the behaviour of large multi-national enterprises (MNEs) or the ability of governments to protect their tax bases.

We have actively engaged with our membership in respect of all these initiatives and the feedback that we have received is that corporate clients in Europe are more concerned with avoiding reputational harm and mitigating cases of double taxation than in pursuing tax savings from the implementation of aggressive tax structures. They have also noted that there has been a large increase in double taxation, especially for corporate clients conducting cross-border activities.

In respect of personal income and capital taxes there have also been considerable international efforts to exchange information to help combat tax evasion and aggressive tax planning – such as the OECD's Common Reporting Standard and the EU's DACs 1,2 and 6. DACs 7 and 8 should further reduce the opportunities available to taxpayers to evade or avoid tax.

Additionally, there has been work undertaken on combating the influence of national governments that deliberately facilitate aggressive tax planning or even evasion. The EU's Code of Conduct Group and List of Non-cooperative Jurisdictions for Tax Purposes, and the OECD's List of Unco-operative Tax Havens have been hailed as initiatives that have changed the behaviour of certain governments that facilitated harmful tax practices.

The European Commission has reported that not all Member States are providing quality information through the existing mechanisms for tax data exchange and that others are not fully utilising the data that is provided to them. If tax evasion and aggressive tax planning have continued to increase after implementing such measures, and during a period of enforced economic slowdown, this could either indicate that such measures have been improperly targeted or that national governments are failing to devote the resources necessary to use them effectively.

Indeed, whilst the study 'Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU' suggests that it is too early to assess the impact of DAC 6, it refers to a study that highlights "a trend of 'multi-fragmented' implementation across the EU with some states having more strenuous and often burdensome requirements than others, potentially undermining the EU internal market."

However, before introducing any new measures, we would strongly recommend that the Commission undertakes further analysis of the nature and extent of the problem (which we understand will start next month) and the results analysed.

3.5 Enablers play an important role in facilitating tax evasion and aggressive tax planning. To what extent to do you agree with this statement?

- [ ] I strongly agree
- [ ] I agree
- [ ] I am neutral
- [ ] I disagree
- [ ] I strongly disagree
- [x] I don't know

3.6 Please explain your reply.

The term ‘enablers’ is not defined in this survey. Consequently, this question is difficult to respond to, especially at an EU level.

We understand that the Commission’s intention is to focus on those tax intermediaries that deliberately flout the system and assist their clients in tax evasion or in implementing aggressive tax planning structures, especially where the planning (or an element of the planning) involves non-EU countries. This is not made clear in this survey, which could be construed as including all tax intermediaries, compliant or otherwise, within or outside the EU.

This lack of definition/clarity could be perceived to negatively label all tax intermediaries. In our opinion, the vast majority of tax intermediaries, and particularly tax intermediaries that are members of professional accountancy bodies, seek to provide the best result for their client within the legal system(s) involved and in accordance with their own professional ethical requirements. Where the law is uncertain, and it often is, they seek to provide the best advice to their client, which includes considering any reputational impact that could arise should the tax planning advice be challenged in a court of law.

‘Enablers’ is a pejorative term. It is only used, to our knowledge, in the tax code of the United Kingdom in relation to tax intermediaries involved in aggressive tax planning, albeit legislation using the same term has been proposed in the United States of America.

Perhaps because it is not a widely used term and concept, there is lack of reliable and relevant information on the impact of ‘enablers’, which is highlighted in the study requested by the FISC subcommittee, ‘Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU’. One of the key findings is that “The impact of specific tax intermediary regulation on reducing tax evasion and undesirable tax avoidance remains unclear and there is insufficient data available to enable the identification of best practices on the various forms of regulation currently in place.”

https://www.europarl.europa.eu/RegData/etudes/STUD/2022/733965/IPOL_STU(2022)733965_EN.pdf

In the UK, the ‘Promoters of Tax Avoidance Schemes’ legislation in 2017 was built on nearly two decades of anti-tax avoidance legislation – tax evasion is dealt with by different legislation. The most notable preceding legislation is the 2004 Disclosure of Tax Avoidance Schemes (DOTAS) and the 2014 Promoters of Tax Avoidance Schemes (POTAS) legislation. It has been a step-by-step process that has led to, broadly:

1. the disclosure of tax avoidance schemes that meet certain hallmarks
2. the identification and monitoring of persistent tax avoidance schemes where certain threshold conditions have been met, and
3. the power to raise penalties on designers, managers, financial enablers etc of ‘abusive tax arrangements’ that have failed in law.

The UK's enablers legislation is interlinked with other domestic legislation, such as the UK's General Anti-Abuse Rule. It also refers to the Professional Conduct in Relation to Taxation (PCRT). The PCRT, adopted by seven leading UK professional bodies, sets out the fundamental principles applicable to, and behaviour expected from, their members working in tax.

In our opinion, it is important to understand the context and background to specific measures in national tax codes before deciding whether they may be applicable more widely across the EU. This is particularly an issue as the EU has a mix of civil law and common law systems. 'Enablers' is a term from a common law jurisdiction and may not work as anticipated in a civil law context.

In this context, it could be argued that DAC 6 is an expanded analogue of the UK's DOTAS. However, there is in the EU no intervening stage of registering and monitoring of promoters of schemes deemed to be abusive - i.e. the equivalent of the POTAS legislation.

Given that Member States have sole competency for considerable elements of their tax code, and have different requirements in respect of the regulation of the provision of tax advisory services, the development of a common EU definition of aggressive tax planning will have to be carefully considered. It also needs to be clear and robust enough to be operationalised by all parties and to be enforced on those third-country tax intermediaries (or their clients) involved with transactions within the EU.

Penalties in respect of 'enablers' should only be applied once persistent offenders have been identified, registered, and notified and yet still fail to change their behaviour. The UK's classification of who is categorised as an enabler can be found here: https://www.gov.uk/guidance/tax-avoidance-enablers-who-is-classed-an-enabler

3.7 In determining aggressive tax planning, several factors should be taken into account. In your opinion, to what extent the following elements could indicate that a company structure is resulting in aggressive tax planning?

	Very indicative	Indicative	Not very indicative	Not indicative at all	No Opinion
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	◉	○	○	○	○
Other (please specify)	○	○	◉	○	○

3.8 In case you chose the option ‘Other’ above, please specify, which alternative option you would propose.

We assume that this question is in relation to developing an EU-wide definition of aggressive tax planning. We wonder why the five criteria used by the Code of Conduct Group (Business Taxation) would not be the obvious starting point?
https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/

The combination of the main business purpose of a corporate structure and the level of economic substance of the entities in the structure give good indications of whether the structure has been set up for aggressive tax planning purposes.

The tax advantage, whether stated as an absolute amount or as a percentage of the underlying transaction value concerned, is less convincing as an indicator. It is possible to produce significant tax savings from genuine transactions, especially when governments have deliberately provided a beneficial tax regime for transactions that are deemed beneficial for the economy or for society. Common examples would include enhanced tax relief / tax credits for research and development expenditure or for investing in environmentally friendly plant and equipment.

For the next factor, ‘Use of preferential tax regimes/tax treaties/mismatches in national legislation across countries involved in the structure’, we assume that ‘preferential tax regimes’ are those that:

- would be found to be abusive by the EU Code of Conduct Group
- or fulfil the OECD definition as those that cause international harm by treating certain entities, activities or structures over-favourably for the purposes of taxation.

There is some debate as to whether using a legal tax regime purposely established for that purpose by one country constitutes aggressive tax planning, even if such a regime is considered unacceptable by other countries. However, we are aware that some Member States regard use of low or zero tax jurisdictions as a strong indicator that aggressive tax planning structures are in place.

If it is intended that ‘preferential tax regimes’ covers tax regimes broader than those found abusive by the EU Code of Conduct Group or under the OECD definition, then this may be less indicative.

In respect of using mismatches in national laws and gaps and inconsistencies in tax treaties, there is a more persuasive argument that these constitute aggressive tax planning. As Accountancy Europe stated in its 2017 paper ‘The Role of Professional Accountants in Tax,’ (https://www.accountancyeurope.eu/wp-content/uploads/170719-The-role-of-professional-accountants-in-tax.-QA-position-paper.pdf) “accountants must not devise and promote tax planning structures or arrangements that are designed to achieve a different result than that which is clearly intended by the legislators and\or which are wholly artificial and wholly contrived and which seek to exploit loopholes, mismatches between different legislation or different treatment of structures or items in different countries”.

In reality, none of the elements described above should be taken singularly when trying to determine

whether a tax planning arrangement or structure constitutes aggressive tax planning, but rather must be considered as a whole.

If the European Commission intends to propose a harmonised definition of aggressive tax planning, it will have to be capable of being 'operationalised' by tax administrations, taxpayers and tax advisors, as well as being capable of being monitored or checked during the course of a tax audit under all Members States' legal systems.

Such a definition should also be consistent with existing EU case law and take into account the fundamental freedoms. It needs to be capable of being used by tax intermediaries from third countries, who may be used to a very different legal environment when giving tax advice. If the definition is being directed towards third countries that are considered to have abusive tax systems, these jurisdictions should be consulted in advance and given the opportunity to change those elements considered abusive.

Additionally, aggressive tax planning is a concept that shifts with time, so it will be necessary to monitor developments across the EU to ensure that the definition remains fit for purpose.

3.9 Coordination at EU level, e.g. on the nature of the measure and the type of aggressive tax planning schemes to be covered, is fundamental to help prevent that enablers contribute to tax evasion or aggressive tax planning. To which extent do you agree with this statement?

- ☐ I strongly agree
- ☐ I agree
- ☐ I am neutral
- ☐ I disagree
- ☐ I strongly disagree
- ☑ I don't know

3.10 Please provide reasons for which you consider that the EU should **take** action to enhance the fight against tax evasion and aggressive tax planning by addressing the role of enablers.

In respect of aggressive tax planning, EU action would be beneficial if it can be proven that the EU can achieve a better result than Member States acting on their own. This would presumably only cover EU based structures or transactions with a cross border element, including situations when non-EU based tax intermediaries are involved in structures that impact on the EU.

As mentioned previously, this would require:

- Agreeing a common definition of aggressive tax planning that could be operationalised by taxpayers (and tax intermediaries) and was capable of being operationalised consistently across Member States' tax authorities. This is necessary to avoid costly cross-border disputes within the EU.
- Finding a way for Member States to identify and record those tax intermediaries that consistently create, promote etc arrangements and structures that breach the agreed definition
- Having a mechanism in place to notify those tax intermediaries that are consistently / frequently / habitually in breach of the definition, and, therefore, are considered to be an 'enabler'
- Proving that the arrangement and / or structure fails in law
- Raising penalties for non-compliance

If there were proven to be a need for such action against enablers, and that non-EU tax intermediaries could be effectively captured by EU-level action, this could help level the playing field for EU and non-EU based tax intermediaries. This could help prevent compliant EU tax intermediaries suffering unfair competition from non-EU based enablers.

There is also a potential benefit of having a harmonised definition of aggressive tax planning for business doing cross-border trade and investing into the EU from third countries. If EU Member States were to have different definitions, this would increase the compliance costs for taxpayers and also increase the possibility for disputes – both between taxpayers and tax authorities but also between different Member States' tax authorities.

In respect of tax evasion, Member States' tax authorities should have adequate legislation in place to deal with the issue. However, more resources may need to be devoted to identifying and prosecuting the taxpayers, and any intermediaries that knowingly enabled tax evasion.

3.11 Please provide reasons for which you consider that the EU should **not take** action to enhance the fight against tax evasion and aggressive tax planning by addressing the role of enablers

In respect of aggressive tax planning and tax evasion, the EU should not act unless there is empirical evidence that such action is needed and that it would assist in combating abusive cross-border tax planning structures.

In respect of 'enablers', the EU should only take action once:
- the term is properly defined,
- it is known to be compatible with the legal systems of all EU Member States
- the necessary interim steps have been taken to properly identify the issues being addressed
- the appropriate legal steps have been taken to embed the concept of enablers within EU law.

4 Ways to tackle the role of enablers in facilitating tax evasion and aggressive tax planning

4.1 If the EU took new action to address the role of enablers in facilitating tax evasion and aggressive tax planning, which of the following means do you consider most likely to be effective?

- ☐ New EU action should be primarily of soft law nature so as to take into account the specific circumstances of each case and the situation of each Member State.
- ☐ New EU action should be of hard law nature, i.e. a new EU Directive. This would ensure the necessary level of coordination in the EU to effectively tackle the problem.
- ☑ Other

4.2 If you replied with 'Other', please provide more details.

We are not able to specifically answer this question because of the lack of a definition of 'enablers' and of a clear description of the nature and scope of the EC's proposed actions.

Generally speaking, EU action on taxes is more effective when it is of a hard law nature – soft law initiatives often remain unimplemented by Member States. There is a clearly a role for constructive ethical guidelines to be applied on an EU-wide basis, for example Accountancy Europe's paper on the role of professional accountants in tax (https://www.accountancyeurope.eu/wp-content/uploads/170719-The-role-of-professional-accountants-in-tax.-QA-position-paper.pdf)

4.3 Enablers should be **prevented** from designing, marketing, organising or assisting in the creation of tax schemes that lead to evasion and aggressive tax planning. To what extent to do you agree with this statement? To what extent to do you agree with this statement?

- ☐ I strongly agree
- ☑ I agree
- ☐ I am neutral
- ☐ I disagree
- ☐ I strongly disagree
- ☐ I don't know

4.4 Please explain your reply.

As mentioned previously, introducing the concept of 'enablers' is premature in EU tax law. Although disclosure of some potential aggressive tax planning schemes has been enacted via DAC 6, the steps of

classifying, identifying, and warning tax intermediaries that are persistently involved in tax planning that is considered abusive have not been incorporated into EU tax law.

Consequently, it is premature to consider preventing ‘enablers’ from ‘designing, marketing, organising or assisting in the creation of tax schemes that lead to aggressive tax planning’.

Additionally, before any legislative proposals are introduced, it is important to assess the existing legislative measures at a national and EU level. This is to ensure that the legislative proposals are compatible with national tax law and do not duplicate existing EU measures to combat aggressive tax planning.

In respect of tax evasion, as an illegal act it is axiomatic that intermediaries that knowingly enable such activities should be prevented from ‘designing, marketing, organising or assisting in the creation of tax schemes’. All EU Member States already have laws to prevent and punish such activity but often need to devote more resources to identifying, investigating, and prosecuting the parties involved.

In this respect, one cannot underestimate the potential for information technology helping to identify, and thereby deter, tax evasion. Big data analysis can assist tax authorities in identifying suspicious money flows, collusion between taxpayers and is of clear benefit in the conduct of audits by tax authorities. A common system of EU digital reporting requirements, including real-time financial reporting, mandatory e-invoicing etc., would also help identify illegal behaviour, including across Member States’ borders. In our response to the EC’s public consultation ‘VAT in the Digital Age’ we strongly supported such measures and stressed their value in fighting VAT fraud in the EU - https://www.accountancyeurope.eu/wp-content/uploads/VAT-in-the-Digital-Age-Accountancy-Europe-response.pdf .

Such information technology systems may also help in identifying aggressive tax planning activities.

4.5 **Due diligence procedures** (as for example used in the field of anti-money laundering) would require enablers to perform a self-assessment test to demonstrate that the tax schemes do not lead to tax evasion and aggressive tax planning. To what extent would you agree that this is an effective measure?

- ☐ I strongly agree
- ☑ I agree
- ☐ I am neutral
- ☐ I disagree
- ☐ I strongly disagree
- ☐ I don’t know

4.6 Please explain your reply.

Due diligence processes in themselves are of no use in preventing ‘enabling’ tax evasion. Individuals and organisations knowingly enabling tax evasion are deliberately assisting with a criminal act and a self-assessment test would either not be performed or would be done so fraudulently in an attempt to cover up the criminal activity.

However, under existing anti-money laundering law, stringent due diligence procedures (such as those used in the field of money laundering), exercised by responsible tax intermediaries, can help identify potential

criminal activity committed by taxpayers and the reporting of it to the relevant national bodies.

In respect of aggressive tax planning, such due diligence procedures are already undertaken by professional accountants giving responsible tax advice to their clients.

Professional accountants, whose professional bodies are members of the International Federation of Accountants (IFAC), are required to comply with the International Code of Ethics for Professional Accountants issued by IESBA or standards no less stringent. They may be subject, in addition, to specific national legal or ethical requirements in respect of tax advice and tax compliance work. They will have internal procedures and/or codes of conduct covering tax advice to ensure that it is appropriate for their client and does not subject their client or their practice to unnecessary risk, including reputational risk.

They will also have consideration of the requirements of their professional indemnity insurer in respect of giving quality tax advice that is appropriate to their clients' circumstances, is a credible interpretation of tax law as it stands at the time and that is appropriately documented.

The situation could be different for tax intermediaries that are currently unregulated – either by membership of a recognised professional body or that are directly regulated by a governmental body. For such tax intermediaries a legal requirement to perform stringent due diligence procedures to demonstrate that tax schemes do not lead to tax evasion and aggressive tax planning could result in a reduction in such activities. However, there would also need to be robust and effective monitoring and enforcement procedures to ensure that such due diligence procedures were being correctly implemented so that effective self-assessment tests were performed by unregulated tax intermediaries.

4.7 In case an **EU register** of enablers would be established, which of the following options do you consider as the most effective?

	Very effective	Effective	Not very effective	Not effective at all	No Opinion
Mandatory registration for enablers in order to be able to provide tax advice	○	◉	○	○	○
Optional registration that gives access to certain benefits (e.g. submitting tax return on behalf of their clients)	○	○	◉	○	○
Other (please specify)	○	○	○	○	◉

4.8 In case you chose the option 'Other' above, please specify, which alternative option you would propose.

Again, we have issues with the wording of this question. It is not practicable to have a mandatory register of enablers when 'enablers' is undefined.

So, we have based our response on the concept of a register of tax intermediaries.

It is highly unlikely that anyone would voluntarily register as an enabler – legitimate tax intermediaries would be concerned about the negative connotations of the term and true enablers would not want to be publicly recognised as such.

There is also an issue with the example given as an incentive for voluntary registration – the benefit of "submitting tax return on behalf of their clients." Filing of tax returns is a very important compliance activity and not an element of legal tax planning. If voluntary registration were required to submit tax returns on behalf of clients, this would make registration necessary for most tax professionals and would result in tax authorities having to deal with thousands of registrations – including from third countries – which may be beyond their administrative capacity.

In some countries, tax intermediaries are either required to be registered to provide certain tax services or must be registered to give any tax advice. Such registers may be public but may also just be held privately by the national tax authorities.

The first step would, therefore, be that all Member States have a national registration procedure for all tax intermediaries active in their country. This could be mandatory or optional, depending on the legal requirements of the country. If registrants were found to be acting as 'enablers', then the national authority could withdraw registration, or mark the registrant as non-compliant. This register could be public or private. A public register would provide taxpayers with an indication that an advisor is legitimate but strong controls would need to be put in place to ensure that the register was kept up to date and that previously non-compliant intermediaries are given an opportunity to change their practices to ensure their compliance in future.

It would also have to be determined how the register would be structured. Would it cover in-house advisors within corporate groups? Would it require every individual involved in tax intermediary work to be registered, or the business for which they work? If it were to be the business that is registered, is it fair to 'black-list,' sanction or remove from the register an entire firm (which may be trans-national) for the actions of one or more individuals? Additionally, how would the register deal with organisations where the legal form may not be identified in a particular jurisdiction as an individual – i.e., partnerships are not recognised as separate legal persons from the partners in all EU Member States.

For a register to be effective at an EU-level, a common EU definition of aggressive tax planning would be a pre-requisite condition. This definition would need to be interpreted in a common fashion by Member States' tax authorities. Given the differences in tax law (and culture) across the EU, this is unlikely to be a simple matter. There would then need to be either a central repository of all registered intermediaries, or a common data exchange format such that such information could be extracted from national registers. There would also need to be a legal requirement on Member States to keep the registers up to date.

To be truly effective, there would then need to be a strong legal basis (with enforcement mechanisms) to require non-EU based tax intermediaries to register in respect of tax services impacting the EU. Given that tax services can easily be provided digitally, monitoring the compliance of non-EU tax intermediaries would be of prime importance and would probably require some sophisticated data analysis tools.

4.9 Would you agree that a **code of conduct for enablers** that would prohibit them to design, market, organise or assists in the creation of tax evasion and aggressive tax planning schemes without any complementary mandatory measures will be sufficient and effective in fighting tax evasion and aggressive tax planning?

- [ ] I strongly agree
- [x] I agree
- [ ]

I am neutral

- [ ] I disagree
- [ ] I strongly disagree
- [ ] I don’t know

4.10 Please explain your reply.

Where the provision of tax services is unregulated, or only partially regulated, a code of conduct that covers all tax intermediaries should be useful in clarifying their responsibilities (including the degree to which public interest should be taken into account in providing tax services). This is particularly the case where tax advice is given in the ‘grey zone’ – i.e., when the tax law is unclear in its wording, purpose or intent.

For example, the UK has the aforementioned PCRT that assists members of many of the main professional bodies working in tax in applying the fundamental professional ethical principles to taxation work and sets standards for tax planning https://www.icaew.com/-/media/corporate/files/technical/tax/pcrt/pcrt.ashx .HMRC’ s guidance notes on the UK’s tax enablers legislation states that if tax advisors subject to the PCRT “conduct their business in accordance with the PCRT and act wholly within the spirit of the standards for tax planning, it’s unlikely that such a person will come within scope of the enablers legislation.” https://www.gov.uk /guidance/tax-avoidance-enablers-who-is-classed-an-enabler#interaction-with-pcrt

Accountancy Europe supports the principles embodied in the PCRT in its aforementioned publication ‘The Role of Professional Accountants in Tax,’ (https://www.accountancyeurope.eu/wp-content/uploads/170719-The-role-of-professional-accountants-in-tax.-QA-position-paper.pdf). In this document, we state that (subject to specific Member State legal requirements) professional accountants:

- must give tax advice that is based on a realistic assessment of the tax law as it stands. Where uncertainties exist, the accountant must give their client an honest assessment of these uncertainties and the potential risk that they pose. Where necessary, the accountant should take appropriate additional advice to confirm the position taken.
- must provide tax advice that is client specific. In practice, accountants should not promote pre-packaged tax avoidance schemes but rather base their advice around the commercial and economic realities of their clients.
- must not devise and promote tax planning structures or arrangements that are designed to achieve a different result than what is clearly intended by the legislators and\or which are wholly artificial and wholly contrived and which seek to exploit loopholes, mismatches between different legislation or different treatment of structures or items in different countries.
- must terminate any client relationship with clients who decide not to disclose the relevant facts (as defined at a national level) to the tax authority.

Additionally, the document draws accountants’ attention to circumstances of where a legitimate commercial transaction could be subject to enhanced public scrutiny or concern.

It is also notable that IESBA has an ongoing project, Tax Planning and Related Services, to determine whether the mandatory Code of Conduct for all professional accountants requires to be amended in respect of tax planning. https://www.ethicsboard.org/consultations-projects/tax-planning-and-related-services The Commission might consider waiting on the outcome of this project before further working on this topic.

Many firms of professional accountants also have their own internal codes of conduct that cover tax matters, often including set procedures for reviewing tax advice where it could be considered to be in the ‘grey zone’ and / or could result in reputational harm for the client or the firm providing the advice.

Consequently, there is existing material that could be drawn on if it were decided to develop an EU specific code of conduct for tax advice.

In respect of aggressive tax planning, where tax advisory and intermediary services are covered by local law there may only be limited benefit from having an additional layer of 'regulation' in the form of a code of conduct. This will depend on the extent and scope of the local law.

In respect of tax evasion, a code of conduct is clearly nonsensical as tax evasion is a criminal act, which is the antithesis of what most people regard as the activities covered by a code of conduct.

To be effective, all codes of conduct must be monitored and enforced. It would be politically damaging to all parties to create a European code of conduct that is subsequently found to be poorly adopted, or ineffectual.

There is also the related issue issue of who would monitor and enforce this code of conduct in countries where the tax profession is unregulated or where some tax intermediaries are regulated but others are allowed to provide tax intermediary services without supervision and enforcement.

4.11 Would you agree that a new reporting requirement for EU taxpayers of participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means' in a non-listed company outside the EU will boost transparency of EU investment abroad?

- ☐ I strongly agree
- ☐ I agree
- ☐ I am neutral
- ☐ I disagree
- ☐ I strongly disagree
- ☑ I don't know

4.12 Please explain your reply.

This option appears to be outside the context of this survey as it:

1. doesn't appear to be related to 'enablers' and
2. introduces transparency of EU taxpayers' investments abroad as an objective.

Little explanation has been given as to why this option has been raised and what issue it hopes to solve.

Given that we have no data as to whether owning in excess of 25% in a non-listed entity increases the risk of tax evasion or aggressive tax planning, we have been unable to express an opinion on this question.

4.13 If new requirements were imposed on enablers, can you please provide an estimation of the **magnitude of the economic impact** that each option would entail?

	Strong Impact	Some Impact	Little Impact	No impact at all	No Opinion
Tax collection across the EU would increase as the rules would deter from using tax evasion or aggressive tax planning	○	○	○	○	◉
Resource allocation across the EU would be optimised through better distribution of tax burden across taxpayers	○	○	○	○	◉
Higher tax fairness as all companies would pay their fair share (levelled playing field)	○	○	○	○	◉
Improved level playing field for enablers regardless of their location (as all enablers would be prohibited from tax evasion and aggressive tax planning)	○	○	○	○	◉
Other (please specify)	○	○	○	○	◉

4.14 In case you chose the option 'Other' above, please specify, which alternative option you would propose.

Not applicable

4.15 Please describe any further major impacts you consider likely to arise from a new EU action addressing the role of enablers in facilitating tax evasion and aggressive tax planning, towards the main stakeholders (enablers, business asking for tax advice services, citizens, taxpayers, tax administrations etc.)

The effectiveness of any further EU actions against tax evasion and aggressive tax planning, and the collateral impacts on the main stakeholders, depend on the nature of the actions taken. This survey does not give sufficient detail of the scope or the nature of the actions that are most likely to be taken, so it is not possible to accurately gauge the magnitude of any economic impacts (macro or micro) at this time – including compliance costs per 4.16 below.

4.16 If new requirements were imposed on enablers, can you please provide an estimation of the magnitude of the impact on the compliance costs that each option would entail?

	Strong Impact	Some Impact	Little Impact	No impact at all	No Opinion
Code of conduct that would prohibit the enablers who design, market, organise or assists in the creation of tax evasion and aggressive tax	○	○	○	○	◉

planning schemes without any complementary mandatory measures					
EU register of enablers and the obligation to register	○	○	○	○	◉
Due diligence procedures to perform a self-assessment test to demonstrate that the tax schemes do not lead to tax evasion or aggressive tax planning	○	○	○	○	◉
New reporting requirement for EU taxpayers of participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means in a non-listed company outside the EU	○	○	○	○	◉
Other (please specify)	○	○	○	○	◉

4.17 In case you chose the option 'Other' above, please specify, which alternative option you would propose.

Not applicable

4.18 **If the EU took no further action** to address the role of enablers in facilitating tax evasion and aggressive tax planning which of the following scenarios do you consider most likely?

- ☐ The internal market will be more fragmented because Member States will provide their own rules addressing the role of the enablers.
- ☐ Without EU action addressing the role of the enablers, the problem will remain.
- ☑ Other

4.19 In case you chose the option 'Other' above, please specify.

As with question 4.15, it is not possible to judge the impact that any further action at EU level in this area would have, because:

- The term 'enabler' is not defined
- The scope of the measures proposed is not defined
- We do not know whether enablers are considered to be a significant issue in EU Member States
- We do not know the financial impact of the action of enablers across the EU

5 Enforcement of the Measure

5.1 In your opinion, are **monetary penalties** an adequate means to appropriately sanction and deter enablers from facilitating tax evasion and aggressive tax planning?

- [ ] I strongly agree
- [x] I agree
- [ ] I am neutral
- [ ] I disagree
- [ ] I strongly disagree
- [ ] I don’t know

5.2 In case you answered *'I strongly agree'* or *'I agree'* in the question above, which type of monetary penalties do you find adequate to deter enablers helping their clients evade or avoid taxes? Monetary penalties:

- [ ] As a proportion of their fees
- [ ] As a proportion of amounts evaded on behalf of their clients
- [ ] As an absolute fixed number
- [x] Other

5.3 If you replied with ‘Other’, please provide more details.

We would suggest that EU Member States’ tax authorities should have data on the effectiveness of different forms of monetary penalties as a deterrent. If not, this may be an area where the European Commission could consider some research.

5.4 In your opinion, would **preventing an enabler to design, market, organise or assist in the creation of tax schemes that lead to evasion and aggressive tax planning from being allowed to provide services** be an efficient way to deter them from facilitating abusive tax schemes?

- [ ] I strongly agree
- [x] I agree
- [ ] I am neutral
- [ ] I disagree
- [ ] I strongly disagree
- [ ] I don’t know

5.5 Please describe any other enforcement mechanism (e.g. other type of sanctions or compliance measures against enablers that market, sell or otherwise promote tax evasion or aggressive tax planning) that you consider appropriate and effective for EU and non-EU enablers.

The enforcement mechanism, including sanctions in the form of monetary penalties or other measures, can only be determined once the scope of the proposals is known, the term ‘enabler’ is properly defined, and the

form of EU action determined.

We would also comment that question 5.4 is difficult to answer. It would obviously be efficient to prevent an ‘enabler’ (for example, a tax intermediary that consistently promoted or managed tax schemes regarded as abusive by a national tax authority and who had been forewarned about the possibility of sanctions) from continuing to act as such. The difficulty is formulating effective legislative proposals that prevent enablers from continuing to provide such services. Evidence suggests that many such enablers are persistent re-offenders.

Preventing enablers from facilitating tax aggressive tax planning will not prevent aggressive tax planning – particularly as taxpayers would presumably not be within the scope of such regulation.

In respect of tax evasion, Member States have laws that specify the sanctions for intermediaries that knowingly facilitate the crime of tax evasion. These would normally include the possibility of imprisonment, as well as monetary penalties.

In respect of aggressive tax planning, it could be appropriate to impose financial or other penalties on individuals (or organisations) that fail to heed warnings that their behaviour fails to meet their legal obligations (or the standards of accepted behaviour for taxpayers in the jurisdiction where the ‘tax advantage’ is obtained). However, this would need to be supported by a robust legal framework with clear objectives, definitions, and processes.

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