CFE tax advisers europe

OPINION STATEMENT

Opinion Statement PAC 1/2022 on the European Commission Public Consultation on a Planned Directive on Securing the Activity Framework of Enablers ("SAFE")

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Philippe Vanclooster, Chair of the CFE Professional Affairs Committee or Aleksandar Ivanovski, Director of Tax Policy at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

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1. Background

The European Commission launched a public consultation on 6 July 2022 on the policy options being considered by the Commission 'to improve a regulatory framework for tax intermediaries', through a legislative proposal 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). This paper has been drafted to serve as CFE's response to the Consultation Document.

2. Executive Summary

CFE Tax Advisers Europe and its Member Organisations have always been supportive of reasonable and proportionate initiatives of the European Union. However, before introducing any new regulatory anti-avoidance measures, we would recommend that the Commission undertakes further analysis of the nature and extent of the problem to help better inform any measures eventually proposed and, in particular, to ensure alignment with the broader policy priorities of the European Commission. In addition, the opportunity should be taken to assess the impact of recent EU initiatives to combat tax evasion and aggressive tax planning, including Council Directive (EU) 2018/822 introducing mandatory disclosure rules for intermediaries and taxpayers (DAC6 / MDR), Council Directive (EU) 2016/1164 – the Anti-Tax Avoidance Directive (ATAD), as well as Anti-Money Laundering (AML) rules and provisions for the protection of whistle-blowers.

CFE strongly urges that no additional legislative action is taken by the European Commission in this area until such analysis has been performed. We understand that such work may be launched imminently.

In the event of any action being taken, CFE's view is that any EU proposals should not have a disproportionate impact on reputable tax advisers, i.e., members of professional organisations who are giving advice on market-based, commercial transactions. Any additional compliance burden for reputable tax advisers must not in any event go beyond reasonable 'due diligence' to ensure that they do not promote aggressive avoidance regimes. Tax advisers play a very significant role in supporting the functioning of the tax system by assisting taxpayers to interpret complex tax laws, to meet their compliance obligations and engage with tax authorities in relation to disputes. Onerous due diligence obligations will in any event add another layer of compliance on intermediaries resulting in increased cost for taxpayers and potentially making tax advice a "luxury product" which will leave many taxpayers unable to access professional tax advice at a reasonable cost. It will create an unlevel playing field between taxpayers and well-resourced tax authorities which would be contrary to the intrinsic right of defence.

To move forward in this very important area, CFE would like to draw to the Commission's attention the CFE paper on 'Professional Judgment in Tax Planning.' This paper sets out a framework to help steer all advisers in the direction of an appropriate balance between the rights and obligations of taxpayers, thereby raising standards in tax advice and reducing incentives for aggressive tax avoidance.

3. Policy Options

The Commission's Information Note[1] sets out the options currently being considered by the Commission for the proposed directive, and include:

Option One: Requirement for all enablers to carry out dedicated due diligence procedures (DD)

This option involves a prohibition on enablers from assisting in the creation of arrangements outside the EU that facilitate tax evasion or aggressive tax planning in the EU. In addition, this option foresees the requirement for 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. It also requires the enabler to maintain records of these due diligence procedures in all cases. This option could be combined with appropriate measures to address possible non-compliance.

Option Two: Prohibition to facilitate tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for enablers to register in the EU

This option involves a prohibition on enablers from assisting in the creation of arrangements outside the EU that facilitate tax evasion or aggressive tax planning in the EU. The enablers covered by the scope would be required to carry out dedicated due diligence procedures as outlined under Option 1.

In addition, enablers that provide advice or services of a tax nature to EU taxpayers or residents would be required to register in an EU Member State. Only registered enablers could provide advice or services of a tax nature to EU taxpayers or residents. In cases of non-compliance, enablers may be removed from the registry.

Option Three: Code of Conduct for all Enablers

This option 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.

The consultation also covers the issue of the measures potentially being considered to ensure compliance via monetary penalties as a means of deterring the facilitation of evasion and aggressive tax avoidance and to sanction Enablers, either as a proportion of their fees, a proportion of the amount of tax evaded or absolute fixed amounts. Other penalties being considered might include the prevention of an Enabler from providing any further services.

[1] Information Note on the Commission's proposal for a directive "Securing the activity framework of Enablers: (SAFE)

4. General Comments

CFE supports reasonable and proportionate initiatives at EU and Member state level to tackle aggressive tax avoidance and tax evasion. The comments in this paper have been prepared in the context of the longer-term evolution of policies focused on aggressive tax avoidance, within which the most relevant EU measure is the Council Directive on reportable cross-border arrangements ("DAC6"). The Directive imposes a requirement on tax advisers (or taxpayers, where applicable) to report tax arrangements of a cross-border, which bear certain hallmarks that could potentially be used by tax authorities to identify aggressive tax avoidance.

Our aim is to support policymakers in achieving their overall aims while ensuring that regulation and reporting obligations are proportionate and do not over-burden businesses or advisers, thereby undermining the policy goals of such initiatives and ultimately the post-pandemic economic recovery.

Nonetheless, CFE believes that there is a mismatch between the European Commission's stated objective of tackling aggressive tax planning and tax evasion, and the outlined policy options which focus solely on tackling the role of Enablers. Despite the recent introduction of a number of anti-avoidance measures, the Information Note states that the EU is looking into possibilities to address aggressive tax planning related to the utilisation of structures/flows with little or no commercial substance to minimise taxes due within the EU, which is at odds with the stated policy objective of this consultation.

We note the Commission's view that despite all of the 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. However, we are very concerned that this view is based on pre-BEPS project data, which is not reflective of the impact of the very considerable volume of new legislative measures that have been introduced on foot of BEPS. It would be wholly inappropriate to introduce further measures without first fully evaluating the impact of the measures recently introduced.

CFE strongly recommends that no additional legislative action is taken by the Commission until such analysis has been performed (which we understand will start imminently). In this regard, CFE notes the recent study commissioned by the European Parliament, Permanent Committee on Taxation (FISC), which too notes that the impact of recent EU regulations on tax compliance across the Single Market remains uncertain, given that most intermediary regulations such as DAC 6 have been implemented quite recently. This is compounded by the chronic lack of data on the direct effectiveness of current regulations in reducing tax avoidance.[2]

[2] "There seems to be a convergence towards a more conservative approach to tax planning, as evidenced by the apparent reduced level of off-the shelf tax planning schemes being marketed. It is unclear what percentage can be attributed specifically to tax intermediary regulation and what may be attributed to reputational risks as well as other regulations targeting taxpayers on the demand side. In terms of weaknesses of the current tax advisory marketplace the market access rules remain problematic. 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."; Emer MULLIGAN (with Lynne OATS, Edidiong BASSEY, Dennis DE WIDT, Marco GREGGI, Dirk KIESEWETTER), *Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU*, European Parliament (2022).

CFE unequivocally condemns tax evasion in all its forms where this means criminal non-payment of tax, regardless of the jurisdiction or actors involved in this type of criminal activity. We emphasise this definition because in some countries legal tax avoidance is sometimes translated as tax evasion, and as this paper discusses, different responses are needed for legal and illegal activity. The work undertaken by the EU and the OECD in this regard, in particular relating to tax evasion, tax transparency and anti-money laundering, has been instrumental in ensuring a steady decline in this type of illegal activity. This is the so-called "black zone". Our further comments do not address tax evasion as all Member states have their own national legislation in place to tackle this criminal activity, including dealing with advisers, intermediaries and consultants who actively conspire with their clients to defraud the revenue authorities.

CFE acknowledges that there is also a "grey zone" - an element that in spite of the best possible regulations or legislation being in place, will inevitably continue to exist due to the nature of the tax and legal systems of different countries. Mismatches will continue to exist in cross border matters, because most tax is jurisdictional. Every country retains tax sovereignty and therefore legislates on tax, apart from those taxes which are 'harmonised' at EU level e.g. VAT, excises etc. Much has been done to counteract these mismatches, but the grey zones will continue to exist in spite of our collective efforts aimed at alignment and addressing aggressive tax avoidance with legislation.

The EU has done significant work on addressing aggressive tax avoidance, targeted by a number of legislative initiatives, notably ATAD, as well as the disclosure and transparency requirements as imposed by the subsequent revisions of the Directive on administrative cooperation in the EU (DAC). Whether Member States' tax administrations make good use of the instruments at their disposal, made possible by these progressive initiatives of the European Commission and the European Parliament, is a matter that merits further consideration by the EU and Member States. The broad range of new anti-abuse tax legislation approved in the last 5 years needs to be assessed before going further with more legislation. Coupled with the AML identification obligations approved more than 20 years ago, this legislation is of itself proving very effective to mitigate "bad behaviour" amongst intermediaries in the EU.

To address the outstanding issues in this "grey zone", as argued by CFE in our paper 'Professional Judgment in Tax Planning', a synergy of a number of actions can take place between governments, organisations, tax professionals and taxpayers alike. We all bear responsibility to protect the integrity of our tax systems. Legislators design tax laws, tax administrations apply the law in collecting taxes due, and taxpayers comply with the law, while availing themselves of applicable rights. Tax advisers play a critical role by exercising professional judgment on taxpayers' rights and obligations in advising across a range of areas, for example, the relevant aspects of the law, jurisprudence and administrative matters, as well as the consequences of taking or not taking their advice.

Taxpayers have a major and important role to play in this debate. They should be informed and advised that there are significant consequences for their actions if they pursue aggressive tax planning and structuring, despite cautionary advice from their advisers.

4. Clarification of Terms & Objectives

In the view of CFE there are a number of issues, however, which urgently require clarification for the consultation to be of significant value:

I: Scope of the Consultation

Geographical Scope

The Consultation Document is unclear in relation to:

i. Whether the EU will target specifically flows/structures involving only 3rd countries;
ii. Purely domestic structures/flows, i.e. within a single Member state;
iii. Structures/flows involving two (or more) EU Member states i.e. involving structuring/flows between two entities within the EU.

Our understanding from the materials made available is that the proposed Directive is focussed only on (i) above. However, it transpires from the Consultation Document that all of the above could well fall, potentially, within the material scope of the proposed directive. We would welcome clarification on this matter.

Material Scope

a) Intermediaries within the scope

The consultation does not seem to be clear as to whether it is only those intermediaries established within the EU that will be within the scope of the proposed directive – if the scope is to include non-EU intermediaries, then there must be clear rules as to which intermediaries are concerned and there must be scope for effective enforcement. Different regulatory regimes between EU and non-EU established intermediaries must be compatible with the EU and Member States' WTO obligations. Further comments are provided below re. 'Definitions of Terms'.

Any envisaged measures should be focussed on those intermediaries that engage in unacceptable behaviour. As the majority of tax advisers adhere to high professional standards, any measures introduced need to be targeted.

b) Transactions within the scope

The proposed rules must be clear as to which transactions are in scope. For instance, it remains unclear whether transactions that are undertaken wholly outside of the EU but which impact taxes being paid the EU, are within scope.

II: Definition of Terms

'Enablers' and 'Intermediaries'

The directive must contain precise definitions of terms to be used to ensure that taxpayers have the highest possible level of legal certainty. Vague terms are unhelpful, leading to additional cost and potential litigation.

The key term - 'Enabler' - needs to be carefully defined, so that it is clear who is in and who is out of scope. It might encompass a potentially broad group of people (as is the case for example with the UK's Enablers Penalty Legislation, but where it is associated with a very clearly and narrowly targeted range of serious avoidance activity) and may need further explanation via Guidance Notes, which would be acceptable as long as all stakeholders accept this as reasonable and understand who is within scope and who is not.

Alternatively, if the Commission uses the word 'tax intermediary', in the place of 'Enabler', this concept should also be defined and would presumably then include investment bankers, lawyers, notaries and other professionals who can act as tax intermediaries. The definition will also need to include those businesses that are not regulated by any professional association or body, but which provide tax intermediary services – i.e. agents requesting income tax refunds on behalf of their clients etc.

In the DAC6 there is a 'definition' of intermediary and the circumstances where a person other than an intermediary has a reporting obligation, i.e. professional privilege. We are concerned that introducing additional concepts such as 'Enabler' in addition to existing definitions will cause confusion, uncertainty and limit the impact of any reporting obligation.

'Aggressive Tax Planning' and 'Tax Evasion'

CFE stresses that there needs to be an agreed EU level definition of both 'aggressive tax planning' and 'tax evasion' so that their meaning is clear and understood, and there is no risk of conflating the two. If there is no definition of the basis on which intermediaries would be penalised, this would cause uncertainty and unequal treatment, contrary to the general principles of EU law.

With respect to aggressive tax avoidance, policymakers should be focused on tax planning arrangements that are highly artificial or contrived, without economic substance, which are created for the essential purpose of avoiding taxation and achieving a tax benefit which would not otherwise exist. As per the general anti-abuse rule (GAAR) in the EU 2016 Anti-Tax Avoidance Directive (ATAD), the main target of policymakers are arrangements which defeat the object of applicable tax legislation, are not genuine and are not put in place for valid commercial reasons which reflect reality.[3]

[3] Cf. In VAT, the CJEU has stated in case C-255/02, that: "The Sixth Directive must be interpreted as precluding any right of a taxable person to deduct input VAT where the transactions from which that right derives constitute an abusive practice. For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding

Although the EU has adopted the ATAD, it is clear that definitions remain problematic at EU level. Neither EU primary nor secondary legislation defines the notion of "tax avoidance" (or as noted above 'aggressive tax planning'), primarily due to the evolution of the concept over time, geography and legal systems within the EU.

Establishing a 'bright line' test to distinguish between aggressive tax planning and non-aggressive tax planning will not be straight forward. We believe the GAAR is the appropriate mechanism to apply to cases where there is disagreement between two parties as to whether an arrangement is abusive or not. A clear framework is therefore required. If the definitions are vague or too wide drawn, they will have a disproportionate impact on the large body of reputable tax advisers who are not the focus of the Directive and a cost to taxpayers.

The list of hallmarks in the Annex to DAC6 appears intended to identify characteristics of aggressive avoidance, but in practice covers far more tax arrangements. If this approach is adopted, then there should be a link between both so that there is more legal certainty as to the advice which is unacceptable and should be attacked/challenged. If new unacceptable advice is identified (because this is of course an evolving concept), the Annex to DAC6 should be revisited and amended. This is the only way to maintain a certain level playing field among the 27 Member States' tax authorities and domestic courts' understanding of the concept of "Aggressive tax planning" towards taxpayers' activities, hence contributing to a much-needed increase in legal certainty in the EU.[4]

In broad summary, the work of policymakers to target aggressive avoidance has centred on abuse, as distinct from both tax evasion – where a taxpayer breaks the law by, for example, not reporting income or simply not paying taxes due – and 'acceptable' tax planning which is where a taxpayer's obligations are minimised through the appropriate, i.e. non-abusive, use of tax deductions, tax deferral plans and tax credits as foreseen by the legislator.

II: Taxes Covered

The consultation document and the Information Note do not expressly outline the taxes to be covered by the proposed directive. The taxes within scope must be sufficiently detailed in an annex, although CFE appreciates that this will make the annex substantial and subject to regular change/update.

formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage".

4 If all taxes are in scope of the proposed directive, then additional taxes – i.e. VAT will need to be added to the DAC 6 annex; see below comments on Option 2.

5. CFE Comments on the Policy Options

CFE have detailed below its comments on each of the Options set out in the Information Note.

Option One: Requirement for all enablers to carry out dedicated due diligence procedures (DD)

In general, CFE does not object to looking to the UK/ Irish approach of defeated schemes (courts and legislation), and the principle of 'due diligence'. The UK position, for example, is that it is up to advisers to make sure that they steer clear of falling into the Promoters of Tax Avoidance Schemes (POTAS regime) by having procedures/checklists/processes etc in place so that they can identify any advice etc that may be construed as 'aggressive' (referred to in the regime as 'relevant arrangements'). It is in effect placing a burden/cost on advisers to ensure that they stay compliant and outside the regime (POTAS). There is no requirement to submit the due diligence reports to HMRC/the UK tax authority. HMRC will only investigate an adviser if they suspect them of being a promoter ('Enabler' in EU terminology), presumably identifying them through risk assessment techniques and intelligence gathering. In such a scenario the question remains of who will issue conduct notices, stop notices etc at EU level, and might lead to an EU regulator being created.

CFE's view is that any EU proposals should not have a disproportionate impact on reputable tax advisers, e.g., members of professional organisations who are giving advice on market-based, commercial transactions. Any additional compliance burden for reputable tax advisers must not go beyond reasonable 'due diligence' to ensure that they stay clear of the promoting of aggressive avoidance regimes.

Any tax avoidance legislation to address the issue of 'Enablers' that is introduced should be designed to minimise costs and administrative burdens on reputable advisers who are not involved in 'aggressive tax planning' (however that is defined). Also, such a regime should NOT have an impact on normal commercial activities and transactions, but should be focused on tax avoidance schemes.

CFE notes that any proposed EU legislation requiring additional due diligence and/or registration may hamper competitiveness and create situations where taxpayers cannot access tax advice because the compliance obligations can only be fulfilled by large firms, potentially shutting smaller providers of professional tax advice out of the market. This will likely depend on how specific is the definition of 'aggressive tax planning'. CFE's expectation is that only a small minority of advisers would fall into what one would consider to be Enablers of 'aggressive tax planning'.

Due Diligence obligations will add another layer of compliance on intermediaries and additional cost to taxpayers, potentially making tax advice a "luxury product" at the expense of leaving many EU taxpayers incapable of accessing professional tax advice at a reasonable cost. It creates an unlevel playing field with better resourced tax authorities which goes against the fundamental right of defence.

Option Two: Prohibition to facilitate tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for enablers to register in the EU

CFE understands that this option is in effect an extension of Option 1 by requiring registered intermediaries (both EU and non-EU) under Option 2 to carry out the due diligence requirements in Option 1.

Registration of tax intermediaries is an important step to appreciate the potential businesses within the scope of the directive. However, this requirement should, in CFE's view, be implemented by Regulation to ensure that the same definition of 'intermediary' is applied in all EU Member States and reduces the chances of mismatches arising.

The registration process should be organised nationally, but the data held on a single EU wide and publicly accessible database such as the VIES system or registration in the EU's Transparency Register. Non-EU intermediaries could select one Member State as the point of registration as is done for example with the non-EU OSS system.

The question of enforcement will arise, and the sanction suggested in the Information Note will of course only be effective ex ante.

Option Three: Code of Conduct for all Enablers

CFE points out that a code of conduct and monitoring it are in fact a form of regulation. CFE disagrees with putting some aspects of a system in place without a whole structure being clearly detailed and defined. It is particularly dangerous to base a proposed directive on such vague definitions such as those introduced and used in the Consultation Document. This needs to be accompanied by a proper appreciation of the diverse landscape of the tax profession across Europe.

We call on the Commission to consider how the CFE paper 'Professional Judgment in Tax Planning' closely[5] can provide a roadmap towards greater responsibility to clients by introducing more transparency between clients and their intermediaries. Tax advisers and intermediaries must be protected from clients 'adviser shopping' or putting undue external pressure on advisers by ensuring that there is a level playing field across all Member States with identical regulatory frameworks and sanctions for non-compliance.

Reporting Obligation of Shareholder Interests

In the same manner, a new reporting obligation on EU taxpayers on their holdings of interests above 25% in non-listed EU companies seems to be in duplication of statistical reporting obligations already in existence for investments abroad as well as with consolidation accounting

[5] CFE Tax Advisers Europe, Professional Judgment in Tax Planning (June 2021): https://taxation-customs.ec.europa.eu/system/files/202110/211007%20TGG%20Platform%20Meeting_CFE%20discussion%20paper_Ethics%20Quality%20Bar%20for%20Ta x%20Advisers.pdf

requirements, where these kinds of interests are already identified. In this matter, we also have the UBO registration requirements in Europe in accordance with the 4th AML Directive. This option is not retained in the 'Information Note'.

6. Conclusion

A 'one-size-fits-all' approach to regulating tax professionals is difficult to achieve in Europe (and consideration should be given to global standards in this area). We must ensure that whatever legislative measures are introduced that they suit the objectives of the initiative. The regulatory culture differs significantly across European states, both within and outside of the EU. It is important in this discussion to recognise the significant differences that exist between the role, functions, and attributes of tax intermediaries in different countries. We, therefore, need to ensure that all tax intermediaries operate to the highest possible standards. It is a question which calls for a holistic policy approach.

CFE believes that it is essential for the envisaged dialogue to encompass the role of tax advisers who work outside of any professional affiliation and to consider the significant evolution of the tax services market in the light of technological change and indeed how tax administrations can more effectively use tax technology.[6] CFE member bodies across Europe are engaged in various efforts to draw their members' attention to ethics in their mandatory professional training and other updates, as part of ongoing efforts to support high-quality work among their members in a way which provides confidence to the market and helps to distinguish them from other tax service providers. It should be noted that anti-money laundering (AML) rules are directed at all providers of tax advice, and there is considerable focus by regulatory authorities on AML matters at the current time.

CFE underlines the importance of having tax authority participation in the open dialogue. It will be beneficial to receive input on any areas where the initiative to raise the quality bar for ethics should place emphasis, and where relevant, how the quality bar could be pursued with respect to unaffiliated advisers.

Nonetheless, CFE is of the view that a thorough detailed analysis of existing legislation and its application (up to and including DAC6) must be carried out before any new legislative initiative is introduced and detailed consideration given to a more generalised use of existing legislation by all Member States.

[6] See for example, European Commission, Directorate-General for Taxation and Customs Union, Luchetta, G., Giannotti, E., Dale, S., et al., *VAT in the digital age: final report. Volume 1, Digital reporting requirements*, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2778/541384