

CCBE response to the public consultation on tackling the role of enablers

7 October 2022

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.

2 About you

2.1 Language of my contribution

English

2.2 I am giving my contribution as

Other

2.9 Organisation name

Council of Bars and Law Societies of Europe

2.10 Organisation size

07.10.2022

15-20

2.11 Transparency number

4760969620-65

2.12 Country of origin

Belgium

2.14 Contribution publication privacy settings Additional help available

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.

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 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. (word limit: 5000 characters)

- The CCBE considers that EU Member States must tackle tax fraud. The CCBE firmly condemns any lawyer engaging in illegal activities. Such lawyers face both criminal charges in front of ordinary courts and disciplinary sanctions which include disbarment.
- On the other hand, the CCBE takes the view that “tax optimisation” or “aggressive tax planning” are not prohibited by law. Indeed, a number of Member States have obtained rulings from their Constitutional Courts confirming that a taxpayer can legitimately follow the most favoured tax route and that a tax motivation as a component of a transaction is not against the Constitution as long as the underlying transaction is genuine and not fictitious.
- The extent of “aggressive tax planning” or “tax evasion” is difficult to evaluate as those terms are not well defined. We understand that the questionnaire equates tax evasion with “tax fraud” as a criminal offence such as defined under national law.
- Therefore, the CCBE can hardly evaluate the scale of those issues. Only tax administrations can do so following their tax audits.
- Regarding the effectiveness of the latest EU instruments, it appears that the latter do not eliminate the issues as anticipated by the Commission as “harmful tax practices” survive as a result of attractive tax regimes voted by national Parliaments in the context where there is no harmonised direct tax regime in the EU.

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.

- High-profile cases such as the “Panama Papers” and the “Pandora Papers” may create the impression that those cases are (i) more numerous than they were before and (ii) more numerous than they actually are.
- Those high-profile cases are not an accurate measure to determine the extent of the issue.
- Furthermore, certain tax authorities who have had knowledge of “undesirable measures” for a long time have not taken action to prohibit them (e.g. “CumEx” in Germany).
- Therefore, the CCBE is not in a position to reply to this question.

3.5 Enablers play an important role in facilitating tax evasion and aggressive tax planning. 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

3.6 Please explain your reply.

- The CCBE strongly opposes the generic categorisation of lawyers as “enablers”.
- The statement that “Enablers play an important role in facilitating tax evasion and aggressive tax planning” confuses two separate situations with two separate consequences. Enabling tax evasion is a criminal offence. Aggressive tax planning is not unlawful. Therefore, the question asked conflates two contrasting activities.
- As it stands in the consultation, the term “enabler” refers to a very broad population including, on the one hand, regulated professions subject to ethical rules and, on the other hand, unregulated “boutique firms” who have no legal background nor any legal skills. It appears though that the latter may promote or replicate tax schemes without having a personal nor a professional understanding of their legal and tax consequences.
- In this regard, the CCBE suggests referring to the OECD, which, unlike the Commission in this questionnaire, has indicated that: “The majority of professionals are law-abiding and play an important role in assisting businesses and individuals to understand and comply with the law and helping the financial system run smoothly. Such law-abiding professionals are to be differentiated from a small set of professionals who use their skills and knowledge of the law to actively promote, market and facilitate the commission of crimes by their clients” (See OECD, February 2021, “Ending the Shell Game: Cracking Down on the Professionals who Enable Tax and White Collar Crimes”).
- In other words, the OECD refers to professional enablers as those who deliberately facilitate “wrongdoing” by their clients.
- The CCBE claims that the term “enabler” must be used carefully, pointing the finger at a small group of professionals engaged in criminal activities.
- Referring to lawyers involved in providing tax advice as “enablers” pictures a wrong image of the profession. Lawyers are genuinely gatekeepers, not “enablers”.
- The legitimate task of lawyers is to draw a line between tax fraud and the most tax-friendly way of setting up a structure while complying with the law.
- Lawyers play an important role in the prevention of crime as they advise clients on how to stay within legal boundaries. For example, they are already required to file suspicious transaction reports (STRs) in case of identified tax fraud or laundering of proceeds from tax fraud (which does not include legally permitted activities such as “aggressive tax planning”, tax optimisation, etc.).
- In addition, very few lawyers are prosecuted and convicted by EU courts for engaging in illegal activities. This demonstrates the high professional standards which the profession operates within.
- Eventually, the responsibility of Member States to design their laws to attract business in the context of the freedom of establishment and the free movement of capital enshrined in the TFEU (Art. 49 & 63) remains a core issue.
- The legitimate inclination of taxpayers to pay the “lower appropriate amount of tax” is a freedom recognised by most Constitutional Courts, and a clear border between this ancient freedom and the latest anti-abuse provisions remains to be stabilised. In this regard, lawyers will be key players and should not be prevented from doing their job.
- The merit of a tax motivation as a clear component of a transaction should be defended by lawyers and citizens as long as the underlying transaction is genuine and not fictitious.
- Any EU regulation aimed at bringing limitations to this long-established freedom must match requirements laid down in Art. 52 of the EU Charter of Fundamental Rights.

- Any tentative limitation brought to the activity of lawyers to discuss those tax issues with their clients first, then with the tax authorities during the course of tax audits and eventually in court would simply sound the end of the rule of law.

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)	X				

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

- As indicated above, "aggressive tax planning" is not well defined and is very much dependent on the facts and circumstances of each case.
- The exercise by taxpayers of the various freedoms recognised in the Treaty based on genuine transactions should not qualify as "aggressive tax planning".
- Subject to the observance of professional rules of conduct and the rule of law, a lawyer acts primarily in the best interests of the client. It is not for the lawyer to fill in the gaps or uncertainties left by parliaments and governments.
- Regarding the reservations one may have vis-à-vis the above-mentioned elements, a company may, for example, be created without a full set of in-house resources and still be set up for legitimate reasons and act in accordance with the laws so that it should not be challenged or disregarded for tax purposes.

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.

- More robust definitions and a clear border between “aggressive tax planning” and “tax optimisation” at an EU level would be most helpful for taxpayers as well as a clear border between those terms and “tax fraud/tax evasion” (considered equivalent in the questionnaire) defined as a criminal offence.

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

- The EU has taken a significant number of initiatives recently to combat the erosion of the tax base: ATAD, DAC6, CBCR, etc.
- Instead of trying to generate a new layer of regulations in haste, the CCBE strongly suggests taking a pause and evaluating the outcome and merits of those latest regulations.
- It has also been noted in a recent study 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.” (See Emer MULLIGAN, Edidiong BASSEY, Dennis DE WIDT, Marco GREGGI, Dirk KIESEWETTER and Lynne OATS, 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).
- DAC6 is an example of a good regulatory tool aimed at identifying issues by way of hallmarks which clearly puts the responsibility on the Member States to close the loopholes in their legislations. Regarding DAC6, the CCBE only argues that a lawyer should not be a reporting agent as taxpayers can do the reporting themselves and lawyers should not be required to illegitimately breach their legal duty of professional secrecy.
- One should first let DAC6 produce its effects before creating a new layer of regulation.

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.

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 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.

- A statement that provides that "Enablers should be prevented from designing, marketing, organising or assisting in the creation of tax schemes that lead to evasion and aggressive tax planning" creates the impression that all "Enablers" are involved in facilitating tax evasion and aggressive tax planning. This is not helpful and is completely misrepresentative of the work undertaken by respectable and responsible professionals.

- The initiative should not impede the creation of "legitimate"/"genuine" tax solutions. A too far-reaching initiative could go against the entrepreneurial freedom for lawyers as well as against the freedom of establishment and the free movement of capital for companies, as it would excessively limit their capacity to take advantage of the internal market.

- If lawyers were irrevocably regarded as enablers, the assumption under question 4.3 would mean that lawyers would not be allowed to fulfil their fundamental duty to provide legal advice in all circumstances.

- When Member States increase the complexity of tax laws, the principle of proportionality (and equality of arms) requires that taxpayers are granted access to professionals to help them determine what is permissible and what is not. By creating grey areas in tax law and threatening with harsh sanctions against those professionals, one creates a "better safe than sorry" and "cover your rear" attitude whereby professionals will tell taxpayers that they should pay the highest amount of tax in case of doubt, just to avoid tax professionals themselves to be labelled as "enablers" and sanctioned accordingly. This would actually harm the rule of law.

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.

- In principle, self-assessment may be good idea in the framework of know-your-customer (KYC) procedures and "acceptance of clients" processes.

- The question is incomplete though as it does not say if the due diligence would lead to the filing of a suspicious transaction report (STR) as is the case for tax fraud and the laundering of tax fraud.

- The CCBE would disagree with any STR for "aggressive tax planning" which is not a criminal offence.

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				X	
Optional registration that gives access to certain benefits (e.g. submitting tax return on behalf of their clients)				X	
Other (please specify)					

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

- The idea of a "register" should simply be dropped for lawyers and be limited to those professions who do not carry on a regulated activity as part of a new set of regulations applicable to those unregulated professions.

- Access to the profession, eligible activities, ethical rules, disciplinary procedures and sanctions for breaching those ethical rules, etc. are already highly regulated for lawyers in the Member States.

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?

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

4.10 Please explain your reply.

- In a number of EU countries, tax advisers are not lawyers and are not members of bars.
- Such a code of conduct could yet be conceived for unregulated professionals who are not covered by professional rules and are not members of a professional association that supervises their registration, their skills, and has disciplinary power over them.
- Lawyers have already in-depth rules for access to the profession and ethical rules which prevent them from carrying out illegal activities, including possibilities to be disbarred if doing so. It is therefore unclear what the added value of such a new code for lawyers would be.
- So far, there is no EU harmonisation regarding the access to the profession of lawyer nor the way the business is conducted.

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.

It seems that the issue is already handled through the Country-by-country reporting regulation as well as the various controlled foreign corporations (CFCs) legislations.

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					X

Resource allocation across the EU would be optimised through better distribution of tax burden across taxpayers					X
Higher tax fairness as all companies would pay their fair share (levelled playing field)					X
Improved level playing field for enablers regardless of their location (as all enablers would be prohibited from tax evasion and aggressive tax planning)					x
Other (please specify)					

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

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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.)

- An initiative using the term "enablers" in such a broad way as it is suggested in the public consultation is disproportionate as it contributes to a misrepresentation that tax advice is an illegitimate activity. It brings reputational damage even to the vast majority of those intermediaries and professionals who abide by the law and their professional rules.

- Overreaching measures would be seen as an obstacle to the various freedoms provided for by the Treaty and would undoubtedly be challenged before the EU Court of Justice as well as various Constitutional Courts.

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)					x

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

As already explained above, those new provisions are unlikely to be applicable to lawyers who are already highly regulated with respect to the same matters.

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.

The CCBE is of the view that it is time to make a pause in the regulations for 2 to 3 years and evaluate the merits of what has been done so far before taking new actions.

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
- 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
- Other

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

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
- 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.

None