

Commissioner Moscovici
DG TAXUD
Rue Montoyer 59
1000 Brussels

Brussels, 16 February 2017

Subject: European Commission's Public Consultation - Disincentives for advisors and intermediaries for potentially aggressive tax planning (ATP) schemes

Summary

- *Most tax work performed by accountants is beneficial to the economy and improves tax collection.*
- *Taxpayers need continuing access to high quality tax services.*
- *If ATPs are to be reported, there must be clear and defined criteria for determining those schemes to be reported.*
- *Apart from the promoters of pre-packaged ATPs, any disclosure should be by the taxpayer - they are responsible for signing the tax declarations and may have sole access to the full details of the ATP.*
- *Automatic exchange of ATPs should be limited to those that have a cross-border element.*
- *Member States should be encouraged to publish codes of conduct in giving tax advice, specific to their local market conditions and in cooperation with the relevant professional bodies.*

Dear Commissioner,

We have pleasure in submitting our response to the above named open public consultation, together with a cover letter that should be read as part of our formal response.

There has been an undeniable change in the public perception of tax avoidance across the EU- particularly since the economic crisis and its associated austerity measures have drawn attention to the strains on the public purse that "aggressive" tax avoidance can bring.

Legislators, taxpayers and tax advisors have all failed to keep pace with this shift in perception. After having considered tax as a purely technical matter, the profession now recognises and is committed to addressing the broader political dimension of the issues at stake. For the profession, this means taking greater account of the public interest.

The accountancy profession continues to play its full role in the public debate – as evidenced by recent Accountancy Europe events¹ and publications² dealing with tax policy issues. It continues to strengthen its professional standards relating to ethics and independence, and, at a practical level, helps tax administrations across the world in capacity building and the implementation of IT solutions.

We commend the European Commission for including all intermediaries within the scope of the consultation – achieving a level playing field across the many different “tax intermediaries” and the diverse legislative frameworks within the EU will be challenging but is essential to ensure the effectiveness of any measures undertaken and to avoid distortions of competition.

ACCOUNTANTS CONTRIBUTE TO THE PROPER FUNCTIONING OF TAX SYSTEMS

Most tax work performed by accountants on behalf of their clients relates to:

- Compliance work to help their clients deal with increasingly complex tax systems to declare and pay the correct amount of tax at the correct time and
- Tax advisory services that help taxpayers pay the correct amount of tax and by benefiting from the incentives, reliefs and exemptions provided by law.

The activities undertaken by our members benefit the European economy by facilitating the collection of tax revenues and assisting business growth by ensuring that clients benefit, for example, from tax incentives designed to increase business investment.

Any EU level action undertaken should not put at risk taxpayers’ ability to obtain reliable, good quality tax advisory and compliance services. This would result in lower collection of taxes. Consequently, we commend the European Commission for emphasising in the glossary of this consultation that “ordinary tax planning allows taxpayers to exercise their legitimate interests to plan their tax affairs according to the national tax rules of their state of residence” and should not be brought into the scope of “aggressive tax planning”.

Different perceptions of tax avoidance increase the difficulty of introducing pan-EU legislation. What is perceived as being acceptable tax planning varies widely across the EU - and even nationally between regions and social strata. Therefore, defining what advice falls within the bounds of this tax avoidance will, inevitably, be problematic - especially when it is linked to loose concepts such as being “in contradiction with the intent of the law it purports to follow”. This is why we stress in the next section that any legislation introduced in response to ATP schemes must be based on clear, concise and objective criteria that give as much legal certainty as possible to tax authorities, tax payers and tax intermediaries.

We observe that tax avoidance and evasion are linked by implication in the preamble to the consultation. This helps promote the misconception that the two are equivalent behaviours, which they are not. We refer to a European Parliament fact sheet³ on the fight against tax avoidance, which is very clear on this. Tax avoidance, it states, is “using legally permitted measures to pay the lowest amount of tax possible”.

¹ Such as the recurring Tax Day event, roundtables on Public CbCR and CCCTB etc.

² See for example, <https://www.accountancyeurope.eu/publications/concrete-proposal-public-country-country-reporting-disclosing-tax-information/> ; <https://www.accountancyeurope.eu/publications/fee-issues-views-responsibility-accountancy-profession-tax/> & <https://www.accountancyeurope.eu/publications/tax-policy-debate/>

³ <http://www.europarl.europa.eu/news/en/news-room/20160530STO29669/corporate-taxation-the-fight-against-tax-avoidance>

On the other hand, tax evasion involves “resorting to illegal and deliberate acts to pay fewer taxes or even no taxes at all”. **The accountancy profession wholeheartedly supports measures to combat illegal acts of all kinds and has always played its part in the fight against tax evasion.**

REPORTING OF AGGRESSIVE TAX PLANNING SCHEMES

There are practical issues in reporting “aggressive tax planning”. Reporting requirements should be based on objective criteria, clearly stated in legislation. Only with clear, factual criteria will taxpayers, their advisors and tax authorities be able to properly determine what needs to be reported. Failure to set clear criteria would increase uncertainty and the risk of costly and time-consuming litigation that would not be of benefit to any of the parties concerned.

Accountancy Europe supports, in principle, the reporting promoted, “pre-packaged” schemes – in these circumstances, **promoters of such “pre-packaged” schemes are the obvious candidates to disclose the relevant details to the national tax authority.** These “pre-packaged” schemes are not a common feature in all EU Member States and, where they have been a factor in the tax planning environment, they are usually based around domestic legislation. **Promoted schemes based around national legislation are best dealt with at a Member State level,** as has occurred in the United Kingdom with the implementation of its Disclosure of Tax Avoidance Schemes (DOTAS) and Promoters of Tax Avoidance Schemes (POTAS) legislation.

In addition, many Member States have already enacted a General Anti-Abuse Rule (GAAR) or have in their domestic law a general principle of “abuse of rights\law. Additionally, they are in the process of implementing the provisions of the Anti-Tax Avoidance Directive and may well be considering implementing other aspects of the OECD’s BEPS initiative. At this stage, it is not clear what additional tools may be required at both a Member State and EU level to effectively combat tax avoidance.

If disclosure of non-“pre-packaged” ATP schemes is considered, then Accountancy Europe believes that **only the taxpayer is in a position to provide such disclosure.** This is on the basis that:

- In some Member States it is expressly forbidden by law for tax advisors to disclose such information;
- Ultimately, the taxpayer is responsible for signing any tax return;
- Where more than one advisor is engaged, only the taxpayer will have a full overview of the tax planning structure and the commercial intentions behind implementing it. This would particularly be the case in cross-border tax planning where different advisors may be used in each of the countries involved in the structure used by the client;
- It is possible that the advisor is not cognisant with all of the relevant facts - either because these have been withheld by the taxpayer or because the advisor has only been engaged to advise on specific transactions and not on the structure as a whole.

Future proposals on reporting ATP schemes should make it clear that reporting is only to be made to the national tax authority, who is then responsible for sending details of cross-border ATP schemes to the relevant tax authorities of other Member States.

AUTOMATIC EXCHANGE OF ATP SCHEMES

We agree that the automatic exchange of ATP schemes between Member States' tax authorities could be useful as a measure against **ATP schemes that have a cross-border element**. Due to the lack of homogeneity in national tax systems within the EU, we cannot see the usefulness of the automatic exchange of ATP schemes that do not have a cross-border element, as it could lead to potentially useful information being buried within a mass of data with little or no relevance to the recipient tax authority.

At a practical level, any automatic exchange of ATP schemes will require developing **EU-wide standard criteria to allow the consistent identification of cross-border ATP schemes across all Member States**. Failure to develop such criteria would lead to the information exchange being based on national legislation or practices, which could lead to the disclosure of information that is not relevant to the recipient or the failure to exchange information that could be of relevance to the potential recipient.

EU CODE OF CONDUCT FOR TAX INTERMEDIARIES

Accountancy Europe supports, in principle, the development of a pan-EU code of conduct insofar that it affects equally all of the intermediaries providing tax advisory services. However, with the different legislative environments covering tax and tax advisors across EU Member States, we believe that **it will be very difficult to design a "one size fits all" code of conduct covering all Member States**.

A practical example of the problems facing a pan-EU code of conduct relates to question 5 in section 6.2 of the consultation – namely whether intermediaries should be obliged to report use of ATP schemes by their clients. This is permissible in some Member States. In other Member States domestic laws requiring tax advisors to maintain professional secrecy in respect of their clients would make such disclosure illegal.

A better approach would be an **EU initiative calling upon Member States to implement their own codes of conduct**, tailored to the national legislative framework, in cooperation with the national professional bodies of tax intermediaries. The professional bodies are willing to work with regulators on issues such as this.

In the United Kingdom, seven professional bodies representing a large proportion registered tax advisors and all the main accountancy bodies whose members provide tax services, have pro-actively produced a comprehensive update to the UK Code of Conduct for Tax Professionals. Whilst too soon to judge the eventual impact of this initiative, this indicates the willingness of the accountancy profession to address the concerns of stakeholders. As such, it represents an important difference between the profession and tax advisors that are not members of a professional body.

We believe that this is a good model of how workable national codes of conduct can be achieved. Such national codes of conduct should also include guidance on dealing with cross-border tax planning and what constitutes responsible tax advice.

Yours sincerely,
On behalf of Accountancy Europe,

A handwritten signature in blue ink, appearing to read 'Edelfried Schneider'.

Edelfried Schneider
President

A handwritten signature in blue ink, appearing to read 'Olivier Boutellis-Taft'.

Olivier Boutellis-Taft
Chief Executive

About Accountancy Europe

Accountancy Europe unites 50 professional organisations from 37 countries that represent close to **1 million** professional accountants, auditors, and advisors. They make numbers work for people. Accountancy Europe translates their daily experience to inform the public policy debate in Europe and beyond.

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