Summary Report

Responses received on

The Commission's consultation on disincentives for advisors and intermediaries for potentially aggressive tax planning schemes

# Directorate General for Taxation and Customs Union

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## 1. Background

Recent public discussions have shown the crucial role that certain intermediaries play in facilitating tax avoidance and evasion. At international level, the OECD issued in 2015 a set of best practices on the use and promotion of potentially aggressive tax planning (ATP) schemes.

The Commission launched an open public consultation on 10.11.2016, which ran until 16.02.2017 (14 weeks), in order to gather views on whether there is a need for EU action aimed at introducing more effective disincentives for intermediaries engaged in operations that facilitate tax evasion and avoidance. The consultation also deals with how this action should be designed if it is decided that there is a need for action.

Open public consultations run by the European Commission offer interested stakeholders the opportunity to contribute to law-making by providing their views and input. The main objective is to collect views and input from stakeholders via freely accessible online questionnaires. As such, this consultation tool should not be expected to provide results that are representative of the population.

## 2. Executive Summary

**Section 3: Breakdown of responses**

The Commission received 131 responses given by a wide variety of stakeholders to the public consultation. The largest share of replies came from trade/business associations/professional associations (27%) and private citizens (20%). From a geographic point of view, the largest share of responses originates in Germany (24% of the total number of responses), followed by Spain with 15% and Bulgaria with 11%.

**Section 4: Providing and receiving tax advice**

Forty six respondents replied that they had received professional tax advice. Tax advisors constituted the largest professional group that provided tax advice (52%). Furthermore, 30 respondents replied that they provided tax advice and 10% of them indicated that they could possibly be an intermediary for potentially aggressive tax planning schemes.

**Section 5: Opinions on the objectives of the policy initiative**

The following objectives were deemed to be the most relevant to classifying aggressive tax planning schemes: artificial arrangements, preferential treatment under the application of national law, schemes designed to circumvent the Common Reporting Standard followed by the use of jurisdictions that present difficulties in identifying the beneficial owner. Amongst the most important objectives for strengthening the fight against tax evasion and avoidance was the facilitation of administrative cooperation between Member States followed by the need to improve voluntary compliance. Specifically, almost 33% of respondents considered that Member States should be made aware of any Aggressive Tax Planning (ATP) scheme whilst for 40%, it would suffice that they only be aware of such schemes if these applied within their jurisdiction. Only 21% of the respondents considered that the future common EU list of third country jurisdictions should be used for defining ATP schemes.

**Section 6: Tax transparency**

On the impacts of tax transparency, three fourths of the respondents agree/agree very much that the EU should implement the recommendations issued at the international level by the OECD. Furthermore, almost three fourths of the respondents agree/agree very much with the statement that the recommendations should be implemented alongside the global partners. More than half of the respondents also agree/agree very much that the EU should be at the forefront. At the same time, only 19% agree/agree very much that current legislation related to potential ATP schemes is sufficient and that it should be left to Member States to decide whether or not to implement a recommendation issued at international level.

Finally, only 30% of the respondents took the position that Member States would be likely/very likely to abstain from introducing transparency requirements if no EU action was envisaged. Instead, respondents considered that the most likely result would be to have different transparency requirements amongst Member States.

**Section 7: Mandatory disclosure requirements**

Twenty five percent of all respondents have mandatory disclosure obligations in their national legislation. Twenty two out of 32 respondents confirmed that such obligations changed ATP schemes. In addition, 43% of all respondents indicated that their national legislation on intermediaries included a code of conduct/ethic rules and 17 out of 56 respondents (who came from jurisdictions with a code of conduct or ethic rules) considered that such arrangements had changed the practice of tax advice.

On the general need to impose mandatory disclosure obligations, without specific reference to the EU, the number of affirmative replies was almost double as compared to that of negative ones (44% to 23%).

In terms of who should be required to follow such obligations, 36% of all respondents considered that both taxpayers and intermediaries should be required to report.

**Section 8: Policy options and their impacts**

Five general policy options were assessed for their effectiveness. Option C on the disclosure and exchange of information was found to be slightly more effective (50%) than option D (47%), which in addition provides for the publication of the disclosed information. Furthermore, the two options that considered soft-law measures were assessed to be similarly effective. Option A encourages Member States to gather and exchange information (49%) and Option E is about an EU Code of Conduct (45%). A divergence of views was recorded on whether the soft law instrument envisaged under Option E would be effective. Still, the biggest disparity of views on the effectiveness of the proposed instrument featured in Option D, which provided for the broadest scope of disclosure, including the publication of information.

## 3. Breakdown of responses

The consultation received contributions from a wide range of respondents. The highest rate of responses came from trade/business/professional associations, which amounts to 27% of the replies, followed by private citizens (20%) and law firm/tax consultancy/tax advisors (18%).





As regards the responses per country, the highest number came from Germany with 32 contributions, followed by Spain with 20 and another 3 Member States (i.e. Belgium, Bulgaria & the UK) with more than 10 replies each. Another 9 replies did not have a specific link to a Member State: 4 originated in organisations representing EU/global interests, one was from an NGO based in South Africa, another one from a consultancy in the US, and 3 replies came from private citizens in Jersey, Guernsey and Switzerland.



In terms of the size of company, 29 of the 36 participants who replied to this question represented businesses with a turnover of less than 50 million Euros whilst the remaining 7 had a turnover of more than 50 million Euros. On the numbers of employees, the replies were divided as follows:

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| --- | --- |
| Size of company | Number of replies |
| 1 - 9 employees, incl. self-employed | 20 |
| 10 - 49 employees | 5 |
| 50 - 249 employees | 4 |
| 250 or more employees | 8 |
| Total | 37 |

## 4. Professional advice

### 4.1 Receiving and using professional advice

Forty-six of the respondents to the survey (35%) indicated that they had received professional tax advice with 4 respondents acknowledging that they were users of ATP schemes.



From the replies, it appears that tax advisors represented the majority (52%) of those who provided professional tax advice:

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| --- | --- |
| Received professional tax advice from | Number |
| Tax advisors | 33 |
| Financial (investment) advisors, accountants, solicitors | 11 |
| Consultants, lawyers | 15 |
| Financial institutions or financial intermediaries, insurance intermediaries | 2 |
| Company-formation agents known as Trust and Company Service Providers | 1 |
| Others | 1 |
| Total | 63 |

### 4.2 Providing professional advice

Thirty respondents replied that they (or the entity they represented) gave professional tax advice and 10% amongst them admitted that they could qualify as an intermediary for potentially ATP schemes. From the 29 intermediaries who responded to this question, 15 indicated that they maintained contacts with the tax authorities, when supplying advice on potentially ATP schemes, in order to discuss the terms of the scheme.



## 5. Opinions on the objectives of the policy initiative

### 5.1 Classification of potential aggressive tax planning schemes

Participants were asked to consider the usefulness of a number of criteria in classifying tax schemes as potentially aggressive. Policy options designed to address artificial arrangements or an artificial series of arrangements were seen as the most useful option by 100 of 131 respondents. This was followed by criteria about preferential treatment under the application of national law (77 replies considered this very useful); by schemes designed to circumvent the Common Reporting Standard (72 replies considered this very useful); and the use of legal arrangements/entities in jurisdictions that present difficulties in identifying the beneficial owner (71 replies considered very useful). Finally, only 39 respondents considered the use of a (future) common EU list of third countries that fail to comply with tax good governance standards as very useful. In fact, 67 respondents replied that this would be of limited use; for example, only in combination with other criteria.

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| --- | --- | --- | --- | --- |
| Criteria | Not useful at all | Of limited use, e.g. only in combination with other criteria | Very useful | Don't know |
| Confidentiality clause | 20 | 46 | 61 | 4 |
| Premium fee | 10 | 49 | 66 | 6 |
| Use of jurisdictions in the (future) EU list of third countries that fail to comply with tax good governance standards | 17 | 67 | 39 | 8 |
| Use of certain legal arrangements/entities in jurisdictions that pose difficulties to identify the beneficial owner | 8 | 50 | 71 | 2 |
| Use of entities subject to zero taxation or less than a certain % (to be defined), including hybrid entities (i.e. entities that are treated as transparent by one country but as non-transparent by another country). | 10 | 54 | 62 | 5 |
| Schemes designed to **circumvent the** **Common Reporting** **Standard** (CRS) forautomatic exchanges of financial account information. | 5 | 47 | 72 | 7 |
| Use of a **group company in a low tax jurisdiction for intragroup financing** ofother groupcompanies in high tax jurisdictions. | 11 | 57 | 59 | 4 |
| Use of group companies with very little substance that are nevertheless entitled to tax treaty benefits and through which large amounts of money flow. | 7 | 54 | 66 | 4 |
| A general **artificial arrangement or an****artificial series of arrangements** created for theessential purpose ofavoiding or evadingtaxation and whichleads to a tax benefit. | 8 | 20 | 100 | 3 |
| **Transfer pricing arrangement which is not in conformity with the arm's length principle** and/or the OECDtransfer pricingguidelines. | 17 | 37 | 69 | 8 |
| **Profit allocation** between different parts of the same group which is **not** **in conformity with the arm's length principle** and/or theOECD transfer pricing guidelines. | 18 | 37 | 69 | 7 |
| A **preferential treatment** under theapplication of thenational tax law that isnot in line with thegeneral application orinterpretation of thelaw. | 14 | 33 | 77 | 7 |
| Other or additional criteria. | 6 | 32 | 24 | 29 |

Third country jurisdictions

On the question of whether tax planning schemes relating to countries that appear on the common EU list of third country jurisdictions should be disclosed, only 21% of all respondents found that these should automatically be treated as accommodating potentially aggressive tax planning schemes. Thirty three percent of respondents who picked 'other' gave a wide range of replies, including that such a list may be too limited in scope; or, that hallmarks should be used instead of jurisdictions; and that there may be legitimate economic reasons to have activities in such jurisdictions.

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| EU list of 3rd country jurisdictions which fail to comply with tax good governance standards |
| Reply | Number of responses |
| Yes | 28 |
| No | 50 |
| No opinion/I don't know | 10 |
| Other | 43 |
| Total | 131 |

### 5.2 Objectives of the policy initiative

The respondents were asked to consider how important a number of objectives were in strengthening the fight against tax evasion and avoidance. The aim to facilitate administrative cooperation between tax authorities, in order to tackle cross-border abuse, topped the list with 125 replies in favour (i.e. agree/agree very much). The improvement of voluntary compliance rates came second. The least popular objective with 32 negative responses (i.e. disagree very much/disagree) was to dissuade intermediaries and users of potentially aggressive tax planning schemes from engaging in such activity.



Respondents were also asked whether a potential EU policy initiative should exclusively focus on potentially ATP schemes with a cross-border dimension or address any potentially ATP scheme, irrespective of whether it is cross-border. On this question, respondents were evenly divided: 56 replied that the cross-border dimension should not be a criterion and 55 that only cross-border schemes should be included. Furthermore, 15 of the 129 replies to this question put forward another option and 3 respondents did not give an opinion.

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| Should a potential EU policy initiative focus on those potentially ATP schemes only when there is a cross-border dimension? |
| Question | Number of replies |
| Should address ATP irrespective of cross-border | 56 |
| Should address ATP only for cross-border | 55 |
| No opinion/I don't know | 3 |
| Other opinion | 15 |
| Total | 129 |

Currently, only a small number of EU national tax authorities receive information on potentially ATP schemes. Respondents were asked whether the tax authorities in all Member States should be made aware of such schemes. They were more inclined to reply that tax authorities should only be made aware of such schemes if those were applied within their jurisdiction: 53 supported this view while 43 claimed that the tax authorities should be made aware of all such schemes. The breakdown was the following:

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| --- |
| In what circumstances should tax authorities be made aware of ATP schemes? |
| Question | Number of replies. |
| Yes, Member States should be made aware of any potentially ATP schemes. | 43 |
| Yes, Member States should be made aware of potentially ATP schemes if they are applied within their jurisdiction. | 53 |
| Other opinions | 27 |
| No | 7 |
| No opinion/I don't know | 1 |
| Total | 131 |

Respondents were asked whether the national tax authorities should share information on potentially ATP schemes with the tax authorities of other EU Member States. The most popular response was that information should be shared in all cases with 49 replies in favour. It was followed by 42 replies for sharing only if a scheme features a cross-border element and only with the Member State(s) concerned.



Finally, respondents were asked whether the EU should focus on the role of intermediaries who assist in potentially ATP schemes. 70 respondents replied in the affirmative against 28 in the negative and 17 who did not express an opinion. In addition, 16 respondents put forward an alternative view.

In response to whether the EU should focus on the role of intermediaries in potentially ATP schemes, 53% of respondents agreed that this should be the focus of the EU.

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| Should the EU focus on the role of intermediaries in potential EU schemes? |  |
| Yes | 70 |
| No | 28 |
| No opinion/Don't know | 17 |
| Other | 16 |
| Total | 131 |

## 6. Tax transparency

With regard to tax transparency, respondents were asked to rate a number of statements. The highest (favourably) rated question (100 'agree/agree very much' out of 131 replies) was that the EU should implement recommendations issued at international level by the OECD. Furthermore, almost two thirds (82 out of 131) of the respondents agreed/agreed very much with the statement that the recommendations should be implemented alongside the global partners. More than half of the respondents (68 out of 131) also agreed/agreed very much that the EU should be at the forefront. The least favourably rated response (25 'agreed/agreed very much' out of 131 replies) was that current legislation is sufficient and should be left to Member States.



Respondents were then asked to consider the consequences in the event of no EU action. A hundred and seven out of 131 replied that Member States would still be likely/very likely to take action and introduce differing transparency requirements at the national level. Conversely, 39 (out of 131) respondents – around 30% of the overall number - took the position that Member States would be likely/very likely to abstain from introducing transparency requirements. From the main stakeholder groups who replied to this question, 38% of consultancy/tax advisors, 32% of private citizens and 21% of NGOs aligned with the above view.



### 6.1 Direct and indirect impacts

Respondents were then asked what would be the direct consequences if advisors/intermediaries were obliged to report potentially ATP schemes. For this question, the divergence in responses was less marked. The most likely consequence, with 79 respondents stating 'agree/agree completely', was that there would be an easier evaluation of national tax legislation with a view to detecting and addressing loopholes that allow for tax avoidance and evasion. With 55 respondents stating 'agree/agree completely', the least likely consequence was seen as being to improve voluntary compliance in general by providing reassurance on the fairness of the taxation system.



Indirect consequences:

Ninety two respondents considered that there would be an increase of the administrative burden for public authorities. The next most likely indirect impacts are linked to the creation of a level-playing field between SMEs and large companies in terms of competitiveness. Thus, opportunities would be reduced for large companies to take advantage of ATP schemes. At the other end of the spectrum, a growth-friendly environment and the attractiveness of the EU as a place to invest feature as the least likely consequences of EU action.



Other impacts:



## 7. Mandatory disclosure obligations

### 7.1 Existing mandatory disclosure obligations

Twenty five percent of all respondents replied that they had rules in their national legislation on the mandatory disclosure of tax planning schemes **for taxpayers**.

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| Are there mandatory disclosure obligations for taxpayers in your national legislation? |
| Yes | 33 |
| No | 64 |
| Don't know | 34 |
| Total | 131 |

Respondents were then asked whether these mandatory disclosure obligations changed ATP schemes following their introduction. Twenty two out of 32 respondents confirmed that the introduction of such obligations did change ATP schemes. Furthermore, 62 of 93 respondents considered that if such obligations were to be introduced, they would change ATP schemes.

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| --- | --- | --- |
|  | Did ATP schemes change following the introduction of mandatory disclosure requirements for taxpayers? | In your view, would the introduction of mandatory disclosure requirements for taxpayers change ATP schemes? |
| No. | 3 | 9 |
| Yes, to some extent. | 19 | 47 |
| Yes, to a large extent. | 3 | 15 |
| I don't know. | 7 | 22 |
| Total | 32 | 93 |

### 7.2 Mandatory disclosure regimes for intermediaries

Twenty one percent of all respondents replied that they had rules in their national legislation on the mandatory disclosure **for intermediaries** who assist in potential ATP schemes:

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| --- |
| Are there mandatory disclosure obligations for intermediaries in your national legislation? |
| Yes | 27 |
| No | 61 |
| Don't know | 43 |
| Total | 131 |

Respondents were then asked whether these mandatory disclosure obligations changed ATP schemes following their introduction. Twenty two out of 26 respondents confirmed that the introduction of such obligations did change ATP schemes. Furthermore, 72 out of 104 respondents considered that if such obligations were to be introduced for intermediaries, they would indeed change ATP schemes.

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| --- | --- | --- |
|  | Did ATP schemes change following the introduction of mandatory disclosure requirements for intermediaries? | In your view, would the introduction of mandatory disclosure requirements for intermediaries change ATP schemes? |
| No. | 2 | 11 |
| Yes, to some extent. | 18 | 52 |
| Yes, to a large extent. | 4 | 20 |
| I don't know. | 2 | 21 |
| Total | 26 | 104 |

**Code of Conduct**

Forty three percent of all respondents indicated that intermediaries were subject to a code of conduct or ethic rules on the use of potentially ATP schemes whilst 37% were not aware of whether such rules existed in their national legislation.

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| Is there a code of conduct or ethic rules for intermediaries in your national legislation? |
| Yes | 56 |
| No | 26 |
| Don't know | 49 |
| Total | 131 |

Seventeen out of 56 respondents (who came from jurisdictions with a code of conduct or ethic rules) considered that the introduction of a code /ethic rules changed the practice of tax advice. This said, 17 out of 25 respondents expressed the view that if a code of conduct/ethic rules were to be introduced, the practice of tax advice would change.

|  |  |  |
| --- | --- | --- |
|  | Did tax advice practice change following the introduction of a code of conduct or ethic rules? | In your view, would the introduction of a code of conduct or ethic rules change tax advice practice? |
| No. | 10 | 7 |
| Yes, to some extent. | 10 | 17 |
| Yes, to a large extent. | 7 | 0 |
| I don't know. | 29 | 1 |
| Total | 56 | 25 |

### 7.3 Need to target mandatory disclosure

Despite the positive results of the introduction of mandatory disclosure requirements, only 44% of all respondents replied positively to the question on whether there is a need to impose mandatory disclosure requirements. Yet, this percentage was still significantly higher compared to the 23% of respondents who denied the need for action. The views diverged widely, depending on the respondent category, on whether there was a need to impose mandatory disclosure obligations: 93% of NGOs and 68% of private citizens replied in the affirmative whilst only 17% of the consultancy/ tax advisors and trade business associations considered that mandatory disclosure obligations were required.

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| --- |
| Is there a need to impose mandatory disclosure obligations? |
| Yes | 58 |
| No | 31 |
| No opinion/I don't know | 14 |
| Other | 28 |
| Total | 131 |

### 7.4 Taxpayers and intermediaries

Thirty six percent of all respondents considered that both taxpayers and intermediaries should bear mandatory disclosure obligations whilst 25% of respondents offered another opinion. Opinions also differed significantly amongst the main stakeholder groups regarding their response to the question whether both intermediaries and taxpayers should report. Although this option was supported by 84% of NGOs and 54% of private citizens, consultancy/tax advisors and trade/business associations were positive only at 11 and 8% respectively.



If there is no intermediary, for instance where a company/group develops a tax planning scheme "in house", 56% of all respondents agreed that the burden of disclosure should fall on the taxpayer.

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| --- |
| In the absence of an intermediary should the taxpayer be obliged to disclose the relevant information? |
| No | 17 |
| Yes | 74 |
| No opinion/I don't know | 18 |
| Other | 22 |
| Total | 131 |

### 7.5 Scope of the mandatory disclosure

Most of the listed items scored high as potential inclusions in the scope of mandatory disclosure. The following items were found to be useful/very useful by over 100 respondents: details of potential ATP schemes; hallmarks that qualify a tax planning scheme as potentially aggressive; identification of the different jurisdictions used in the scheme; and description of the tax benefit or advantage. Conversely, the list of clients and the Member State of residence of clients, which are both linked to disclosures made by intermediaries, were found to be useful/very useful by less than 70 respondents.



## 8. Policy options and their impacts

Respondents were asked to rate a number of policy options in terms of whether those met the identified primary objectives. Option D, which suggests reporting and exchanging information as well as publishing this input, received the highest ratings (223) on the assessed objectives. It was closely followed by Option C on reporting and exchanging information, which gathered 217 positive ratings.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| 7.1 Which policy option is best suited for obtaining the objectives | Rating | a. Dissuade intermediaries and users of potentially aggressive tax planning schemes from using them | b. Ensure that national tax authorities have timely access to relevant information on such schemes | c. Avoid distortions in the Single Market due to diverging reporting requirements as regards such schemes so as to ensure a level playing field amongst intermediaries | D. Facilitate administrative cooperation between tax authorities in order to stop cross-border abuse | e. Improve voluntary compliance by introducing reassurances on the fairness of the tax system | Total |
| 0: No action at the EU level | Positive | 6 | 8 | 5 | 6 | 7 | 32 |
| Neutral  | 27 | 24 | 25 | 23 | 38 | 137 |
| Negative | 42 | 38 | 39 | 41 | 25 | 185 |
| A. Encourage MS to use currently available exchange of information mechanisms (DAC) | Positive | 23 | 27 | 22 | 40 | 20 | 132 |
| Neutral  | 30 | 33 | 22 | 21 | 40 | 146 |
| Negative | 20 | 8 | 24 | 7 | 9 | 68 |
| B. Reporting | Positive | 40 | 25 | 34 | 18 | 19 | 136 |
| Neutral  | 21 | 33 | 23 | 39 | 37 | 153 |
| Negative | 12 | 10 | 11 | 11 | 11 | 55 |
| C. Reporting and Exchange of Information | Positive | 51 | 49 | 43 | 48 | 26 | 217 |
| Neutral  | 15 | 11 | 16 | 11 | 32 | 85 |
| Negative | 7 | 7 | 9 | 7 | 9 | 39 |
| D. Reporting (Option B) or Reporting and Exchange of information (Option C) + Publication | Positive | 46 | 45 | 42 | 47 | 43 | 223 |
| Neutral  | 20 | 18 | 20 | 18 | 17 | 93 |
| Negative | 8 | 8 | 9 | 8 | 11 | 44 |
| E: EU Code of Conduct | Positive | 31 | 24 | 25 | 21 | 36 | 137 |
| Neutral  | 32 | 36 | 35 | 39 | 23 | 165 |
| Negative | 12 | 11 | 11 | 11 | 12 | 57 |

Respondents were asked to rate how effective the policy options would be in deterring taxpayers from using potentially ATP schemes. The following options were considered almost equally effective: Option C: Disclosure and exchange of information (50%); Option A: encourage Member States to use current exchange of information mechanisms (49%); Option D: disclosure (option B) and exchange (Option C) + publication (47%); and Option E: EU Code of Conduct (45%).

With respect to Option E on a code of conduct, opinions differed significantly amongst the main stakeholder groups. Fifty eight percent of the consultancy/tax advisors and 69% of the trade/business associations considered that option E was effective/very effective whilst only 16% of NGOs, 32% of private citizens and 33% of academics shared the same view. Those who rated this option as being of low effectiveness considered that a code would be weak in enforcing the rules and would lack a strong sanction regime. The respondents who replied favourably to this option noted that an effective code of conduct existed in their jurisdiction and that intermediaries already had obligations to act in the public interest and not engage in tax evasion/avoidance.

With regard to Option D, which provides for broad disclosure, including publication, opinions on its effectiveness differed again significantly amongst the main stakeholder groups. Eighty nine percent of NGOs, 75% of companies and 60% of private citizens assessed this option of broad disclosure as effective/very effective, contrary to only 25% of consultancies/tax advisors and 19% of trade/business associations who shared this view.

