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Securing the **Activity Framework** of Enablers

The European Union's Securing the Activity Framework of Enablers (SAFE) policy aims to step up the fight against tax evasion and aggressive tax planning. SAFE's goal is to prevent certain tax intermediaries, which the European Commission (EC) refers to as "enablers", from setting up complex and non-transparent structures in non-EU countries because such structures erode Member States' tax bases through tax evasion or aggressive tax planning.

The Commission is considering a range of options in this respect, including:

- a requirement for all enablers to carry out dedicated due diligence procedures;
- a prohibition on facilitating tax evasion and aggressive tax planning combined with due diligence procedures and a requirement for enablers to register in the European Union; and
- a code of conduct for all enablers.

Although the aims of SAFE are admirable, the framework as it currently stands gives rise to certain areas of concern.

Definition of "Aggressive Tax Planning"

The lack of definition from the Commission could create challenge. The Commission needs to clearly and concisely define what constitutes aggressive tax planning or provide a set of parameters outlining the activities that fall into aggressive tax planning. SAFE consultation responses considered whether the scope of the definition will be narrow enough to identify highly artificial and contrived arrangements, or if it will be wider and inadvertently catch legitimate tax planning. Without a clear definition, tax advisers will not be able to decide on the appropriate tax advice to give.

Connection of Evasion and Aggressive Tax Planning

The use of the terms "evasion" and "aggressive tax planning" in conjunction is unhelpful, leading to the possible conflation of the terms. Collins dictionary defines tax evasion as "***the act of reducing the amount of tax that you have to pay by using illegal methods.***"[1] Tax planning is legal with certain types (aggressive) considered unacceptable. The Commission needs to make a clear distinction between the two terms. Is this a shift to a broader use of terminology since in the past reference was made to "evasion and tax avoidance" rather than evasion being coupled with tax planning?

1 https://www.collinsdictionary.com/dictionary/english/tax-evasion

Definition of "Enabler"

As with aggressive tax planning, there is no definition of "enabler". The lack of definition/clarity on the concept of "enabler" could be interpreted as negatively labelling all tax intermediaries. The vast majority of tax intermediaries seek to provide the best advice for their clients within the legal system(s) involved and in accordance with their own professional standards. Responses to the EC consultation stated that 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.

A study commissioned by the European Parliament's FISC Committee on the "Regulation of intermediaries, including tax advisers, in the EU/Member States and best practices from inside and outside the EU", July 2022[2] states:

"***Evidence […] suggests that the bulk of tax advisers are law abiding and that a few bad apples may be the problem with most of them outside the scope of the professional bodies. Further research is needed to explore the characteristics of these 'bad apples', and crucially how we manage the behaviour of these tax advisers if they are not members of any professional bodies. This research would include identifying and addressing the implementation of appropriate sanctions.***"

EU tax professionals are already subject to strict rules on ethics via their professional bodies and should be out of the scope of SAFE, unless sanctioned for tax crimes or unethical behaviour under their national law. International Ethics Standards Board for Accountants (IESBA) have an open consultation on proposed revisions to the code addressing tax planning and related services, demonstrating the commitment to maintaining high standards for accountants[3].

The definition of enabler needs to be clear enough so that relevant authorities in EU and non-EU countries can consistently apply it.

Impact of Recent Measures Introduced Remain Unassessed

Much of the data pertaining to tax loss from aggressive tax planning relates to periods prior to OECD Guidelines and EU Directives. At this stage, the impact of the OECD's Base Erosion and Profit Shifting project (BEPS), the EU's Anti-Avoidance Tax Directives (ATADs) and the Directives in Administrative Cooperation (DACs) remains unclear. Without relevant data, it is uncertain whether further policies will reduce the incidence of tax evasion and undesirable tax avoidance. The Commission should consider alternatives to regulation to address concerns around facilitating tax evasion and abusive tax planning schemes.

2 https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)733965
3 https://www.ethicsboard.org/publications/proposed-revisions-code-addressing-tax-planning-and-related-services

Increased Administrative Burden

The SAFE framework increases the potential for over-regulation as well as the adverse impacts of creating additional administrative burdens on tax advisors and tax administrations, without providing material benefit. DAC 6 (EU Directive on cross-border arrangements) has already created a reporting requirement for intermediaries in relation to certain cross border transactions. Responses to the EC consultation for SAFE suggest that the functioning of DAC 6 and other measures need evaluation before determining the need for further regulation. Other suggestions stated that amendments to DAC 6 would be more appropriate than the introduction of SAFE.

The EU is currently conducting an evaluation of The Directive on Administrative Cooperation and DAC 6 in particular, which will run until November 2023, involving consultations with a wide range of stakeholders at European and national levels. This study will provide valuable insights into the effectiveness of DAC and the necessity for SAFE.

Role of Intermediaries

The focus of SAFE is how to address legitimate tax planning where other considerations require Member States to prevent it. Implementing SAFE could also be seen to pass the burden of lawmakers on to intermediaries when giving advice on which structures or transactions are legally allowed but regarded as providing an unacceptable tax benefit.

Sovereignty

Differences in the tax systems of countries exist since taxation is a key element of sovereignty under EU Treaties, being used to finance public policies and act in the general interest of citizens of each country. These discrepancies give rise to conflicting interests between governments competing against each other to attract taxable investment.

Next Steps

The European Commission held a feedback and consultation on the SAFE proposals between July and October 2022. A summary of the responses received by the EU Commission have been published on the EU Commission's website.[4] The EU Commission had planned to adopt the final SAFE Directive in early June 2023. However, it has emerged that there are currently no immediate plans to implement the Directive. SAFE remains on the EU agenda and an update will be released in due course.

4 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13488-Tax-evasion-aggressive-tax-planning-in-the-EU-tackling-the-role-of-enablers_en

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