The EU initiative for the Securing the Activity Framework of Enablers – SAFE by Paolo Ludovici

Premise

The European Commission has recently published a "Call for evidence" to manage the role and responsibility of "enablers" or "facilitators" in structuring and creating evasive and aggressive tax schemes for their clients.
The issue has long been discussed in the field of international taxation due to the relevance that certain enablers had in the collaboration with taxpayers involved in evasive or aggressive schemes.

The necessity to tackle the issues of tax evasion and aggressive tax planning strongly and effectively is evident and it is essential to promote competitiveness and equality at the international level.

The idea of targeting not only the taxpayers – as already provided for in other Directives and proposals – but also the enablers, may present some benefits but it should also be treated with caution. While the general concept is agreeable, and the need to promote the cooperation of financial, tax, and legal advisors in the fight against aggressive tax planning and evasion is of paramount importance, the initial indications provided by the European Commission in the "Call for evidence" suggest a potentially counterproductive path to take.

The synthetic documents that the European Commission has shared, for instance, do not distinguish between tax evasion and aggressive tax planning. Such concepts are very different, both in terms of the conduct adopted and in terms of the severity of such conduct, hence they should not be dealt with in the same way.
Most importantly, the European Union has already enacted several measures and provided a multitude of tools directed at identifying and sanctioning evasive and abusive conduct (for example those set out by DAC 6, by the Anti-Money Laundering legislation, etc.). Creating new ones, instead of developing further the framework already existing in order to make it more effective and coherent in its application by the different Member States, may have the effect of multiplying costs – both for taxpayers and Tax Administrations – without providing a material benefit. Such measures may be redundant with respect to those who are already compliant with the several transparency and reporting requirements, while on the other hand, those who are active enablers of illegal schemes would probably continue to operate outside of the realm of legality.

The real question that the European Commission should consider is whether developing or ideating other types of measures may be more effective.

Who are the "Enablers"?

It is not of immediate understanding, from the published documents, what would be the subjective application of the new measures. Who are the "enablers" that the European Commission is referring to?

According to the recent OECD Report[1] on enablers of fiscal and white collar crimes, "professional enablers" are those intermediaries who commonly have (*i*) specific professional qualifications, (*ii*) expertise in taxation, legal or financial processes, or (*iii*) experience in the creation of cross-border tax structures or opaque structures that allow clients to avoid scrutiny of their activities. In essence, according to the OECD, the role of enablers can be covered by a wide variety of advisors, including not only those who already belong to regulated categories – as lawyers and chartered accountants – but also financial advisors and other service providers. The OECD formulation is very broad, and it could be interpreted as including also those advisors that exercise a professional activity abusively.

The "Call for evidence" specifies that there is a need to identify *"effective rules and mechanisms that prevent enablers, especially those located outside the EU, from assisting in tax evasion and aggressive tax planning*".[2] It follows that the scope of the initiative does not refer *exclusively* to those advisors located outside the EU, but also to those who are located inside.

A broad scope of application, in terms of types of advisors involved and location, is *per se* problematic. The obligations, disclosure duties, rules of conduct, and transparency procedures with which these individuals have to comply are very different. While some advisors belong to already heavily regulated professions in the EU Member States, others may be completely unregulated persons operating outside the EU – or worse, in grey or black-listed Countries. Adding further compliance duties to those advisors that already must respect a rich set of rules, may prove to be an unuseful duplication of costs, while the same rules may prove to be ineffective to the most unscrupulous enablers resident in non-EU countries. In addition, there is a very concrete difficulty in enforcing specific limitations to non-EU enablers, since, without the cooperation of the State of residence, there are no legal means that can be enforced in case of non-compliance.

Monitoring the Enablers or the "Enabled"?

As described above, the choice made by the European Commission with the SAFE initiative is to hold responsible the advisors (the enablers) in addition to the taxpayers (the "enabled"), which are already targeted by other measures at the EU level. In this respect the following comments can be made:

i) Clients normally seek advice and then autonomously decide which conduct to take. Once the advisors have provided an opinion, they can lose control of the client's subsequent action. In other cases, enablers and enabled may act together, tracing a commonly agreed course of action. Distinguishing situations in which advisors do not act in conjunction with the "aggressive" taxpayer, and simply provide answers to the client's legitimate queries from those where the advisors actively promote illicit tax schemes may prove to be extremely difficult.

[1] OECD (2021), Ending the Shell Game: Cracking down on the Professionals who enable Tax and White Collar Crimes, OECD Publishing, Paris.
[2] Call for Evidence, Part A.

ii) Incentivizing taxpayers to make a responsible choice, when choosing their advisors may be a more useful approach. Option two illustrated by the "Call for evidence", among other elements, suggests the creation of a Registry for those advisors operating in the European Union. It is likely, that each Country would create a specific Registry and those included in it, would be able to operate throughout the European Union. The proposal still raises many questions. Does it refer only to advisors who physically operate in the EU? Which could be the penalties for those non-compliant, especially if resident outside the EU?

iii) Increasing transparency in terms of the advisors and their attitude towards fiscal planning may be a winning approach but instead of having a "white list" why not simply having a "black list"? The EU could, for example, create a tool to identify those advisors who in the past assisted certain clients in tax evasion or aggressive tax planning schemes. This would, on one hand, allow compliant clients to identify in advance advisors respectful of the law and it would work hand in hand with the ESG and reporting obligations towards which the European Union has already been working – specifically those related to governance. On the other hand, the "name and shame" effect – as already applied in the Anti-Money Laundering legislation – would be a very strong disincentive for enablers to suggest illicit conduct to clients.
To guarantee full effectiveness of the measure, each Member State should create a national list where those enablers that have assisted and promoted aggressive arrangements and evasive schemes could be included. Clients should thus be able to access a European database comprehensive of all national Registers through which they could check if the advisor to whom they are intending to give a mandate is consistency with their own etchical principle and would not raise reputational issues. Such Registry could be reinforced through measures directed at the tax payers as better detailed in the last paragraph.

Reporting obligations

As far as reporting is concerned, it should be noted that also for DAC6 purposes reporting obligations fall on intermediaries. In most cases, intermediaries are advisors and in almost every European Member State a "legal professional privilege" exists. The existence of such privilege is indeed specifically recognized in the DAC6 Directive where it is stated that in cases where the reporting obligation breaches the legal professional privilege under the national law of a Member State *"(...) each Member State shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations*" (see Art. 8ab(5)).[3]

Moreover, it should be considered how the reporting obligations for enablers can be compatible with the right against self-incrimination (*nemo tenetur*), also in light of ECJ Case 481/19. For example, it should be noted that the Italian decree 100/2020 which transposed the DAC6 directive in Italy explicitly provides that the intermediary and the taxpayer do not have an obligation to report any cross-border arrangements if the information reported might trigger for them criminal liabilities. The same issues should be considered to apply to enablers.

[3] It is worth mentioning that the compatibility of legislation that limits the scope of a lawyer's professional secrecy with EU primary law is currently under discussion. *See* ECJ Case C-694/20 and the opinion of the Advocate General that affirmed that the disclosure of the name and the data regarding the lawyer-intermediary to tax authorities by other intermediaries, including the taxpayers, indeed conflicts with Article 7 of the Charter of Fundamental Rights of the European Union.

Other issues with the proposed options

The three proposals outlined in the "Call for evidence" have in common the idea of enforcing a ban on advisors for "assisting in the creation" or "facilitating" tax evasion or aggressive tax planning and the document further specifies that the primary objective of the initiative is to respond to issues related to non-EU shell entities, following the Unshell proposal.

The precise scope of application of the initiative is however unclear and this may create situations where the tax advisor is unsure of the limits of its legal activity range. Imagine situations in which a corporation requests an advisor to outline the fiscal implication of a certain operation. The analysis may result in a scheme that presents significant tax advantages, which may however be potentially abusive. In such a situation the advisors should be able to provide feedback to the client describing the fiscal advantages of the proposed operation since they are not those who ideated the structure. Tracing precise limits of conduct in situations where the tax planning may come from different advisors is however extremely complex.

Another issue concerns the effectiveness of the test – or due diligence – envisaged in Options one and two. Such a test seems to be self-administered by the advisor. If the perimeter of the test is not precisely defined and there is no clear regulation of subsequent controls, the effectiveness of this measure may remain very limited. Self-control procedures will likely be diligently applied by operators that are already compliant with the law and will be completely ignored by those who already build their business on providing fiscally aggressive and illegal tax solutions.

The additional proposal envisaged by the "Call for evidence" also includes further transparency measures. The Commission, in particular, refers to the disclosure in the Annual Tax Returns of "*any participation above 25% of shares, voting rights, ownership interest, bearer shareholdings or control via other means in a non-listed company located outside of the EU*".[4] While improving transparency is a trend that is developing and fostering the compliance of taxpayers, the idea to disclose participation in foreign entities is not new or innovative in many Countries. For example, Italy already provides similar requirements, even for minority participations, and both for individuals – in a specific section ("Quadro RW") of their tax declaration – and for companies – in the financial statements. In addition, this is not in line with the scope of the SAFE, since it is not an obligation directed at enablers.

Alternative Solutions

In conclusion, other measures may be sensibly more effective and cost-efficient for both the taxpayers and the Tax Administrations.
Penalties such as the loss of professional privilege and inclusion in the "Law-breaching advisors" Registry may have a moral and reputational effect able to incentivize advisors to respect certain standards of conduct.

[4] Call for Evidence, Part B.

The effectiveness of such measure could be highly increased by the provision of penalties and disadvantages for those taxpayers that engage advisors included in the list provided obviously that such taxpayers are themselves not compliant. This may involve disclosure obligations but also more stringent measures such as the non-deductibility of costs related to advisors who are included in a "non-compliance" Registry and the reversal of the burden of proof. As mentioned before the EU should provide tools to properly guarantee the accessibility of the information from taxpayers, such as a common database of all the national Registries.

Finally, the European Commission should consider how the proliferation of tools and regulations with similar scopes and addressed to the same subjects will increase enormously the compliance costs without providing material benefits. Instead, the coordination and further development of already existing tools may be a better path to follow.