

THE CRIMINAL LIABILITY OF TAX ADVISORS AND INTERMEDIARIES IN AGGRESSIVE TAX PLANNING SCHEMES: A COMPARATIVE LEGAL ANALYSIS OF INDONESIA, GERMANY, AND THE EUROPEAN UNION

Wahyu Widodo

Doctoral Program in Law, Pelita Harapan University

Corresponding email: wahyugalih@gmail.com

Abstract

Aggressive Tax Planning (ATP) refers to strategies that exploit legal loopholes to minimize tax obligations in ways that contravene the spirit of tax law, resulting in significant losses to governments and undermining the fairness of tax systems. Tax advisors and intermediaries play a pivotal role in ATP schemes, raising critical questions about their criminal liability. This study presents a comparative legal analysis of the criminal liability of tax advisors and intermediaries involved in ATP in Indonesia, Germany, and the European Union (EU). The findings reveal that Indonesia lacks a specific legal framework explicitly targeting ATP, relying instead on general provisions in the Criminal Code (KUHP) and the General Tax Provisions and Procedures Law (UU KUP). In contrast, Germany has a robust regulatory framework through the Abgabenordnung (AO) and the Steuerberatungsgesetz (StBerG), while the EU enforces transparency through the Directive on Administrative Cooperation (DAC6), which mandates the disclosure of ATP schemes by intermediaries. The study also identifies several legal challenges to criminal enforcement against tax advisors in Indonesia, including substantive legal weaknesses, opaque institutional structures, weak legal culture, limited access to financial information, ineffective sanctions, and the under-implementation of Mandatory Disclosure Rules (MDR). It is recommended that Indonesia strengthen its regulatory framework by adopting clear definitions of ATP, introducing mandatory disclosure requirements, and enhancing oversight of tax advisors, drawing from best practices in Germany and the EU—particularly the DAC6 framework—to improve transparency, enforcement effectiveness, and tax justice.

Keywords: tax advisor, legal liability, tax liability, intermediary

A. INTRODUCTION

Aggressive Tax Planning (ATP) involves strategies that exploit legal loopholes or mismatches between tax systems to minimize tax liabilities, often in ways that undermine the intended spirit of tax law. Such practices can lead to substantial revenue losses for governments and erode the fairness of the tax system. Tax advisors and intermediaries play a central role in designing, promoting, and implementing these schemes, raising critical questions about their criminal liability.

The growing prevalence of ATP schemes has prompted both international and domestic efforts to curb tax avoidance and evasion. In the European Union, initiatives such as the Anti-Tax Avoidance Directive (ATAD) and the Directive on Administrative Cooperation (DAC6) have been implemented to combat aggressive tax planning and

enhance transparency. DAC6 mandates that intermediaries report potentially aggressive cross-border tax arrangements to tax authorities, facilitating early detection and prevention of such schemes.¹ Germany has established a robust regulatory framework governing tax advisors. The profession is legally protected, and practitioners are subject to strict regulation and oversight. This structure is intended to ensure ethical conduct and compliance with tax law, thereby reducing the likelihood of involvement in ATP schemes.² In contrast, Indonesia's regulatory approach toward tax advisors remains relatively informal. The lack of legally protected professional status and the absence of a comprehensive regulatory framework for tax advisors create vulnerabilities that may be exploited for aggressive tax planning. This regulatory gap highlights the need for a comparative legal analysis to understand the implications of differing regulatory environments on the criminal liability of tax professionals.

Several previous studies have explored aggressive tax planning (ATP) and the role of tax advisors and intermediaries across various jurisdictions. These include: a) The Tax Justice Network, which has provided a comprehensive overview of global tax justice issues, including the impact of ATP and the responsibility of tax professionals in promoting tax compliance,³ b) The OECD, which has outlined principles for combating tax crimes, emphasizing the importance of criminalizing tax-related offenses and the dual role of tax advisors in either facilitating or preventing such crimes; and c) Cachia's study, which examined the relationship between Gross Domestic Product (GDP) and tax behavior—specifically tax avoidance and evasion—within the European Union. This research highlighted the significance of tax compliance and the detrimental fiscal effects of ATP on national budgets.⁴ However, the novelty of the proposed study lies in its comparative legal approach. While previous research has tended to focus either on individual jurisdictions or broader global perspectives, this study aims to analyze and compare the legal frameworks, enforcement mechanisms, and judicial interpretations regarding the criminal liability of tax advisors and intermediaries across Indonesia, Germany, and the European Union. Such a comparative analysis offers a nuanced understanding of how different legal systems address the involvement of tax professionals in aggressive tax planning. It provides valuable insights for policymakers and legal practitioners seeking to enhance regulatory frameworks and enforcement capabilities.

Tax advisors and intermediaries play a critical role in the structuring of ATP schemes that often verge on or constitute tax evasion. Indonesia's criminal tax regulations regarding tax advisors remain ambiguous compared to the more stringent frameworks in Germany and the European Union. This study conducts a comparative legal analysis of the criminal liability of tax advisors and intermediaries involved in ATP schemes in Indonesia, Germany, and the EU. By examining the relevant legal

¹ European Parliament, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2022/733965/IPOL_STU%282022%29733965_EN.pdf?utm_source=chatgpt.com.

² Baker McKenzie, available at https://www.globalcompliancenews.com/2024/04/03/https-insightplus-bakermckenzie-com-bm-investigations-compliance-ethics-european-union-and-germany-sustainable-supply-chains-comparing-legal-requirements_03202024/?utm_source=chatgpt.com.

³ Tax Justice Network, available at https://taxjustice.net/wp-content/uploads/2020/11/The_State_of_Tax_Justice_2020_ENGLISH.pdf?utm_source=chatgpt.com.

⁴ Franklin Cachia, *Aggressive Tax Planning: An Analysis from an EU Perspective*, EC Tax Review, Vol. 26, Issue 5, September 2017, pp. 257-273. DOI:10.54648/ECTA2017028.

frameworks, enforcement mechanisms, and judicial interpretations in these jurisdictions, the study seeks to identify best practices and offer recommendations for effectively addressing the involvement of tax professionals in ATP. Accordingly, this study aims to address the following two research questions: First, how is the criminal liability of tax advisors and intermediaries in aggressive tax planning regulated in Indonesia, compared to Germany and the European Union? and second, what are the main legal barriers to criminal enforcement against tax advisors in Indonesia?

B. ANALYSIS AND DISCUSSION

1. Regulation of Criminal Liability for Tax Advisors and Intermediaries in Aggressive Tax Planning in Indonesia Compared to Germany and the European Union

Indonesia's legal framework concerning the criminal liability of tax advisors and intermediaries involved in aggressive tax planning (ATP) remains underdeveloped in comparison to Germany and the European Union (EU). Indonesia does not currently have specific legislation that explicitly targets the involvement of tax consultants in ATP schemes. Nevertheless, general provisions from the Indonesian Criminal Code (KUHP) and Law No. 6 of 1983 on General Provisions and Tax Procedures, as amended by Law No. 7 of 2021 on the Harmonization of Tax Regulations (UU KUP), can be applied. These laws address offenses such as tax evasion and fraud, but do not explicitly cover the intermediary's role in ATP.

Moreover, Indonesia's legal system does not provide a clear definition of ATP. Lawful tax planning refers to legitimate strategies intended to minimize tax obligations within the bounds of the law. In contrast, tax evasion involves illegal acts of concealing income or information to avoid tax liability. The distinction between legitimate tax planning and aggressive tax planning remains vague in Indonesia, potentially leading to ambiguity in enforcement.⁵ Law enforcement mechanisms in Indonesia rely on general criminal and tax provisions. Tax consultants who facilitate tax avoidance may be prosecuted under the KUHP or UU KUP, facing penalties such as fines and imprisonment. However, the absence of targeted regulations addressing ATP and the intermediary role limits the effectiveness of prosecution and deterrence.

In Germany, lawful tax planning is recognized as legitimate tax optimization within legal boundaries. Germany maintains a comprehensive legal framework that specifically addresses the criminal liability of tax advisors and intermediaries.⁶ The German Fiscal Code (Abgabenordnung – AO) contains provisions that criminalize tax evasion (§ 370 AO) and aiding and abetting tax evasion (§ 27 AO). ATP in the German context refers to schemes exploiting legal loopholes or inconsistencies to reduce tax liability in ways that may contradict the intent of the law.

⁵ AP News, available at <https://apnews.com/article/denmark-tax-fraud-sanjay-shah-7dc495a331e9ee78c92a191c1fc2059d>.

⁶ WILKE M, MACPHERSON A. Liability of Banks for Aiding Tax Evasion: A Comparative Analysis of German and UK Law. *European Journal of Risk Regulation*, Vol. 10, No. 1, 2019; pp. 148-163. doi:10.1017/err.2019.15

Tax evasion is explicitly defined as the deliberate concealment of income or taxable assets to avoid taxation and is punishable under § 370 AO. Tax advisors may be held liable if they intentionally or negligently assist clients in evading taxes. Additionally, the German Tax Consultancy Act (Steuerberatungsgesetz – StBerG) regulates the profession, imposing strict duties of care and compliance on tax consultants. Breaches of these duties can result in disciplinary actions, including the revocation of the right to practice.⁷ This illustrates Germany's rigorous enforcement mechanisms. Tax advisors found guilty of facilitating tax evasion may face criminal sanctions, including fines and imprisonment. The StBerG also enables professional disciplinary measures, such as suspension or revocation of licenses. German tax authorities are proactive in investigating and prosecuting cases involving ATP, as evidenced by the “cum-ex” scandal, in which numerous individuals, including tax consultants, were prosecuted and convicted.⁸

The European Union (EU) has implemented directives to combat aggressive tax planning (ATP) and hold intermediaries accountable. The Directive on Administrative Cooperation (DAC6) mandates the disclosure of cross-border tax arrangements that exhibit hallmarks of ATP. Intermediaries, including tax advisors, are required to report such arrangements to tax authorities. Non-compliance may result in penalties imposed by Member States. The directive aims to enhance transparency and prevent the facilitation of aggressive tax avoidance.⁹ The EU provides a clear distinction between legitimate tax planning, aggressive tax planning, and tax evasion. Legitimate tax planning involves lawful methods of reducing tax obligations. ATP is characterized by arrangements that exploit mismatches between tax systems to obtain tax advantages unintended by the law. Tax evasion, by contrast, involves the illegal non-payment or underpayment of taxes. DAC6 outlines specific hallmarks to help identify ATP schemes, thereby distinguishing them from legitimate tax planning. This demonstrates that DAC6 serves as a primary enforcement tool in the EU, obligating intermediaries to report ATP-related arrangements. Failure to comply may lead to sanctions enforced by individual Member States. The European Court of Justice (ECJ) has upheld the legality of DAC6, further reinforcing its role in the EU's legal framework to combat ATP.¹⁰

Indonesia could benefit from enacting targeted regulations addressing ATP and the role of tax advisors. Introducing a mandatory disclosure regime modeled after DAC6 could significantly enhance tax transparency and deter ATP. Under DAC6, intermediaries such as tax consultants are required to report cross-border arrangements that bear specific hallmarks indicating potential tax avoidance. Adopting similar legislation in Indonesia would compel tax advisors and other intermediaries to disclose arrangements that may facilitate avoidance, thus providing tax authorities with timely information to detect and address ATP

⁷ Federal Ministry of Finance, available at https://www.gesetze-im-internet.de/englisch_ao/englisch_ao.html.

⁸ Financial Times, available at https://www.ft.com/content/fa9ff38b-f6af-4b82-be92-a6069ec047cb?utm_source=chatgpt.com.

⁹ InfoCuria, available at https://curia.europa.eu/juris/document/document.jsf?cid=2109986&dir=&docid=288836&doclang=EN&mode=DOC&occ=first&pageIndex=0&part=1&text=&utm_source=chatgpt.com.

¹⁰ Harneys, available at https://www.harneys.com/our-blogs/regulatory/european-court-of-justice-decision-on-dac-6-combatting-aggressive-tax-planning-the-obligation-for-a-lawyer-to-inform-other-intermediaries-not-valid/?utm_source=chatgpt.com

schemes. Indonesia has already implemented certain anti-avoidance measures, including General Anti-Avoidance Rules (GAAR) and Specific Anti-Avoidance Rules (SAAR). These rules are designed to counter unethical tax planning by applying the substance-over-form principle, ensuring that transactions are taxed based on their actual economic substance rather than their legal form. Furthermore, Indonesia has introduced regulations requiring legal entities to disclose their beneficial ownership, aiming to increase transparency and prevent the misuse of corporate structures for tax avoidance and money laundering purposes. To further strengthen its anti-avoidance framework, Indonesia should consider enacting mandatory disclosure rules similar to DAC6. Such rules would impose an obligation on intermediaries to report specific tax arrangements to the Directorate General of Taxes, thereby improving the ability to monitor, detect, and prosecute aggressive tax planning. This measure would complement existing legal provisions and align Indonesia's tax system with international best practices, reinforcing its commitment to transparency, fairness, and compliance in the global tax environment.

2. Legal Barriers to Criminal Tax Enforcement Against Tax Advisors in Indonesia

Aggressive tax planning (ATP) involves strategies that exploit legal loopholes or inconsistencies to minimize tax obligations in ways that may contravene the spirit of the law. While legitimate tax planning is recognized as lawful tax optimization within legal boundaries, ATP schemes are often designed to reduce tax liability through means that may be perceived as unethical or contrary to the intent of tax regulations. Tax evasion, by contrast, is explicitly defined as the deliberate concealment of income or taxable assets to unlawfully avoid taxation and is subject to criminal penalties.

ATP and broader tax planning practices often involve the engagement of professional actors, such as tax advisors. However, Indonesia faces several complex legal barriers to the criminal prosecution of tax advisors involved in aggressive tax planning:

a. Substantive Legal Weaknesses

Indonesia's tax legislation often contains loopholes that can be exploited by tax advisors to construct ATP schemes. These legal gaps allow tax avoidance practices to occur in ways that do not explicitly violate existing laws, making criminal prosecution difficult due to the absence of clear statutory prohibitions.¹¹

b. Lack of Transparency in Institutional Structure

The bureaucratic structure of the Directorate General of Taxes (DJP) lacks full transparency, potentially enabling collusion between tax advisors and tax officials. This undermines criminal enforcement efforts, as it creates opportunities for conflicts of interest and protection of offenders within the institutional framework.¹²

¹¹ Wirana N. Kaunang, *Penegakan Hukum terhadap Tindak Pidana Pajak Berdasarkan UU No. 9 Tahun 2017 tentang Penetapan Peraturan Pemerintah no. 1 Tahun 2017 tentang Akses Informasi keuangan*, *Lex Crimen* Vol. 7, No. 5, 2018.

¹² Lamijan, *Problematisasi Penegakan Hukum Perpajakan (Kajian Tindak Pidana Ekonomi Bidang Mafia dan Korupsi Perpajakan)*, *Jurnal Pembaharuan Hukum*, Vol. 1, No. 1, 2014.

c. Weak Legal Culture

Indonesia's weak legal culture presents another obstacle. A general lack of legal awareness and low levels of integrity among some tax professionals and law enforcement personnel hinder effective enforcement. Unethical practices are allowed to flourish due to the limited enforcement of professional ethics codes and ineffective disciplinary sanctions.¹³

d. Limited Access to Financial Information

Prior to the enactment of Law No. 9 of 2017 on Financial Information Access for Taxation Purposes, tax authorities faced serious challenges in accessing taxpayers' financial data. This limitation was frequently exploited by tax advisors to design opaque ATP schemes that were difficult to detect and prosecute.¹⁴

e. Ineffectiveness of Criminal Sanctions

The existing criminal sanctions against tax advisors involved in ATP have not been applied optimally. The penalties imposed are often insufficient to create a deterrent effect, allowing aggressive planning practices to persist with minimal legal consequence.¹⁵

f. Challenges in Implementing Mandatory Disclosure Rules (MDR)

Indonesia has not yet fully implemented Mandatory Disclosure Rules that would require intermediaries to report ATP schemes to tax authorities. The absence of such a framework limits the ability of tax authorities to identify and respond proactively to ATP strategies involving tax advisors.¹⁶

The lack of specific regulations targeting aggressive tax planning (ATP) and the role of intermediaries limits the effectiveness of tax law enforcement in Indonesia. Tax consultants who facilitate tax evasion should be subject to prosecution under applicable laws, with penalties such as fines and imprisonment. However, the absence of clear definitions and legal guidance regarding ATP creates ambiguity in distinguishing between legitimate tax planning and aggressive schemes. To strengthen Indonesia's legal framework and enforcement mechanisms, the adoption of specialized regulations targeting ATP and the role of tax advisors is recommended. Implementing mandatory disclosure rules (MDR) similar to the EU's DAC6 directive could enhance transparency and deter the facilitation of aggressive tax avoidance. Strengthening the regulatory framework for tax advisors—through licensing, oversight, and professional accountability—would promote ethical conduct and improve public trust. Additionally, introducing clear definitions and legal guidelines distinguishing legitimate planning from ATP would support more consistent enforcement and regulatory compliance.¹⁷

C. CONCLUSION

Based on the analysis and discussion, this study draws two main conclusions: First, while Indonesia has general laws addressing tax offenses, the absence of specific

¹³ *Ibid.*

¹⁴ Wirana N. Kaunang, *Ibid.*

¹⁵ Lamijan, *Ibid.*

¹⁶ Darussalam, available at https://news.ddtc.co.id/review/perspektif/6701/melawan-perencanaan-pajak-agresif?utm_source=chatgpt.com.

¹⁷ Tax Justice Network, available at https://taxjustice.net/wp-content/uploads/2022/11/20221010-TJN-Enabler-Submission-EC-Contribution2a6ca5bf-c4d8-46d3-8881-981d12d4e28e.pdf?utm_source=chatgpt.com.

regulations targeting ATP and the role of tax advisors presents a major challenge to effective enforcement. Strengthening the legal framework with clear definitions, mandatory disclosure obligations, and enhanced oversight of tax advisors will improve the ability to combat aggressive tax planning schemes. Second, although Indonesia has made significant strides in tackling tax avoidance through various legal reforms, the adoption of a mandatory disclosure regime similar to DAC6 would further improve transparency and act as a deterrent against ATP. Such an approach would provide tax authorities with timely information to identify and address potentially abusive tax arrangements, ultimately fostering a more equitable and effective tax system. It is therefore recommended that Indonesia clarify the criminal tax regulations concerning the legal liability of tax advisors involved in ATP schemes and develop firm administrative policies aligned with European best practices to ensure a stronger, more transparent, and accountable tax advisory regime.

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