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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	22 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.:	SEC(2021) 565
Subject:	REGULATORY SCRUTINY BOARD OPINION Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU

Delegations will find attached document SEC(2021) 565.

Encl.: SEC(2021) 565



EUROPEAN COMMISSION

25.10.2021

SEC(2021) 565

REGULATORY SCRUTINY BOARD OPINION

Fighting the use of shell entities and arrangements for tax purposes.

{COM(2021) 565}

{SWD(2021) 578, 579}



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Fighting the use of shell entities and arrangements for tax purposes.

Overall opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

Legal entities and arrangements with no, or only, minimal substance and economic activity (often referred to as shell entities) can pose a risk of being used in aggressive tax planning structures allowing taxpayers operating cross-border to reduce their tax liability. Several actions to tackle abusive and aggressive tax structures have been put in place at EU level. However, there are no measures specifically focused on shell entities.

This initiative aims to tackle the misuse of shell entities and arrangements for tax avoidance and tax evasion purposes. It aims to complement existing legislation addressing tax avoidance, tax evasion and fostering administrative cooperation. Most important among these are the Anti-Tax Avoidance Directives and the Directive on Administrative Cooperation.

(B) Summary of findings

The Board notes the additional information provided in advance of the meeting and commitments to make changes to the report.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

- (1) The report does not sufficiently explain the rationale for addressing both tax evasion and tax avoidance. It does not clearly distinguish between legitimate and problematic shell entities.
- (2) The report does not demonstrate that the preferred option effectively and efficiently identifies problematic shell entities. It does not provide a sufficient overview of possible alternative and complementary measures.
- (3) The report does not provide sufficient information on the robustness of the quantitative estimates, in particular on the compliance costs for businesses.
- (4) The report does not sufficiently engage with the different stakeholder views in the

This opinion concerns a draft impact assessment which may differ from the final version.

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(C) What to improve

- (1) The report should better justify why it addresses both tax evasion and tax avoidance, in particular discussing and distinguishing between legal and illegal aspects as well as what is fair and unfair. The report would benefit from clearer definitions of the terms, accounting for how the perceptions of tax evasion and tax avoidance have changed over time. In addition, the report should better explain why the existing EU legislation and the international tax frameworks are not sufficient to address the problem.
- (2) The problem description needs to distinguish clearly between shell entities that are problematic because they are set up to avoid or evade taxes and legitimate shell entities. It should clarify that shells can be set up for 'fair' tax purposes, such as avoiding double taxation.
- (3) The report needs to present the options of the initiative within the context of possible alternative and complementary measures, such as regulating trust and company service providers or advisory services that advocate the use of problematic shells. It should make clear that it considered a wide range of feasible options and explain why it discarded some of these. It should clearly outline whether and to what extent the introduction of substance requirements is the most feasible option.
- (4) The report should better justify the scope and thresholds for the exemptions, carve-outs and gateway criteria. It should explain to what extent the preferred option can precisely and effectively identify the problematic shell entities. It should analyse what type of companies would need to use exemptions or tax rulings to avoid being treated unduly as a problematic shell entity. It should estimate to the greatest extent possible how many companies would be affected. The report should more clearly describe the trade-offs between a large scope and costs for legitimate companies and shell entities. In addition, the report should clearly outline how the two soft-law sub-options differ, and separately analyse their impacts.
- (5) In view of the claimed low compliance costs for businesses and tax administrations, the report should better describe and substantiate the robustness of the related estimates. The report needs to be transparent about what is known and what is unknown, in particular in case of cost estimates. In addition, when describing the impact of the options, the report should pay more attention to possible risks such as the capacity of Member States' tax administrations to handle additional responsibilities and the risk of imposing unnecessary burden on legitimate shell entities.
- (6) The report should better account for how the options consider an effective implementation and governance of the initiative. It should explain how effective cooperation (including information exchange) between tax authorities of affected Member States and the availability of adequate resources would be ensured.
- (7) The report should explain to what extent the preferred option is contested or supported by different groups of stakeholders. It should better explain how and why it took into account different stakeholder views in the main analysis. In particular, the report should better integrate the concerns raised by business associations on the proportionality of the initiative.
- (8) When defining the objectives and the monitoring arrangements, the report needs to define clearly what success would look like for this initiative. Furthermore, the description

of the objectives should not pre-determine the policy choice. The report should also improve the description of the planned monitoring arrangements to explain more clearly how they build on the objectives, collect information on results, address the feasibility of the data collection, and explain how they will feed into robust future evaluation. This is particularly important given the current lack of data on shell entities. It should adjust the timing of the reporting by Member States to the needs of the planned evaluation.

The Board notes the estimated costs and benefits of the preferred option(s) in this initiative, as summarised in the attached quantification tables.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion

The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.

Full title	Fighting the use of shell entities and arrangements for tax purposes - proposal for a Council Directive aimed at introducing substance requirements for companies operating in the EU in order to deny the tax benefits where no substance is identified
Reference number	PLAN/2021/10793
Submitted to RSB on	23 September 2021
Date of RSB meeting	20 October 2021

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

<i>I. Overview of Benefits (total for all provisions) – Preferred Option (Option 4: Directive with automatic exchange of information (AEOI) and common sanctions)</i>		
<i>Description</i>	<i>Amount</i>	<i>Comments</i>
<i>Direct benefits</i>		
Tax revenue gains	Not quantified, but the estimated revenues lost is around 23 billion. A small share of that tax gap would be very significant. In this preferred option revenues should be higher than in other options due to the more significant deterrent effect of sanctions included in this option	Public administrations are the main beneficiary. A higher amount of tax revenues should be collected as schemes used to minimize tax payments via shell entities will be tackledtackled.
Regulatory charges		Public administrations are the main beneficiary. Additional income for public administrations derived from the application of the common sanction regime.
<i>Indirect benefits</i>		
Social impact		EU Citizens are the main beneficiary of positive social impacts. With this initiative the EU show its commitment to tackle schemes leading to tax avoidance and evasion. It will reinforce the role of the EU and increase the willingness of taxpayers to comply with tax obligations
Single Market		EU companies are the main beneficiary. Common substance requirements, combined with AEOI between tax administrations and a common framework for sanctions would ensure a uniform treatment of all legal entities and arrangements and remove the risk of fragmenting the Single Market.. This would also improve transparency and certainty for businesses to operate within the

		Single Market, as well as ensuring a level playing field.
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<i>II. Overview of costs – Preferred option</i>							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
Substance criteria	Direct costs				For companies in scope they need to provide self-assessment on substance requirements		Tax Administrations will need to assess self-assessments. They will need to provide tax rulings in certain cases
	Indirect costs						
Automatic Exchange of Information	Direct costs					EUR 2 Million for the national tax administrations and EUR 1 Million for the EC	EUR 0.8 Million for the National tax administrations and EUR 0.12 Million for the EC
	Indirect costs						
Sanctions Regime	Direct costs				Regulatory charges for the companies that don't fulfil their obligations and expenditure in legal proceedings		Tax administrations will need to execute regular audits and inspection. These could be followed by legal proceedings
	Indirect costs						