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General Secretariat

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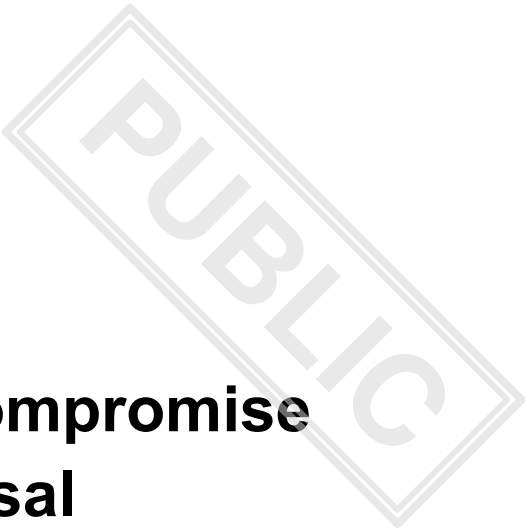
**NOTE**

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From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation)
Subject:	Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU - Presidency compromise text

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In view of the meeting of the Working Party on Tax Questions on 5 September 2023, delegations will find attached the Presidency compromise text.



# **Presidency compromise proposal**

WPTQ meeting (Direct Taxation – UNSHELL proposal)

SEPTEMBER 5, 2023





DRAFT

## COUNCIL DIRECTIVE

### laying down rules to prevent the misuse of shell entities for tax purposes and amending Council Directive 2011/16/EU

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Ensuring fair and effective taxation in the internal market and tackling tax avoidance and evasion remain high political priorities in the Union. While recent years saw important progress in this area, especially with the adoption of Council Directive 2016/1164<sup>3</sup> concerning anti-tax avoidance and the expansion of scope of Council Directive 2011/16/EU<sup>4</sup> on administrative cooperation, further measures are necessary to tackle specifically identified practices of tax avoidance and evasion, which are not fully captured by the existing legal framework of the Union. In particular, multinational groups sometimes create entities with no or minimal **economic substance for tax purposes**, to lower their overall tax liability, including by shifting profits away from certain high-tax Member States in which they carry out economic activity and create value for their business. **Equally, individual taxpayers can use entities with no or minimal economic substance in order to lower their tax liability in the Member State of residence or the Member State where their assets are located.** This proposal complements the progress achieved in corporate

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<sup>1</sup> OJ C , , p. .Not yet published in the Official Journal.

<sup>2</sup> OJ C , , p. .Not yet published in the Official Journal.

<sup>3</sup> Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ L 193, 19.7.2016, p. 1).

<sup>4</sup> Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ L 64, 11.3.2011, p. 1).

transparency through requirements concerning beneficial ownership information introduced by the anti-money laundering framework, which address situations where entities are created to conceal true ownership, whether of the entities themselves or of the assets they manage and own, such as real estate or property of high value.

Changes made to reflect the case of individuals.

- (2) It is acknowledged that entities with no or minimal substance may be set up in a Member State with the main objective of obtaining a tax advantage, notably by eroding the tax base of another Member State. While some Member States have developed a legislative or administrative framework to protect their tax base from such schemes, the relevant rules often have a limited effect, as they only apply in the territory of a single Member State and do not effectively capture situations that involve more than one Member State. Furthermore, the national rules that apply in this field significantly differ across the Union while some Member States have no rules at all, to tackle the misuse of entities with no or minimal substance for tax purposes. This Directive does not introduce new standards to define abuse but adds value in the procedural area by identifying **manifest** ~~certain~~ cases **of shell entities for tax purposes** ~~for further intervention~~ through the application of a risk-based process and a presumption, **and by setting out certain tax consequences for these entities that should be common in all Member States.**
- (3) It is necessary to lay down a common framework, in order to strengthen Member States' resilience against practices of tax avoidance and evasion linked to the use of entities which do not perform an economic activity even if presumably they are engaged with economic activity and therefore do not have any or have only minimal substance for tax purposes **in the Member State of tax residence.** This is done in order to ensure that entities lacking minimal substance are not used as instruments of tax evasion or tax avoidance **through the abuse of Union tax Directives, whose benefits should be denied to such entities in all cases. It is a basic principle that the denial of such benefits by Union law cannot be frustrated by reference to national law provisions.** As those entities may be established in one Member State but may be used with the effect of eroding the tax base of another Member State, it is critical to agree on a common set of rules for determining what should be considered as **manifestly** insufficient substance for tax purposes in **a Member State** ~~the internal market~~ as well as for delineating **certain** specific tax consequences linked to such

determination insufficient substance. This Directive therefore lays down criteria for the identification of manifest cases of entities that can be presumed to be misused for tax purposes in the internal market as well as rules to disallow certain tax benefits to those entities in case they are found to be shell entities. Such manifest cases of presumed shell entities should be therefore understood as those cases in which entities, that are not excluded entities under this Directive, do not meet the substance criteria laid down thereof. Where an entity declares that it meets the criteria laid down in this Directive, this should not prevent the Member States from continuing to apply other domestic or agreement-based provisions to assess any possible tax defaults.

Changes have been made to reflect the outcome of the discussions of the last meeting regarding the meaning of “manifest cases” and that the Directive cannot be undermined by national law provisions ( i.e. Double Taxation Agreements (DTAs))

- (3a) Considering that this Directive does not aim to capture all potential cases of lack of substantial activity of an entity, but only the obvious ones, and considering that it is limited to cases with cross-border relevance that bear features allowing the application of a presumption of misuse for tax purposes, Member States should not be precluded from applying national or agreement-based provisions preventing tax avoidance, tax evasion, tax fraud or abuse to entities that do not fall within the scope of this Directive, including excluded entities, or entities that are not found to be shells under this Directive, i.e. that are not presumed. Even if the Member State of an entity presumed to be a shell entity has concluded that the entity has successfully rebutted that presumption, other Member States should not be precluded from applying, for instance, the anti-abuse provisions of Article 1(2) of Council Directive 2011/96/EU or Article 5(2) of Directive 2003/49/EC and/or the general principle of Union law of prohibition of abuse of rights in order to deny the entity the benefits of those Directives. Equally, given that this Directive prescribes certain limited consequences to be applied by the Member State of tax residence of the shell entity and the Member State from which relevant income flows to a shell entity, Member States should not be precluded from applying further tax consequences to entities found to be shell under this Directive or parties not subject to consequences under this Directive, e.g. the shareholders of shell entities.

~~The Directive lays down certain indicators of minimum substance for entities and rules for disallowing certain tax advantages. Therefore, the Directive does not regulate consequences for entities other than those mentioned above, and does not regulate consequences for shareholders.~~

~~This should be understood in the sense that Member States may continue to apply the relevant domestic or agreement-based rules with respect to excluded entities or entities that meet the criteria of minimum substance, and with respect to the shareholders of entities lacking minimum substance.~~

Changes have been made to further clarify the interaction between the Directive and national anti-abuse rules, without any change in the substance.

- (4) To ensure a comprehensive approach, the rules should apply to all entities in the Union which are taxable in a Member State, regardless of their legal form and status, as long as they have their residence for tax purposes in a Member State. Insofar as permanent establishments and tax transparent entities are not considered tax residents in the Member State of their place of business, the requirements of this Directive should not apply to such entities ~~them~~. **This Directive does not envisage to analyse whether a permanent establishment is a shell entity according therin. Therefore, for such cases, the assessment of a possible tax default should remain addressed at the level of the Member States.**

Changes have been made to clarify that permanent establishments are not in the scope of the Directive and that Member States will have to deal with these cases in their own legislation.

- (5) To ensure the proper functioning of the internal market and the proportionality and effectiveness of proposed rules, it would be desirable to limit their scope to entities which are at risk of being found to lack minimal substance and used with the main objective of obtaining a tax advantage. It ~~is would~~ therefore be important to establish a ~~gateway criterion, in the form of a set of cumulative, indicative conditions, in order to conclude~~ which entities are sufficiently at risk as aforementioned to justify that they be subjected to reporting requirements. A ~~first condition should enable the identification of~~ For Entities presumably engaged mainly in geographically mobile economic activities **are high risk entities**, as

the place where such activities are actually carried out is usually more challenging to identify. Such activities normally give rise to important passive income flows. Hence, entities, whose ~~entire~~ income consists predominantly of passive income flows would **presumably be at high risk of manifestly lacking minimum economic substance under this Directive** ~~meet this condition~~. It should also be taken into account that entities holding assets for private use, such as real estate, yachts, jets, artworks, or equity alone, may have no income for longer periods of time, but still enable significant tax benefits by way of owning those assets. As purely domestic situations would not pose a risk for the good functioning of the internal market and would be best addressed at domestic level, **this Directive** ~~a second condition~~ should focus on entities engaged **predominantly** in cross-border activities. Engagement in cross-border activities should be established having regard, on the one hand, to the nature of the transactions of the entity, domestic or foreign, and on the other, to its property, given that entities that only hold assets for private, non-business, use may not engage in transactions for a considerable time. In order to ensure a proportionate approach and limit the administrative burden for tax administrations, entities that have a yearly revenue of EUR ~~2~~400 000 or less, and a total book value of assets of EUR ~~12~~ 000 000 or less, should be excluded from the requirements of this Directive. **Technically, the delimitation of the scope of the Directive described in this recital is achieved through the use of exclusions.**

Changes made in order to align to the operative part.

- (6) **Additionally, fit** would be fair to exclude from the envisaged rules entities whose activities are subject to an adequate level of transparency ~~and therefore do not present a risk of lacking substance for tax purposes~~. Companies having a transferable security admitted to trading or listed on a regulated market or multilateral trading facility as well as certain financial entities which are heavily regulated in the Union, directly or indirectly, and subject to increased transparency requirements and supervision, should equally be excluded from the scope of this Directive, **as well as governmental entities**. Pure holding entities which are situated in the same jurisdiction as the operational subsidiary and their beneficial owner(s) are not likely to serve the objective of obtaining a tax advantage. Since such entities will not fulfill the cross-border criterion, no specific exemption is required in order to keep such entities out of scope.

Changes made to clarify and align with changes made in the operative part.

- (7) To facilitate **the** implementation of this Directive, ~~entities at risk of being found to lack substance and used with the main objective of obtaining a tax advantage, namely~~ entities that **are not excluded entities under** pass the gateway criterion set out in this Directive, should declare to the tax authority of their Member State, on an annual basis, ~~that~~ **whether** they possess a minimum level of resources such as people and premises in the Member State of tax residence and **be able to** provide documentary evidence if that is requested. While it is recognised that different activities may require a different level or type of resources, a common minimum level of resources would be expected under all circumstances **and in its absence, an entity would justifiably be presumed to manifestly lack minimum economic substance for tax purposes.** This assessment should solely aim at identifying the substance of entities for tax purposes and does not question the role that “trust or company service providers”, as defined in Directive (EU) 2015/849 of the European Parliament and of the Council<sup>5</sup>, have in the identification of money laundering, its predicate offences and terrorist financing. Conversely, the absence of a minimum level of resources may be considered to indicate a lack of substance where an entity is **under the scope of this Directive** ~~already at risk of being found to lack substance for tax purposes.~~ To ensure compatibility with relevant international standards, a common minimum level should draw on the existing Union and international standards on substantial economic activity in the context of preferential tax regimes or in the absence of corporate taxation<sup>6</sup>, as developed in the context of the Forum on Harmful Tax Practices.

Changes made to clarify and align with changes made in the operative part.

- (8) To ensure tax certainty, it is imperative to lay down common rules on the content of entities’ declarations. Entities ~~that~~ that are not excluded and are consequently subject to reporting requirements should be

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<sup>5</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).

<sup>6</sup> General Secretariat of the Council, 9637/18 FISC 241 ECOFIN 555, Code of Conduct (Business Taxation), Guidance on the interpretation of the third criterion; OECD/G20 Base Erosion and Profit Shifting Project, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5: Final Report

presumed to be shell entities if they ~~also~~ declare not to possess sufficient elements that cumulatively constitute a minimum level of substance, or do not provide the required supporting evidence when requested. Entities that declare to possess all the elements of the minimum level of substance and that, upon request, provide the required supporting documentation should **not** ~~instead~~ be presumed ~~not~~ to be **manifestly** shell entities **for the purposes of this Directive** and should incur no further obligations and consequences under this Directive. This, however, should be without prejudice to any applicable law and the right of the administration **of the Member State of the entity** to perform an audit and possibly, arrive at a different conclusion. **The administration of another Member State could on its side consider such entity of the first Member State as lacking sufficient economic substance under the applicable national or agreement-based provisions, while not under this Directive.**

The proposed change aims to clarify the fact that when an entity is not found to be a shell entity under the Directive, no further consequences incur under the Directive. However, it does not necessarily mean that MS other than the MS of the entity can still apply its anti abuse rules if the first MS considers that the entity lacks sufficient economic substance under the applicable national provisions.

- (9) It is recognised that whether an entity is actually performing economic activities for tax purposes or serves mainly tax avoidance or evasion purposes is ultimately a matter of facts and circumstances. This should be assessed on a case by case basis in respect of each specific entity. ~~Therefore, e~~Entities that are presumed to be shell entities **under this Directive** should **therefore** be entitled to prove that they are genuine and put in place for valid commercial reasons which reflect economic reality, and **in this way**, rebut such presumption **for the purposes of this Directive**. The fact that an entity can show that it is not part of an arrangement put into place for the main purpose of obtaining a tax advantage that defeats the object or purpose of the appropriate Union law could be a circumstance to be accounted for when assessing a rebuttal. When fulfilling their reporting obligations under this Directive, they **entities** should **be able to request the rebuttal of the presumption of being a shell** ~~provide additional information~~ to the administration of the Member State where they reside for tax purposes. **It would be possible that entities within one Member State being part of a group, as defined according to national tax law, request a rebuttal procedure as a group, meaning that one group request can include individual rebuttal requests made by the relevant entities**

**which are part of that group. Notwithstanding tax authorities have to assess each individual entity that has made a requests for rebuttal in this manner. Whilst there should be no requirement for including a**~~An exhaustive list of evidence that should be required in all cases should not be included. Nevertheless, **entities should be able to provide evidence of the rationale behind their establishment and existence, showing that they are not a part of an arrangement put in place for the main purpose of obtaining a tax advantage but rather for valid economic reasons. The evidence could consist of documentation**~~ information **on** regarding the corporate structure of the group coupled with an explanation of the key management tasks and transfer pricing studies which prove that the entity has had control over, and borne the significant risks of, the activities that generated relevant income or **that** the activities ~~that~~ were connected with its assets ~~could be part of such evidence~~. Evidence that the commercial cause, as laid down in the Articles of Association, matches the actual activity of the entity could also be accounted for. **The entity could also show that it carries out activities in the Member State at issue through a business set up appropriately for that purpose.** The same applies for evidence showing that assets, typically held for the private use of shareholders, are used within a business activity. Where the Member State, based on such additional evidence, considers that an entity has rebutted **the** a presumption of being a shell entity in a satisfactory manner, it should ~~be able to~~ issue a notice, **within 6 months. To allow a smooth transition, this period should be brought to one year in the first tax period of application of this Directive** to certify that the entity has minimal substance for tax purposes in accordance with this Directive. **It should be possible for**~~Such notice **to**may remain valid for the period during which factual and legal circumstances of the entity remain unchanged, **which should be confirmed annually by the entity, but in any case no longer than**~~ and up to 3 years from the time the decision ~~was~~ issued. This will allow to limit the resources allocated to cases that, **despite the existence of an initial presumption,** have **subsequently** been evidenced not to be a shell for the purposes of the Directive. **In case there is no explicit decision in the period mentioned above, the request for rebuttal should be deemed rejected and tax consequences under this Directive should apply. If, after the end of that period, a Member State issues an explicit decision accepting the rebuttal of the presumption, tax consequences should not apply.**

Changes made to clarify the possibilities and evidences which the taxpayers could use in order to rebut the presumption to be a shell entity under the Directive and align with changes made in the operative text.

- (10) To ensure effectiveness of the proposed framework, it is necessary to establish appropriate tax consequences for entities that **are found to be shell under** ~~do not this Directive~~ have minimal substance for tax purposes. Entities that are presumed to be shell entities **under this Directive** and that have not rebutted this presumption, ~~should not be allowed certain exemptions or reductions of tax in other Member States that follow from agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, to which the Member State of their tax residence is a party. Such entities should not be allowed to benefit from Council Directive 2011/96/EU<sup>7</sup> and Council Directive 2003/49/EC<sup>8</sup>. However, the disallowing of benefits according to those Directives should not imply an obligation for Member States to introduce rules in national law regarding for example withholding taxes, if Member States do not already apply such rules.~~ **Taking into account the EU law, these tax consequences should not be undermined by the application of similar exemptions or reductions of tax enshrined in other provisions, in particular in agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, concluded between Member States or other national law provisions. For this reason, entities that are presumed to be shell entities for the purposes of this Directive and that have not rebutted this presumption should not be entitled to the benefits under agreements and conventions that provide for the elimination of double taxation of income in force between Member States on the basis of the rules of these agreements and conventions covering the same income streams as Directives 2011/96/EU and 2003/49/EC. In addition, it is expected that Member States, where provided, apply other anti avoidance provisions in such agreements or conventions and, where applicable, domestic antiabuse provisions to reach the result set out above.**

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<sup>7</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 345, 29.12.2011, p. 8).

<sup>8</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, 26.6.2003, p. 49).

New language has been added to reflect that provisions granting benefits similar to the ones provided for in those Directives and concerning the same income streams should not be allowed, the primacy of Union law would prevent DTAs from applying even without this explicit reference. In this regard, it is made explicit that shell entities should not be entitled to the benefits under agreements and conventions that provide for the elimination of double taxation of income in force between Member States on the basis of the rules of these agreements and conventions.

- (10a)** The Member State where the entity is resident for tax purposes should, when issuing a certificate of tax residence to the entity, include a notice in the certificate expressing that the entity is ~~presumed~~ **found** to be a shell entity according to this Directive. Such a notice will serve as a warning, that the entity ~~has been lacking~~ **lacked** substance for the ~~previous~~ **relevant** tax period **and, according to the available information, the situation has not changed at the time of issuing this certificate.** The issuance of a certificate of tax residence with such a notice, should not set aside the national rules of the Member State of the entity with regard to the tax residence and relevant obligations linked thereto. It would rather serve to communicate to other Member States, ~~and~~ third countries **and withholding tax agents**, that they should **take into account this fact when determining the tax treatment of income flows** ~~examine the entity more closely before deciding how future transactions with the entity should be treated.~~ **To achieve this result, withholding tax agents in a Member State other than the Member State of the entity should act based on the information that features in the certificate of tax residence that is presented to them at the time of the payment. If the certificate includes a notice indicating that the entity has been found to be a shell under this Directive, the withholding tax agent should apply the domestic tax rate of the source Member State. When this situation reverses and the entity ceases to be a shell entity in subsequent tax periods, tax residence certificates issued afterwards would not have such notice and withholding agents should act consequently.**
- (10b)** **Due to the lapse of time between the end of the relevant tax period and the reporting obligation, it is possible that the tax treatment of income flows of the entity at a certain time does not match its status**

**under this Directive as a shell or not. It should therefore be ensured that where the Member State of the entity communicates that the entity was a shell entity for the purposes of this Directive in the relevant tax period, any tax advantages applied to payments made to the entity during that period and which should have been disallowed under the provisions of this Directive, should be withdrawn. This would mean that the shell entity or the payer on its behalf should become liable to pay the taxes due through filing a tax return. Reversely, the right to a refund of surplus withholding tax paid should accordingly be guaranteed if the entity is found not to have been a shell in a tax period during which it was denied tax advantages as a result of applying the rules on tax consequences under this Directive.**

This addition intends to clarify that when an entity is issued a certificate of tax residence indicating that it is a shell entity according to this Directive in a relevant tax year and that the situation has not changed at the time of issuing this certificate, the benefits of Parent-Subsidiary Directive and the Interest-Royalty Directive, as well as any benefit granted by a DTA to the same income streams should not apply. However, when this situation reverses, tax residence certificates issued afterwards would not have such notice and withholding agents should be able to apply these Directives and DTA.

Additionally, in order to clarify the functioning of the withholding procedure, a new recital (10b) has been included explaining the way in which Member States and taxpayers should act in the cases where the situation of the entity has reversed due to the lapse of time existing between the end of the tax period and the declaration of shell entity status.

- (11) Considering that entities without minimal substance may be used for the purpose of obtaining a tax advantage to the detriment of a Member State other than the Member state of the entity, the relevant information should be shared with the competent authorities of other Member States. To ensure that all interested Member States have timely access to such information, the information should be exchanged automatically through the common communication network ('CCN') developed by the Union. In this context, information should be recorded in a secure central directory on administrative cooperation in the field of taxation available to all Member States. Member States should be required to implement a series of practical arrangements, including measures to standardise the communication of all requisite information through the creation of a standard form. This should also involve specifying the linguistic requirements for the envisaged exchange of information and upgrading the CCN accordingly. Where necessary, following the stage of mandatory automatic exchange of

information under this Directive, a Member State should be able to rely on Article 5 of Council Directive 2011/16/EU as regards the exchange of information on request to obtain additional information on reporting entities from the Member State to which such entities would be liable to have reported this information. Considering that the sooner replies to requests for information are received, the more effective they are, it is appropriate to ensure that replies to requests for information are provided swiftly.

- (12) Directive 2011/16/EU should therefore be amended accordingly.
- (12a) In order to achieve an effective and useful exchange of information, Member States ~~should~~ **shall** require entities that are presumed to be shell entities ~~and do not rebut this presumption~~, to provide the tax authority of the Member State of the entity with information regarding shareholders, regarding beneficial owners and regarding other Member States that are likely to be concerned by the reporting, i.e. the Member States where either shareholder/s and/or beneficial owner/s are resident for tax purposes, the source state of relevant income or the state where relevant assets are situated or registered.

Changes made to clarify and align with changes made in the operative part (Article 10).
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- (13) In order to improve effectiveness, Member States should also lay down penalties against the violation of the national rules that transpose this Directive. Such penalties should be effective, proportionate and dissuasive.
- (14) As the proper implementation and enforcement of the proposed rules in each Member State is critical for the protection of other Member States' tax base, such implementation and enforcement should be monitored by the Commission. Member States should therefore communicate to the Commission on a regular basis, specific information, including statistics, on the implementation and enforcement in their territory of national measures adopted pursuant to this Directive. Such information should be kept confidential by the Commission and should not be used for any purposes other than to determine if Member States comply with this Directive and to fulfil its reporting requirements according to the Directive.
- (15) In order to evaluate the effectiveness of the proposed new rules, the Commission should prepare an evaluation on the basis of the information provided by Member States and other available data. The Commission's report should be published.

- (16) In order to ensure uniform conditions for the implementation of this Directive and Directive 2011/16/EU, in particular for the automatic exchange of information between tax authorities, implementing powers should be conferred on the Commission to adopt a standard form with a limited number of components, including the linguistic arrangements, the necessary practical arrangements for upgrading the central directory on administrative cooperation in the field of taxation. Those powers, as provided in the Directive 2011/16/EU, should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>9</sup>.
- (17) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>10</sup>.
- (18) Any processing of personal data carried out within the framework of Directive 2011/16/EU should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>11</sup> and Regulation (EU) 2018/1725. Data processing is set out in Directive 2011/16/EU solely with the objective of serving a general public interest, namely the matters of taxation and the purposes of combating tax fraud, tax evasion and tax avoidance, safeguarding tax revenues and promoting fair taxation, which strengthen opportunities for social, political and economic inclusion in Member States.
- (19) Since the objective of this Directive cannot sufficiently be achieved by the Member States but can rather, by reason of the fact that such entities are normally established in one Member State but are used in a manner impacting the tax base of one or more other Member States, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

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<sup>9</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13)

<sup>10</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39)

<sup>11</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1)

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I GENERAL PROVISIONS

### *Article 1* **Subject matter**

This Directive lays down indicators of minimum substance for **the identification of manifest cases of misuse of shell** entities in Member States and rules for disallowing certain tax benefits for entities that do not meet those indicators **and are found to be shell entities**, as well as rules on exchange of information.

### *Article 2* **Scope**

This Directive applies to all entities that are considered tax resident in a Member State, and that are not excluded entities within the meaning of Article 2a.

This Directive shall not preclude Member States from applying domestic or agreement-based provisions required for the prevention of tax avoidance, tax evasion, tax fraud or abuse, provided that such provisions are compatible with Union law, including this Directive.

### *Article 2a* **Excluded entities**

**1.** Entities falling within any of the following categories shall not be subject to the requirements set out in this Directive:

- (a) entities with revenues that do not exceed EUR ~~4~~**2** 00 000 on a twelve-month basis **or the proportionally reduced amount for shorter tax periods** and with a total book value of assets or, in the absence of book value, a total tax value of assets of less than EUR ~~4~~**2**000 000 at the end of the tax period;
- (b) entities with less than 75% of **their** revenues **s** being relevant income and with no relevant assets at the end of the tax period;
- (c) entities that are not engaged in cross-border activity on any of the following grounds:
  - (i) more than 60% of the book value of the entity's relevant assets was located or registered outside the Member State of the entity;

- (ii) more than 60% of the entity's relevant income was earned via cross-border transactions;
- (d) companies which have a transferable security admitted to trading or listed on a regulated market or a multilateral trading facility as defined in Article 4, point (22), of Directive 2014/65/EU of the European Parliament and of the Council<sup>12</sup>;
- (e) regulated financial entities;
- (f) governmental entities.**

**2. Member States shall require excluded entities to maintain documentary evidence in support of their exclusion available for inspection at the request of the tax authority of the Member State of the entity in accordance with national law.**

This Article has been changed in order to introduce some suggestions made by the Delegations.

In this regard, the scope of the Directive is narrowed by increasing the revenue threshold set out in point a) of Article 2a(1) as well as the value of assets. In the Presidency's view, through this increase, MS would be able to reach a better balance between the need to tackle shell entities and the reduction of administrative burden for both tax administration and taxpayers.

Additionally, following the above reasoning, the governmental entities are also excluded from the scope of the Directive, to the extent that it is supposed that entities wholly owned by MS governments are not high risk entities. Consequently, a new definition has been added in Article 3.

*Article 3*  
***Definitions***

For the purposes of this Directive the following definitions shall apply:

- (1) 'entity' means any **legal** person, ~~other than a natural person~~, and any legal arrangement regardless of its legal form;
- (2) 'regulated financial entities' means any of the following:

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<sup>12</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).

- (a) a credit institution as defined in Article 4(1), point (1), of Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>13</sup>;
- (b) an investment firm as defined in Article 4(1), point (1), of Directive 2014/65/EU of the European Parliament and of the Council<sup>14</sup>;
- (c) an alternative investment fund manager (AIFM) as defined in Article 4(1), point (b), of Directive 2011/61/EU of the European Parliament and of the Council<sup>15</sup>, including a manager of Euveca under Regulation (EU) No 345/2013 of the European Parliament and of the Council<sup>16</sup>, a manager of EuSEF under Regulation (EU) No 346/2013 of the European Parliament and of the Council<sup>17</sup> and a manager of ELTIF under Regulation (EU) 2015/760 of the European Parliament and of the Council<sup>18</sup>;
- (d) a management company as defined Article 2(1), point (b), of Directive 2009/65/EC of the European Parliament and of the Council<sup>19</sup>;
- (e) an insurance undertaking as defined in Article 13, point (1), of Directive 2009/138/EC of the European Parliament and of the Council<sup>20</sup>;
- (f) a reinsurance undertaking as defined in Article 13, point (4), of Directive 2009/138/EC;

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<sup>13</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>14</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

<sup>15</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

<sup>16</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

<sup>17</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

<sup>18</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

<sup>19</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to entities for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

<sup>20</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (g) an institution for occupational retirement provision as defined in Article 6, point (1) of Directive 2016/2341 of the European Parliament and of the Council<sup>21</sup>;
- (h) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council<sup>22</sup> and Regulation (EC) No 987/2009 of the European Parliament and of the Council<sup>23</sup> as well as any legal entity set up for the purpose of investment of such schemes;
- (i) an alternative investment fund (AIF) managed by an AIFM as defined in Article 4(1), point (b), of Directive 2011/61/EU or an AIF supervised under the applicable national law;
- (j) UCITS in the meaning of Article 1(2) of Directive 2009/65/EC;
- (k) a central counterparty as defined in Article 2, point (1), of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>24</sup>;
- (l) a central securities depository as defined in Article 2(1), point (1), of Regulation (EU) No 909/2014 of the European Parliament and of the Council<sup>25</sup>;
- (m) an insurance or reinsurance special purpose vehicle authorised in accordance with Article 211 of Directive 2009/138/EC;
- (n) a ‘securitisation special purpose entity’ as defined in Article 2, point (2), of Regulation (EU) No 2017/2402 of the European Parliament and of the Council<sup>26</sup>;
- (o) an insurance holding company as defined in Article 212(1), point (f), of Directive 2009/138/EC or a mixed financial holding company as defined in Article 212(1), point (h), of Directive 2009/138/EC, which is part of an insurance group that

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<sup>21</sup> Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

<sup>22</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

<sup>23</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

<sup>24</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

<sup>25</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

<sup>26</sup> Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

is subject to supervision at the level of the group pursuant to Article 213 of that Directive and which is not exempted from group supervision pursuant to Article 214(2) of Directive 2009/138/EC;

- (p) a payment institution as defined in point (4) of Article 4 of Directive (EU) 2015/2366 of the European Parliament and of the Council<sup>27</sup>;
- (q) an electronic money institution as defined in point (1) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council<sup>28</sup>;
- (r) a crowdfunding service provider as defined in point (e) Article 2(1) of Regulation (EU) 2020/1503 of the European Parliament and of the Council<sup>29</sup>;
- (s) a crypto-asset service provider as defined in Article 3(1), point **(158)**, of [~~Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937~~<sup>30</sup>] where performing one or more crypto-asset services as defined in Article 3(1), point **(169)**, of [~~Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937~~];
- (t) a trade repository as defined in Article 2, point (2), of Regulation (EU) No 648/2012;
- (u) a securitisation repository as defined in Article 2, point (23), of Regulation (EU) 2017/2402 of the European Parliament and of the Council;
- (v) an administrator of ‘critical benchmarks’ as defined in Article 3(1), point (25), of Regulation (EU) 2016/1011;
- (w) a credit rating agency as defined in Article 3(1), point (b), of Regulation (EC) No 1060/2009;

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<sup>27</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35)

<sup>28</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7)

<sup>29</sup> Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (OJ L 347, 20.10.2020, p. 1)

<sup>30</sup> **Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, p. 40)** COM/2020/593 final

Changes have been made in order to update the references to the relevant legislation, without any change in the substance.

The Commission will present a room document explaining the reasoning of the definition of regulated financial entities. In the last WPTQ meeting on 4 July the Presidency requested the delegations wishing to include in such definition any other category of entity to present their proposals of new exclusions in writing, due to the need expressed by several delegations that the incorporation of new exclusions has to be highly justified.

(3) 'associated enterprise' means a person who is related to another person in any of the following ways:

~~(a) a person participates in the management of another person by being in a position to exercise a significant influence over the other person;~~

**(ba)** a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;

**(bb)** a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;

**(bc)** a person is entitled to 25 % or more of the profits of another person.

If more than one person participates, as referred to in points (a) to **(bc)**, in the ~~management~~, control, capital or profits of the same person, all persons concerned shall be regarded as associated enterprises.

If the same persons participate, as referred to in points (a) to **(bc)**, in the ~~management~~, control, capital or profits of more than one person, all persons concerned shall be regarded as associated enterprises.

For the purpose of this definition, a person shall mean both legal and natural persons. A person who acts together with another person in respect of the voting rights or capital ownership of an entity shall be treated as holding a participation in all of the voting rights or capital ownership of that entity that are held by the other person.

In indirect participations, the fulfilment of the criteria set out in point **(be)** shall be determined by multiplying the rates of holding through the successive tiers. A person holding more than 50 % of the voting rights shall be deemed to hold 100 % of the voting rights.

A natural person, his or her spouse or registered partner, in accordance with the applicable national law, and his or her lineal ascendants or descendants and his or her siblings shall be treated as a single person.

The definition of associated enterprise has been revised to avoid a technical loophole. The prior wording of Article 3(3) implied that the person that participates in the management of an entity and the entity itself as well as entities that have the same managing person should be regarded as associated enterprises. The Presidency considers that this may lead to inconsistent results in relation to the substance criterion in Article 6(3), point (a) (management of the entity).

In other words, without the proposed changes, entities managed by the same person are considered “associated enterprises” according to Article 3(3) and the limitation set out in Article 6(3), point (a), subparagraph (iv) would not apply.

Therefore, the Presidency proposes to delete both situations of association.

- (4) ‘tax period’ means a tax year, calendar year or any other appropriate period for tax purposes;
- (5) ‘revenue’ means the sum of the net turnover, other operating income, income from participating interests, including dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income as listed in Annexes V and VI to Directive 2013/34/EU of the European Parliament and of the Council<sup>31</sup>;
- (6) ‘Member State of the entity’ means the Member State where the entity is considered a resident for tax purposes;
- (7) ‘entity’s shareholders’ means the natural persons or entities directly holding shares, interest, stakes, participations, membership rights, entitlement to benefits or any equivalent rights or entitlements in the entity;

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<sup>31</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of entities, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19)

- (8) ‘reporting year’ means the year during which the entity is reporting for the purposes of this Directive;
- (9) ‘relevant income’ means income, including capital gains, falling under any of the following categories:
- (a) interest or any other income generated from financial assets, including crypto assets, as defined in [Article 3(1), point ~~52~~ of Regulation **(EU) 2023/1114** of the European Parliament and of the Council ~~on Markets in Crypto-assets, and amending Directive (EU) 2019/1937<sup>32</sup>~~];
  - (b) royalties or any other income generated from intellectual or intangible property or tradable permits;
  - (c) dividends or any other income from shares;
  - (d) income from financial leasing;
  - (e) income from insurance, banking and other financial activities;
  - (f) income from invoicing companies that earn sales and services income from goods and services purchased from and sold to associated enterprises, and add no or little economic value.

Changes are made in order to update the references to other EU law.

- (10) ‘relevant assets’ means immovable or movable property, other than cash, shares or securities, held by an entity for the private use of the entity’s shareholders or beneficial owners, being natural persons, and with a total book value or, in the absence of book value, a total tax value of EUR 1 000 000 or more at the end of the tax period.
- (11) ‘beneficial owner’ means beneficial owner as defined in Article 3(6) of Directive (EU) 2015/849 of the European Parliament and of the Council.
- (12) ‘governmental entity’ means governmental entity as defined in subparagraph B(2) of Annex I, Section VIII of Council Directive 2011/16/EU.**

The definition of governmental entities is taken from DAC2.

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<sup>32</sup> COM/2020/593 final

**CHAPTER II**  
**IDENTIFICATION OF ENTITIES THAT DO NOT**  
**HAVE MINIMUM SUBSTANCE FOR THE**  
**PURPOSES OF THIS DIRECTIVE**

*Article 6*  
***Minimum substance***

1. Member States shall require entities that are not excluded entities within the meaning of Article 2a, to report to the tax authority of the Member State of the entity, on a yearly basis, whether or not in the relevant tax period they meet the criteria set out in paragraph 3.
2. An entity that reports that it does not meet both the criteria set out in point (a) of paragraph 3 and at least three out of the four criteria set out in points (b) to (e) of paragraph 3, shall be presumed to be a shell entity for the relevant tax period; **and** for the purposes of this Directive. The same presumption shall apply to an entity that, upon inspection by the tax authority, does not maintain available supporting documentary evidence in accordance with paragraph 4.
3. The criteria for minimum substance **for the purposes of this Directive** shall be the following:
  - (a) at least one of the managing persons that have the power to bind the entity towards third parties is a natural person that:
    - (i) is resident for tax purposes in the Member State of the entity or in a Member State within a distance from the Member State of the entity that allows commuting on a daily basis;
    - (ii) is qualified and authorised to take decisions in relation to the activities, assets or rights that generate relevant income for the entity;
    - (iii) actively and independently uses the authorisation referred to in point (ii) in the Member State of the entity; and
    - (iv) does not perform the functions referred to in points (ii) and (iii) in more than four enterprises that are not associated enterprises;
  - (b) the entity has premises in the Member State of the entity available for its use, either separately or together with its associated enterprises;

- (c) the entity has at least one own and active bank account or an electronic store of monetary value in the Union;
  - (d) at least five full-time equivalent employees of the entity perform a majority of their working hours in the Member State of the entity, or a majority of the employees of the entity perform a majority of their working hours in the Member State of the entity;
  - (e) the majority of the meetings of the board of directors of the entity take place in the Member State of the entity.
4. Member States shall require entities liable to report in accordance with paragraph 1 to maintain documentary evidence in support of their reporting available for inspection at the request of the tax authority of the Member State of the entity in accordance with national law. The documentary evidence shall relate to the criteria that the entity declared to have met or not met and provide proof for that declaration.
5. ~~Member States shall require that an entity presumed to be a shell entity in accordance with paragraph 2 informs the entity's shareholder(s) of such fact without delay and no later than one month from the relevant reporting or conclusion of the relevant inspection.~~

Article 6(5) is deleted because it is no longer needed since the Directive does not foresee, taking into account the changes made in a previous WPTQ meetings, any direct consequences for the shareholders.

#### *Article 9* ***Rebuttal of the presumption***

1. Member States shall take the appropriate measures to allow an entity that is presumed to be a shell entity under Article 6(2) to **request to** rebut this presumption by ~~showing~~ **evidencing to** the tax authority of the Member State of the entity that it is genuine in the sense that it is put in place for valid commercial reasons which reflect economic reality. ~~For this purpose, entities shall provide evidence of the rationale behind the establishment and existence of the entity, for instance by showing that it is not part of an arrangement put in place for the main purpose of obtaining a tax advantage. The entities shall also provide evidence that the entity has performed and had control over, and borne the significant risks of, the activities that generated the relevant income or had control over, and borne the significant risks connected with the entity's assets.~~ **Member States shall provide to reporting entities the**

**possibility to submit a request for rebuttal at the same time as fulfilling their reporting obligations under Article 6(1).**

2. Members States shall ensure that, where they treat an entity as having rebutted the presumption **for the purposes of this Directive**, or where they deny such a request, a notice of that finding is issued to the entity within six months from the request for rebuttal in accordance with paragraph 1. This shall be without prejudice to appeal procedures in accordance with the applicable national law.

**If, within six months from the request, the competent authority of the Member State of the entity has not issued a notice, the request for rebuttal of the presumption shall be deemed to have been rejected.**

**Member States may extend the period referred to in the first and second subparagraphs up to one year from the request for the rebuttal for the first tax period of application of this Directive.**

3. After the end of the tax period for which the entity rebutted the presumption successfully **for the purposes of this Directive**, ~~in accordance with paragraph 1, a~~ **the Member State of the entity** may consider for a period of three tax periods that the entity has rebutted the presumption on the condition that the factual and legal circumstances of the entity ~~undertaking~~ remain unchanged during this period **and the entity confirms so on an annual basis**. Such conclusion may include an exemption from the reporting obligations set out in Article 6(1). The entity shall **communicate to** ~~be required to inform~~ the tax authority of the Member State of the entity of any material changes in its factual and legal circumstances that could influence the rebuttal of the presumption.

Following comments by a number of delegates, the reference to the entity not being put in place with the main purpose of obtaining a tax advantage has been removed.

Additionally, taking into account what Member States have indicated, the Article now explicitly states that the request for rebuttal has to be filed when an entity reports that it is presumed to be a shell entity.

At the same time, there would be a common expected date of resolution a rebuttal request: six months (or one year) after the date of filing of the report. If within six months from the request (or one year), the competent authority of the Member State of the entity has not issued a notice, the request for rebuttal of the presumption shall be deemed to have been rejected.

*Article 10*  
***Information regarding shell entities***

Member States shall require ~~an entity~~ **entities** that ~~is~~ **are** presumed to be a shell ~~entity~~ **entities** under Article 6(2) ~~and does not successfully rebut that presumption under Article 9(1)~~, to provide the tax authority of the Member State of the entity **at the time of reporting under Article 6(1)** with the following information:

1. the identification of the entity's shareholders, as defined in Article 3(~~7~~**8**) of this Directive, including their name, tax identification number (TIN), or in the absence of a TIN, the date and place of birth (in the case of an individual) and residence for tax purposes;
2. the identification of the entity's beneficial owner(s), including their name, TIN, or in the absence of a TIN, the date and place of birth and residence for tax purposes;
3. the identification of other Member States, if any, likely to be concerned by the reporting of the entity, in particular the source state of relevant income and/or relevant assets.

For efficiency reasons, entities presumed to be shell will have to provide information at the time they report that they do not meet the criteria set out in Article 6(3).

**CHAPTER III**  
**TAX CONSEQUENCES**

*Article 11*  
***Tax consequences in a Member State other than the Member State of the entity***

**1.** Where an entity is presumed to be a shell entity under Article 6(2) and does not rebut that presumption successfully under Article 9(~~2~~), a Member State, other than the Member State of the entity, **including through the withholding tax agent**, shall, in relation to relevant income relating to the tax period to which the reporting refers **and subsequent tax periods**, disallow any exemption or reduction of tax that follows from:

- (a) Articles 5 and 6 of Directive 2011/96/EU and Article 1 of Directive 2003/49/EC, to the extent that those Directives apply due to the entity being considered to be resident for tax purposes in a Member State, and

(b) any other provision which contradicts the purposes of the provisions under point (a) concerning the same income streams, any agreement or convention that provides for the elimination of double taxation of income and, where applicable, capital, in force between that Member State and the Member State of the entity

**2. Where an entity presumed to be a shell entity under Article 6(2) that did not rebut that presumption successfully under Article 9 for a relevant tax period, ceases to be considered a shell entity in a subsequent tax period, Member States shall ensure that this entity is able to request a refund of any additional tax paid by application of the previous paragraph.**

The Commission explained in the last WPTQ of July that national provisions cannot contradict the EU law. Bearing this in mind, tax consequences provided in this Directive should not be undermined by the application of similar exemptions or reductions of tax enshrined in other provisions, in particular in agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, concluded between Member States or other national law provisions.

Taking into account the above, and considering some suggestions made by delegations, Article 11 has been changed in order to specify this general idea and provide more legal certainty.

Additionally, the Article now clarifies the functioning of the withholding procedure, further explained in the new recitals (10a and 10b). It explains the way in which Member States and taxpayers should act in the cases where the situation of the entity has reversed due to the lapse of time existing between the end of the tax period and the declaration of shell entity status. Therefore, paragraph 1 has been amended to make a reference to subsequent tax periods. This addition will allow tax consequences to apply in the periods that follow the reporting tax period. This is complemented by a new paragraph 2, that reflects the possibility of obtaining a tax refund when in subsequent tax periods the entity is not found to be a shell.

#### *Article 12*

#### ***Consequences in the Member State of the entity***

Where an entity is presumed to be a shell entity under Article 6(2) and does not **request to rebut or does not** successfully rebut this presumption under Article 9(2), any tax residency certificates granted by the Member State of the entity shall contain a notice that the entity is presumed to be a shell entity for the relevant tax period, according to this Directive **until the entity meets the substance criteria of Article 6 or rebuts the presumption of being a shell for a subsequent tax period.**

The Presidency believes that a way to ease the administrative burden, achieve the deterrent effect, avoid potential defaults and secure the integrity of the rules would be that tax consequences stated in the Directive apply in the Member State where the entity's income arises not only in the relevant tax period but also in future tax periods, until the taxpayer ceases to be a shell entity (either by complying with the indicators or by rebutting the presumption). For these reasons, the Presidency suggests a new wording of Article 12.

As explained above, in the new recitals 10a and 10b, it is proposed that, once an entity is presumed to be a shell entity, tax residency certificates issued afterwards will include a notice, which would alert the withholding agents of Member States. When this situation reverses and the entity ceases to be a shell entity in subsequent periods, tax residence certificates issued afterwards would not have such notice and withholding agents will have to apply the Directives (and the treaties if applicable).

To be noted that some delegations have expressed their concerns about the interaction between this certificate and the Commission legislative proposal FASTER. In this regard, the Commission clarified in the last WPTQ meeting that both types of certificates are perfectly compatible and, in any case, a reference to the certificate set out in Article 12 of the Unshell Directive could be included in the FASTER Directive.

## **CHAPTER IV EXCHANGE OF INFORMATION**

### *Article 13*

#### *Amendments to Directive 2011/16/EU*

Directive 2011/16/EU is amended as follows:

- (1) in Article 3, point 9 is amended as follows:
  - (a) point (a) is replaced by the following:
    - “(a) for the purposes of Article 8(1) and Articles 8a to 8ad, the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals; for the purposes of Articles 8(1) and 8ad, reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in

accordance with the procedures for gathering and processing information in that Member State;”

(b) point (c) is replaced by the following:

“(c) for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a to 8ad, the systematic communication of predefined information provided in points (a) and (b) of this point.”

(2) In Section II of Chapter II, the following Article 8ad is added:

*“Article 8ad*

***Scope and conditions of mandatory automatic exchange of information according to Directive [OP]***

1. The competent authority of the Member State where the entity is resident for tax purposes shall, by means of automatic exchange, inform the competent authorities of all other Member States, in accordance with paragraph 4 of this Article and the applicable practical arrangements adopted pursuant to Article 21. The automatic exchange shall take place within two months following the end of the quarter in which:

(a) the entity was presumed to be a shell entity according to Article 6(2) of Council Directive [OP] without requesting a rebuttal of the presumption according to Article 9(1) of the same Directive; ~~or~~

(b) a notice under Article 9(2) of Council Directive [OP] was issued concluding that the entity has not rebutted the presumption of being a shell entity; ~~or~~

**(c) the period of six months or one year referred to in Article 9(2) of Council Directive [OP] has ended without any notice issued under that Article.**

Changes have been made to align with article 9.
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2. Where a Member State concludes, including by way of an audit, that an entity, which has not reported in accordance with Article 6(1) of Council Directive [OP], does not meet the criteria of minimum substance laid down in Article 6(3) of Council Directive [OP], or where such a report has been found to be incorrect, the competent authority of ~~that~~ Member State shall, by means of automatic exchange, communicate such information within ~~3~~ **two** months **following the end of the quarter after** ~~from~~ the date it becomes

available, to the competent authorities of all other Member States, in accordance with paragraph 4 of this Article and the applicable practical arrangements adopted pursuant to Article 21.

3. Where following an exchange of information pursuant to paragraphs 1 or 2, a Member State concludes that an entity is no longer considered a shell entity in accordance with Articles 6 and 9 of Council Directive [OP], the competent authority of a Member State shall, by means of automatic exchange, communicate such information within ~~3~~ **two** months **following the end of the quarter after** ~~from~~ the date it becomes available to the competent authorities of all other Member States, in accordance with the applicable practical arrangements adopted pursuant to Article 21.

The information to be communicated under the first subparagraph shall ~~be, include~~ regarding each entity, **the information referred to in** ~~in accordance with points a to e~~ of paragraph 4.

Since the communication under paragraph 3 is a “second” communication, the only information needed is the identification of the entity (point (a) of paragraph 4).

4. The information to be communicated by a competent authority of a Member State pursuant to paragraphs 1 and 2 shall include regarding each entity, where available, the following:
- (a) the name, the tax identification number (TIN) and address of the entity;
  - (b) the identification of the entity’s shareholders, as defined in Article 3, point ~~7~~ **6** of Council Directive [OP], including their name, TIN, or in the absence of a TIN, date and place of birth (in the case of an individual), and residence for tax purposes;
  - (c) the identification of the entity’s beneficial owner(s), as defined in Article 3, point (6) of Directive (EU) 2015/849 of the European Parliament and of the Council including their name, TIN, or in the absence of a TIN, date and place of birth, and residence for tax purposes;
  - (d) the identification of the other Member States, if any, likely to be concerned by the reporting of the entity;
  - (e) ~~{the declaration provided by the entity, in accordance with Article 6(1) of Directive [OP].}~~

**(f) whether information is exchanged due to subparagraphs a), b) or c) of the first paragraph or the second paragraph of this Article.**

5. The communication pursuant to paragraph 4 of this Article shall take place using the standard computerised format referred to in Article 20(5). The first information shall be communicated by [date].

6. For the purposes of paragraphs 1 to 4 of this Article, ‘entity’ shall mean entity as defined in Article 3, point (1) of Directive [OP].

(3) in Article 20, paragraph 5 is replaced by the following:

“5. The Commission shall, by means of implementing acts, adopt standard forms, including the linguistic arrangements, in the following cases:

- (a) for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;
- (b) for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8ab before 30 June 2019;
- (c) for the automatic exchange of information on entities that do not have minimum substance for the purposes of Directive [OP] pursuant to Article 8ad before 1 January [2025].

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).

Those standard forms shall not exceed the components for the exchange of information listed in Article 8a(6), Article 8ab(14) and Article 8ad(4), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a, 8ab and 8ad, respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a, 8ab and 8ad in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union.”;

(4) in Article 21, paragraph 5 is replaced by the following:

“5. The Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field

of taxation where information to be communicated in the framework of Article 8a(1) and (2) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December 2019 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ab(13), (14) and (16) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by [31 March 2025] develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ad(1), (2) and (3) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8ab(17). The Commission shall not have access to the information referred to in Article 8ad. The Commission shall, by means of implementing acts, adopt the necessary practical arrangements for the implementation of the first, second and third subparagraph of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in Article 8a(1) and (2), Article 8ab(13), (14) and (16) and Article 8ad(1), (2) and (3) shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements.”.

## **CHAPTER V ENFORCEMENT**

*Article 14*  
**Penalties**

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

*Article 16*  
**Monitoring**

1. Member States shall communicate the following information to the Commission for each calendar year:
  - (a) number and total amount of penalties imposed pursuant to Article 14 for non-compliance with the requirements of this Directive;
  - (b) number of entities presumed to be a shell entity in accordance with Article 6(2) and number of entities that rebutted such presumption in accordance with Article 9;
  - (c) number of cases where an entity is found to be a shell entity upon an inspection by the tax authorities;
  - (d) number of requests for exchange of information submitted and number of requests received.

Member States shall communicate to the Commission any other information necessary for monitoring and evaluating the implementation of this Directive upon request by the Commission.

2. Starting on 31 December [2027], Member States shall communicate the information listed in paragraph 1 on a biennial basis by 31 December of the year following the end of the reporting year.

Article 16a

***Confidentiality of information***

Information communicated to the Commission pursuant to ~~a~~Article 16 shall be kept confidential by the Commission ~~in accordance with the provisions applicable to Union authorities~~ and may not be used for any purposes other than those related to the implementation of required to determine whether and to what extent Member States comply with this Directive.

Notwithstanding the first subparagraph, the Commission may publish annually anonymised summaries of the statistical data that Member States communicate to it in accordance with Article 16.

Changes are made because the Commission is not a “Union authority”, but a Union institution.

*Article 17*  
**Reports**

1. By 31 December [2028~~9~~], the Commission shall present a report to the European Parliament and the Council on the implementation of this Directive.
2. When drawing up the report, the Commission shall take into account the information communicated by the Member States pursuant to Article 16.
3. The Commission shall publish the report on its website.

**CHAPTER VI**  
**FINAL PROVISIONS**

*Article 18*  
**Transposition**

1. Member States shall adopt and publish, by [31 December 2025~~4~~] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate to the Commission the text of those provisions.  
They shall apply those provisions from [1 January 2025~~6~~].  
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Where this Directive mentions a monetary amount in euros (EUR), Member States whose currency is not the euro may opt to calculate the corresponding value in the national currency on [date of entry into force of this Directive].
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

A large number of delegations have proposed to postpone the transposition and entry into force of this Directive. The text is modified to address their concerns.

*Article 19*  
***Entry into force***

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

*Article 20*  
***Addressees***

This Directive is addressed to the Member States.