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NOTE

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 on Chapters I, III, V and VI

In view of the meeting of the Working Party on Tax Questions on 21 February 2023, delegations will find attached the Presidency compromise text on Chapter I, III, V and VI.

DRAFT

COUNCIL DIRECTIVE

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

(…)

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter

This Directive lays down indicators of minimum substance for entities in Member States and rules **for disallowing certain tax advantages for** ~~regarding the treatment for tax purposes of~~ entities that do not meet those indicators **as well as rules on exchange of information**.

Presidency note: In Chapter III (Article 11 (a) and (b)), the Presidency prososes to limit the tax consequences of the Directive to a denial of benefits following from Articles 4, 5 and 6 of Directive 2011/96/EU (so-called Parent-Subsidiary Directive, PSD), Article 1 of Directive 2003/49/EC (so-called Interest Royalty Directive, IRD) and a denial of benefits under tax treaties between the Member State of the entity and other Member States. Therefore, the wording of Article 1 has been modified. An addition has also been made to clarify that the Directive also entails rules on exchange of information.

Question 1: Do delegations agree with the proposed changes?

Article 2
Scope

(…)

This Directive shall not preclude **Member States from applying** ~~the application of~~ 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 and do not prejudice the rules under this Directive**.

Presidency Note: The first paragraph will not be discussed at the meeting, which will thus only focus on the second paragraph. In the compromise proposal sent to delegations before the working party meeting in January (WK 528/2023) the Presidency suggested a new wording of subparagraph 2 of

Article 2 corresponding to the wording of Directive 2011/96/EU (PSD). At the working party meeting several delegations welcomed the new wording. However, several delegations also emphazised the importance of further clarifying the effect of the Unshell Directive and the need of further analysis in this regard.

The Presidency agrees that it is important to clarify the possibility of applying domestic or agreement-based provisions to avoid tax evasion etc. in relation to the scope of the Directive. The Directive will, as regards aspects falling within its scope, apply uniformly to Member States. This means that, as regards those elements that are governed by the Union act, Member States will not be able to apply other domestic or agreement-based provisions. For instance, Member States will have to apply the rules as such and may not alter the criteria for the identification of a shell entity under the Directive and for an entity identified as a shell, Member States will have to apply the consequences provided for in the Directive.

On situations falling outside the scope of the Directive Member States are not prevented from applying other provisions. This would mean that for elements not governed by the Union act Member States are free to apply other provisions to protect their tax base as long as they do not undermine EU law. Moreover, since permanent establishments and transparent entities are excluded from the scope of the Directive, this means that similar national rules on shell entities could be applied to such entities.

Question 2: Do delegations have any comments on the description of the scope to apply national rules alongside the Directive?

Question 3: Do delegations agree on the proposed new wording of subparagraph 2 of Article 2? If not, which amendments would you suggest?

(…)

Article 4
Relevant income

For the purposes of this Directive 'relevant income' shall mean 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 2 of the proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937[1]];

[1] COM/2020/593 final

(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 services which the entity provides exclusively by using the corresponding services of associated enterprises.~~

Presidency Note: Following comments from several delegations, the compromise proposal sent to delegations before the working party meeting in January suggested a new wording of subparagraph (f) in order not to use the term "outsourcing". However, at the working party meeting several delegations questioned the meaning of this subparagraph and the term "corresponding services" and some delegations suggested a deletion of the paragraph. Outsourcing of administration and decision-making is no longer proposed to be a reporting criterion according to Article 6, which was mentioned as a reason to delete such income from the definition of relevant income. On the other hand, there may be situations where it is possible to use shell entities to obtain tax benefits when providing services, for instance lower witholding tax. The Presidency would like to hear if delegations share the view that the income in subparagraph (f) should be deleted from the definition of relevant income.

As regards subparagraphs (a) – (e), no changes has been made in relation to the previous compromise text.

Question 4: Do delegations agree with the deletion of subparagraph (f) or should it be kept? If you want it to be kept, please elaborate on why.

Article 4a

Relevant assets

For the purposes of this Directive 'relevant assets' shall mean immovable or movable property, other than cash, shares or securities, held for **the** private ~~purposes~~ **use** of the entity's shareholders, being natural persons.

Presidency Note: It is the view of the Presidency that there is general support for the inclusion of this article, and as discussed below under Chapter III, the information about assets held by entities and used for private purposes by the shareholders of the entity could be an important tool in preventing the misuse of shell entities.

As stated in the previous compromise proposal, assets held for private purposes generally do not give rise to income, which is why it makes sense to focus on the mere holding of such assets instead of income. Following the discussion at the latest working party meeting, the wording regarding "private purpose" has been adjusted in order to clarify that it is the private use of the shareholder(s) that is intended.

Question 5: Do delegations agree that the proposed wording is sufficient to cover the relevant situations? If not, please elaborate on why and suggest changes to the drafting.

CHAPTER III
TAX ~~TREATMENT~~ CONSEQUENCES OF ~~UNDERTAKINGS THAT DO NOT HAVE MINIMUM SUBSTANCE FOR TAX PURPOSES~~ BEING PRESUMED TO BE A SHELL ENTITY

Article 11

Tax consequences ~~of not having minimum substance for tax purposes~~ in a Member State~~s~~ other than the Member State of the ~~undertaking~~ entity

Where an entity is presumed to be a shell entity under Article 6 and does not rebut that presumption under Article 9, a Member State, other than the Member State of the entity, shall, in relation to relevant income relating to the fiscal year to which the reporting refers, deny any exemption or reduction of tax that follows from:

(a) Articles 4, 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

~~1. Member States other than the Member State of the undertaking shall disregard any agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, in force with the Member State of the undertaking as well as Articles 4, 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 undertaking being deemed to be resident for tax purposes in a Member State, where the following conditions are met: (a) an undertaking is presumed not to have minimum substance; (b) and undertaking does not rebut the presumption referred to in point (a) for a tax year.~~

Presidency Note: The tax consequences have been discussed in previous working party meetings and at the meeting in September 2022, three alternative ways forward were suggested (see document WK 12150/2022). Based on the comments received from delegations, there is support to further analyse alternative 2. Some delegations have expressed a preference for the other alternatives that have been discussed, such as that the Directive should not contain tax consequences at all or that further work should be conducted in respect of the Commission's original proposal. In the view of the Presidency, it is most likely that a proposal based on alternative 2 could be an acceptable compromise. This alternative implies that shell entities should not benefit from Article 4, 5 and 6 of Directive 2011/96/EU (PSD) and Article 1 of Directive 2003/49/EC (IRD). Against this background, Article 11(a) of the Presidency compromise text contains a proposal to that effect.

Directive 2011/96/EU (PSD) already sets out the following (Article 1(2) and (3)): "*2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. 3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.*" Furthermore, in Directive 2003/49/EC (IRD) (Article 5), it is stated that "*This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.*"

The suggested new wording of the first paragraph of Article 11 is intended to echo these wordings and to clarify that shell entities shall not be granted benefits following from PSD and IRD in other Member States. As the intention of the substance criteria and the rebuttal process is to capture non-genuine arrangements, it could be argued that this tax consequence already follows from the mentioned anti-tax avoidance rules. As shown in the ruling of the ECJ on February 26, 2019, in the joint cases C-116/16 and C-117/16, such rules can be applied in relation to shell entities. In the interest of legal certainty and in order to make sure the rules are applied in the same way in all Member States, the rule should be explicitly stated also in this Directive. Such a rule will bring added value in relation to existing directives and case law.

The first sentence of Article 11 of the compromise text frames the scope of tax consequences as applying to:

- presumed shell entities under Article 6 which have not rebutted that assumption under Article 9,
- relevant income (as defined by Article 4) relating to the reporting period,
- only the exemption or reduction of tax (including withholding tax) relating to relevant income.

At the working party meeting in January the term "fiscal year" in Article 3 was questioned by some Member States. The Presidency intends to continue the discussion on this specific term in one of the upcoming working party meetings. However, the wording "*for the fiscal year to which the reporting refers*" in Article 11 aims at clarifying that the tax consequences should have effect during the period when there is lack of substance, i.e. the fiscal year prior to the reporting year. This may cause practical issues, in particular for the first year when an entity is found to be a shell entity, as withholding taxes are often handled in the year the payment is made and not in the reporting year. It is, however, the view of the Presidency that it gives the most accurate result. It has been discussed in previous meetings whether the tax consequences should instead be applied only after the status as a shell entity has been confirmed by the Tax Administration (i.e. on income during the reporting year and onwards). This approach might, however, lead to tax consequences being applied at a time when the entity is no longer a shell entity.

This Directive is only intended to apply when at least 75 % of the entity's income is "relevant income". An entity lacking minimum substance but that does not pass this gateway test, can still be subject to the anti-tax avoidance rule in the PSD or the IRD. In the view of the Presidency, it makes sense to apply the tax consequences in the same year, regardless of whether it is the Unshell Directive or the anti-tax avoidance rules in the PSD or the IRD that are applied.

It should be noted that the definition of "*relevant income*" does not correspond to the income within the scope of the PSD and the IRD but is deliberately broader. The definition of shell entities and the automatic exchange of information are therefore intended to potentially include a broader group of entities than the group of entities that will be affected by these tax consequences.

Question 6: Do delegations agree with the proposed tax consequences in the form of the denial of benefits that follows from PSD and the IRD? If not, please elaborate? Do delegations agree with the proposed wording? If not, please suggest any changes to the drafting.

Question 7: Do delegations agree on the proposed timing of the tax consequences?

(b) <u>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.</u>

Presidency Note: A number of delegations have expressed concerns about letting this Directive affect the application of tax treaties. Tax treaties generally provide for the beneficial ownership concept and may have specific anti-tax avoidance rules such as the principal purpose test or limitation of benefits, which could be used in order to deny benefits to a shell entity/conduit company regardless of tax consequences according to this Directive. However, on the other hand the need for including provisions that affect the application of tax treaties has also been stressed, as tax treaties often mirror the benefits laid down in the PSD and the IRD. If a shell entity is not entitled to benefits according to the PSD and the IRD but is entitled to the same benefits according to a tax treaty, it can be argued that the proposal would not accomplish a robust effect in preventing the misuse of shell entities for tax purposes.

Most delegations agree that tax treaties with third countries should not be dealt with in this context. Several of those delegations have, however, indicated that if only tax treaties between Member States are affected by this Directive, the issue of the relationship between this Directive and the affected tax treaties will be less contentious. In Article 11(b) the Presidency proposes to include in the tax consequences the denial of benefits under tax treaties between Member States only. Following the first sentence of Article 11, those consequences are limited to the exemption or reduction of tax relating to relevant income. Other parts of the treaties would still apply.

An alternative tax consequence could be to state in the Unshell Directive that shell entities shall not be considered as the "beneficial owner" of the relevant income and therefore should not be entitled to the benefits according to the above-mentioned Directives and tax treaties. However, the same purpose would be achieved through the the denial of benefits in the proposed Article 11 (a) and (b).

Question 8: Do delegations agree with the inclusion of tax treaties between Member States in this Directive? If not, please elaborate on the rationale behind the position?

Question 9: Do you agree with the proposed wording? If not, how should it be drafted?

~~2. The Member State of the undertaking's shareholder(s) shall tax the relevant income of the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s) and deduct any tax paid on such income at the Member State of the undertaking, where the following conditions are met:~~

~~(a) the relevant income accrues to an undertaking that is presumed not to have minimum substance;~~

~~(b) the undertaking does not rebut the presumption referred to in point (a);~~

~~(c) both the undertaking's shareholders and the payer are resident for tax purposes in a Member State.~~

~~The first subparagraph shall apply notwithstanding any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with another Member State.~~

~~Where the payer is not resident for tax purposes in a Member State, the Member State of the undertaking's shareholder(s) shall tax the relevant income accruing to the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force between the Member State of the~~

~~undertaking's shareholders and the third country jurisdiction of the payer;~~

~~Where the undertaking's shareholder(s) is not resident for tax purposes in a Member State, the Member State of the payer of this income shall apply withholding tax in accordance with its national law, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the third country jurisdiction of the undertaking's shareholder(s).~~

Presidency Note: Many delegations have proposed the deletion of this paragraph. The suggested tax consequences in this paragraph are similar but not identical to the "beneficial ownership concept" and CFC-taxation. This raises questions regarding the risk for double taxation and even double non-taxation, when these different tax regimes co-exist. It has been discussed whether there would need to be a special provision, stating that CFC-taxation in accordance with ATAD should not be applied in case an entity is at the same time found to be both a shell entity and a CFC. The majority view of the delegations seems to be that the taxation of shareholders/beneficial owners of shell entities is best handled in accordance with already existing tax rules, and hence left out of this Directive. According to the Presidency an automatic exchange of information regarding shell entities may give the respective Tax Administrations of the Member State of the shareholder and the Member State of the payer the information required, allowing a proper taxation according to alredy existing rules. The Presidency therefore suggests a deletion of this paragraph. Accordingly, there will be no need for a special provision clarifying the relationship between the Directive and CFC-taxation.

Question 10: Do delegations agree with the deletion of this paragraph? If not, please elaborate.

Question 11: If you are of the view that it should not be deleted, how should the paragraph be drafted (including in relation to CFC-rules)?

~~3. Where property referred to in Article 4 is owned by and undertaking that is presumed not to have minimum substance and does not rebut this presumption:~~

~~(a) the Member State where the property referred to in Article 4, point (e) is situated shall tax such property according to its national law, as if such property was owned directly by the undertaking's shareholder(s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction of the undertaking's shareholder(s);~~

~~(b) the Member State of the undertaking's shareholder(s) shall tax such property in accordance with its national law as if the undertaking's shareholder(s) owned it directly, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction where the property is situated.~~

Presidency Note: This paragraph refers to movable and immovable assets held by an entity for the private use of its shareholder(s). When it comes to the concept of shareholders using assets held by an entity for private purposes, there are already various national rules or legal principles being applied to such situations. These differ among the Member States and can include disallowing deductions for private costs, taxation according to the principle of substance-over-form and deemed dividend taxation. The concept of taxing the asset and the shareholder as if the asset was held directly by the shareholder has been questioned in the discussions, since this could imply a lower level of taxation compared to other legal principles already applied.

The lack of information about assets held by entities and used for private purposes is however recognised as a practical problem, in particular when such assets are held through foreign entities. The Presidency therefore suggests that "relevant assets" remains in the Directive but without any proposal on specific tax consequences. Instead, the inclusion of such assets in the automatic exchange of information may give the Tax Administrations of both the Member State of the shareholder and the Member State where the property is situated the information required, allowing the proper taxation according to national rules. It is the view of the Presidency that such information could be an important tool in preventing the misuse of shell entities.

Question 12: Do delegations agree with the deletion of this paragraph and that automatic exchange of information would be an appropriate measure? If not, please elaborate.

Questions 13: If you do not support the proposed change, please suggest an appropriate wording/design of a tax measure relating to assets.

Article 12

~~Tax c~~Consequences ~~of not having minimum substance for tax purposes~~ in the Member State of the ~~undertaking~~ entity

Where an ~~undertaking~~ **entity is presumed to be a shell entity under Article 6** ~~does not have minimum substance for tax purposes in the Member State where it is resident for tax purposes~~ **and does not rebut this presumption under Article 9, any tax residency certificates granted by the Member State where the entity is resident for tax purposes** ~~that Member State~~ shall **contain a notice that the entity does not meet the criteria of minimum substance for the relevant fiscal year according to this Directive.** ~~take any of the following decisions: (a) deny a request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State; (b) g a certificate of tax residence which prescribes that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, and of international agreements with a similar pupose or effect and of Articles 4,5 and 6 of Directie 2011/96/EU and Article 1 of Diretive 2003/49/EC.~~

Presidency Note: According to Article 12 in the Commission´s original proposal a Member State shall, where an undertaking does not have minimum substance for tax purposes according to the Directive, either (a) "deny a request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State" or (b) "grant a certificate of tax residence which prescribes that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, and of international agreements with a similar purpose or effect and of Articles 4, 5 and 6 of Directive 2011/96/EU and Article 1 of Directive 2003/49/EC."

During the French Presidency it was suggested that option (a) "denial of certificate of tax residence" could be deleted. This was supported by several delegations since this option could affect not only Member States but also tax treaties with third countries. The Presidency agrees and suggests a deletion of option (a).

Furthermore, it has been stated that the procedure of issuance of certificates of tax residence differ among Member States, both when it comes to the time of issuance and the period of validity. In some Member States a certificate is issued once the entity is enrolled in the tax register whilst in other Member States, a certificate may be issued on a yearly basis or only upon the request of the taxpayer. Some delegations have questioned the value of the Article as such and suggested that it should be deleted and that exchange of information should be a sufficient measure.

In the working party meeting held in July 2022, it was discussed that tax consequences should come into effect following the issuance of a tax residency certificate including information about the entity being a shell entity (see also information provided by the Commission in document WK 9716/2022). The view of the Presidency is that the issuance of a tax residency certificate does not in itself create or change the rights or liabilities of a taxpayer. Including information about the status as a "shell entity" in a tax residence certificate is accordingly a practical way of giving information about the entity's status.

Stating that certificates of tax residence shall contain information that the relevant entity does not have minimum substance according to the Directive for a relevant fiscal year may have little effect on income received by the entity during the period when the entity is presumed to be a shell, because of the delay in reporting. However, for future transactions it could be argued that this information would send an important signal to Tax Administrations in other Member States as well as in third countries that the entity, at least for the previous fiscal year, was a shell entity and would therefore, in addition to the obligation to exchange information, add value to this Directive. It can also be noted that exchange of information is only available for Tax Administrations. Withholding of taxes is sometimes practically handled by the payer or by intermediates such as banks etc, to whom the information in tax residency certificates can be of importance. The Presidency therefore suggests that option (b) in Article 12 should be kept.

As stated above, the procedure of issuance of certificates of tax residence differs among the Member States. The original wording of Article 12 implies an obligation for Member States to grant certificates of tax residence once an entity has been presumed a shell. Since it would require a common approach regarding the procedure of issuance of certificates that would be appropriate for all Member States, the Presidency suggests a new wording of Article 12. It clarifies that the obligation to include information regarding minimum substance in a certificate of tax residence is only to be applied when a certificate is granted by a Member State, according to national rules.

The French Presidency also highlighted the question if, instead of the wording of option (b) in the original proposal, a notice in the certificate that the entity does not meet the criteria of minimum substance could be better fit for purpose. The Presidency agrees and proposes a new wording to reflect this. As indicated above, the term "fiscal year" will be further discussed in an upcoming working party meeting.

Question 14: Do delegations agree that option a) in the Commission´s original proposal can be deleted?

Question 15: Do delegations agree that there is a value in keeping option b)? If so, do delegations agree with the proposed new wording of Article 12?

Question 16: If delegations do not agree to the proposals, what are the reasons for this? How should the article be worded?

(…)

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.

~~Member States shall ensure that those penalties include an administrative pecuniary sanction of at least 5% of the undertaking's turnover in the relevant tax year, if the undertaking that is required to report pursuant to Article 6 does~~

~~not comply with such requirement for a tax year within the prescribed deadline or makes a false declaration in the tax return under Article 7.~~

Presidency Note: In the discussions of Article 14 regarding penalties, the second subparagraph has been questioned, among other issues, since it could lead to disproportionate outcomes and be difficult to administer. Furthermore, it has been considered that Member States are in the best position to decide which penalties are effective, proportionate and dissuasive. It has furthermore been noted that the first subparagraph corresponds with Article 46 in the Pillar 2 Directive on penalties. In the view of the Presidency, it is appropriate to maintain the first subparagraph and it its proposed that the second subparagraph should be deleted.

Question 17: Do delegations agree with the proposed deletion of the second subparagraph? If not, please comment on the rationale behind why it should be kept and suggest any amendments to the text.

~~Article 15~~

~~Request for tax audits~~

~~Where the competent authority of one Member State has reason to believe that an undertaking which is resident for tax purposes in another Member State has not met its obligations under this Directive, the former Member State may request the competent authority of the latter to conduct a tax audit of the undertaking.~~

~~The competent authority of the requested Member State shall initiate it within one month from the date of receipt of the request and conduct the tax audit, in accordance with the rules governing tax audits in the requested Member State.~~

~~The competent authority which conducted the tax audit shall provide feedback on the outcome of such audit to the competent authority of the requesting Member State as soon as possible and no later than one month after the outcome of the tax audit is known.~~

Presidency Note: In the note WK 15576/2022 issued prior to the working party meeting in November 2022, the CZ Presidency proposed to delete Article 15. There was broad support for the deletion of the provision. Therefore, the Presidency is of the view that Article 15 should remain deleted.

Article 16
Monitoring

1. Member States shall communicate the following information to the Commission for each **fiscal year** ~~tax year~~:

   (a) [number of ~~undertakings~~ **entities** that meet the conditions laid down in Article 6(1);]

   (b) number of ~~undertakings~~ **entities** that reported pursuant to Article ~~7~~**6 (2);**

   (c) penalties imposed pursuant to Article 14 for non-compliance with the requirements of this Directive;

   (d) number of ~~undertakings~~ **entities** presumed ~~not have minimum substance~~ **to be a shell entity** in accordance with Article ~~8~~**6 (4)** and number of ~~undertakings~~ **entities** that rebutted such presumption in accordance with Article 9;

   ~~(e) number of undertakings exempt from the requirements under this Directive in accordance with Article 10;~~

   ~~(f) number of audits to undertakings that meet the conditions laid down in Article 6(1),~~

   (~~g~~**e**) number of cases where an ~~undertaking presumed to have minimum substance was found not to have substantial activity, in particular following an audit~~ **entity is found to be a shell entity upon an inspection by the tax authorities**;

   (~~h~~**f**) number of requests for exchange of information submitted and number of requests received~~;~~**.**

   ~~(i) number of requests for tax audits 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],** ~~M~~**m**ember States shall communicate the information listed in paragraph 1 on a **biennial** ~~biannual~~ basis by 31 December of the ~~tax~~ year following the end of the ~~bi-annual period~~ **reporting year**.

Presidency Note: Deletions are proposed in subparagraphs (f), (g) and (i) to reflect the deletion of Article 15 concerning audits. Changes are also made due to proposed changes in the previous compromise text from the Presidency, presented at the working party meeting in January, relating to new wordings and renumbering of articles compared to the original proposal. Previous subparagraph (g) has been reworded in order to describe entities that are found to be shell entities, not following their own self-assessment but after the inspection of the tax administration, as well as to reflect changes due to the deletion of Articles 10 and 15.

Paragraph 2 has been changed following the comments by delegations at the working party meeting held on May 23, 2022. The aim is to take the administrative burden into account, and it is proposed that reporting shall be made for a two-year period. Clarification relating to the timing is also proposed.

The term "fiscal year" will be further discussed in an upcoming working party meeting. In particular, it should be discussed whether or not entities passing the gateway criteria in Article 6(1) should be subject to reporting obligations. Subparagraph (a) is therefore put in brackets.

Question 18: Do delegations agree with the proposed changes? If not, please elaborate and suggest any changes to the article.

Article 16 a
Confidentiality of information

Information communicated to the Commission pursuant to 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 required to determine whether and to what extent Member States comply with this Directive.

Presidency Note: The question regarding secrecy has been raised during the previous discussions. It can be noted that DAC contains provisions according to which information that has been filed in accordance with the Directive may only be used for certain purposes, see Article 23 a (1). It is the view of the Presidency that there are merits in introducing a similar rule in the Unshell Directive, which clarifies for which purposes information in relation to Article 16 may be used.

Question 19: Do delegations agree to the proposed article? If not, please justify.

Question 20: Do delegations agree to the proposed drafting? If not please suggest any amendments.

Article 17
Reports

1. By 31 December **[**2028**]**, 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 ~~15~~**16**.

3. The Commission shall publish the report on its website.

Presidency Note: In Article 17(2) it is proposed that the reference should be made to Article 16 relating to monitoring instead of Article 15 regarding audits, which has been deleted.

The year is kept within brackets in subparagraph 1, since it will depend on the outcome of the discussions regarding Article 16 amongst others.

Question 21: Do delegations agree to the proposal?

CHAPTER VI
FINAL PROVISIONS

Article 18
Transposition

1. Member States shall adopt and publish, by [~~30 June 2023~~ **31 December 2024**] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall ~~forthwith~~ **immediately** communicate to the Commission the text of those provisions.

   They shall apply those provisions from [1 January ~~2024~~ **2025**].

   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 […].

~~2~~**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.

Presidency Note: In previous discussions of Article 18(1) and (2) regarding transposition (in the original proposal), the proposal that the adoption of the provisions shall occur six months prior to the application of the provisions has been questioned. According to Article 56 of the Pillar 2 Directive *Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2023. They shall apply those measures in respect of the fiscal years beginning from 31 December 2023.* In the view of the Presidency, it is appropriate with a similar wording in this Directive. It is therefore proposed that the provisions shall be adopted on the 31 December 2024 at the latest. Further, it is proposed that the provisions shall apply from 1 January 2025. According to the proposal, the dates are one year later that the original proposal. However, the dates are proposed to remain within brackets. An appropriate period of time after the adoption of the Directive will be needed for transposition.

In previous working party meetings it was suggested to insert a rule regarding values in national currencies, in order to facilitate the application of the Articles mentioning amounts in EUR. The Presidency therefore propose such a rule in a new paragraph 2. The date is kept in brackets and will be added in connection with the adoption of the Directive.

No changes are proposed in paragraph 3 (former paragraph 2).

Question 22: Do delegations agree with the proposals? If not, for what reasons and how should the articles be drafted

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.

Presidency Note: No changes are proposed in Articles 19-20.