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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 steering note on reporting obligations and threshold amounts

In view of the meeting of the Working Party on Tax Questions on 21 February 2023, delegations will find attached the Presidency steering note on reporting obligations and threshold amounts.

Unshell proposal

Presidency steering note on reporting obligations and threshold amounts

WPTQ 21 February 2023

The extent of the reporting obligations according to the Unshell Directive has been discussed during several working party meetings. The tick-the-box-method as such has a strong support among the delegations. On the question who should report in the form of a tick-the-box exercise however, there are different views.

The compromise text presented at the working party meeting in November suggested that only entities that pass the gateway test, but not the substance test were required to report on their status as shell entities (i.e only “shell entities” were to report). At the same meeting, the Commission presented an overview based on the tick-the-box method (WK 15836/2022). That overview suggested that all entities should be subject to at least a minimum set of reporting requirements, even entities that were excluded under the original proposal of the Directive.

In the compromise text presented by the Presidency at the latest working party meeting in January (WK 528/2023), the suggestion was to single out “low-risk entities” (in Article 2a) and leave them altogether out of the scope of the Directive, and, therefore, outside the scope of the reporting obligations (as in the original Directive proposal).

Following that working party meeting, some delegations have stressed the need to further reduce the administrative burden of the proposed Directive by limiting the reporting requirements in order for it to gain acceptance, while other delegations support a reporting requirement for all entities.

The “gateway” criterion in Article 6(1), i.e. the requirement of 75% relevant income / relevant assets and the cross-border criterion, as well as the carve-out criterion of EUR 100 000/EUR 1 000 000, are the criteria that would keep entities with genuine businesses activities out of the scope of the Directive. Arguably, especially small businesses should be kept out of reporting requirement because it would be disproportionally burdensome for them. From the perspective of Tax Administrations, it can also be noted that the “gateway” criterion should exempt the main bulk of entities in the Union. Exempting entities that does not cross the gateway criteria from reporting, should therefore reduce the administration.

From the perspective of the Tax Administrations, it could also be regarded as burdensome to receive information about entities even if the information is not to be used for automatic exchange of information, which were arguments raised in favour of the proposal from the CZ presidency.

In order to facilitate the preparation of the next compromise proposal, the Presidency would like to invite all delegations to comment on the following questions.

1. Reporting obligations

- The extent of exemptions for regulated financial businesses etc. has been debated and there is currently no common view among the delegations. But putting the question of what entities should be exempt (if any) aside for now, is it acceptable for you that those entities that are excluded from the scope of the Directive are also excluded from reporting requirements?
- Would it be acceptable to exclude entities that do not meet the "gateway" criterion or that are excluded by the threshold carve-out from the reporting requirements according to the Directive?

2. Threshold amounts

The threshold amounts of EUR 100 000/ EUR 1000 000 in Article 6 subparagraph 1 (a) in the compromise proposal from the working party meeting in January, are supported by most delegations as such, but several delegations have raised questions regarding timing and verification of the amounts. The verification of amounts is related to the question on when entities should be required to report to the local Tax Administration. The use of tax values requires the Unshell reporting to be linked to the filing of tax returns and the use of book values requires the reporting to be linked to the preparation of annual accounts. Market value has also been discussed as a possible option for assets, but it does not seem proportional to demand yearly valuations to be made especially for this purpose. It has been made clear in previous working party meetings that the procedural deadlines vary between the Member States. Based on your national circumstances:

- Do you think that tax values or book values are best fit for purpose?
- The threshold amount relating to income is meant to be applied to a 12 month period, which should be reflected in the wording. Do you agree?
- In case the accounting year/fiscal year is shorter or longer than 12 months, this would require the threshold amount relating to income to be adjusted accordingly. Otherwise, the outcome could lead to disproportionate results. Do you agree?