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MEETING DOCUMENT

From:	Presidency
To:	Delegations

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Subject:	Draft Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU - Presidency compromise text (clean version)
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Delegations will find attached a clean version of the compromise text prepared by the Presidency for the meeting of the Working Party on Tax Questions (High Level) on 25 April 2023. Please note that the content of the text remains the same as presented in document WK 3554/2023 which was prepared for the meeting of the WPTQ on 22 March 2023.

DRAFT

COUNCIL DIRECTIVE

**laying down rules to prevent the misuse of shell entities for tax purposes
and amending 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 Parliament¹,

Having regard to the opinion of the European Economic and Social Committee²,

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 2016/1164³ concerning anti-tax avoidance and the expansion of scope of Council Directive 2011/16/EU⁴ 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 substance, 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. This proposal complements the progress achieved in corporate transparency through requirements concerning beneficial ownership information introduced by the anti-money laundering framework, which address situations where entities are

¹ OJ C , , p. .Not yet published in the Official Journal.

² OJ C , , p. .Not yet published in the Official Journal.

³ 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).

⁴ 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).

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.

- (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 certain cases for further intervention through the application of a risk-based process and a presumption.
- (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. This is done in order to ensure that entities lacking minimal substance are not used as instruments of tax evasion or tax avoidance. 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 insufficient substance for tax purposes in the internal market as well as for delineating specific tax consequences linked to such insufficient substance. 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.
- (3a) 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.

- (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.
- (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 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 entities presumably engaged mainly in geographically mobile economic activities, 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, which income consists predominantly of passive income flows would 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, a second condition should focus on entities engaged 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 100 000 or less, and a total book value of assets of EUR 1 000 000 or less, should be excluded from the requirements of this Directive.
- (6) It 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. 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.

- (7) To facilitate 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 pass the gateway criterion set out in this Directive, should declare to the tax authority of their Member State, on an annual basis, that they possess a minimum level of resources such as people and premises in the Member State of tax residence and 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. 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 Council⁵, 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 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 taxation⁶, as developed in the context of the Forum on Harmful Tax Practices.
- (8) To ensure tax certainty, it is imperative to lay down common rules on the content of entities’ declarations. Entities that are not excluded and are consequently subject to reporting requirements should be 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 instead be presumed not to

⁵ 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).

⁶ 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

be shell entities 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 to perform an audit and possibly, arrive at a different conclusion.

- (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, entities that are presumed to be shell entities should be entitled to prove that they are genuine and put in place for valid commercial reasons which reflect economic reality, and rebut such presumption. 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 should provide additional information to the administration of the Member State where they reside for tax purposes. An exhaustive list of evidence that should be required in all cases should not be included. Nevertheless, information 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 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 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 a presumption of being a shell entity in a satisfactory manner, it should be able to issue a notice to certify that the entity has minimal substance for tax purposes in accordance with this Directive. Such notice may remain valid for the period during which factual and legal circumstances of the entity remain unchanged and up to 3 years from the time the decision is issued. This will allow to limit the resources allocated to cases that have been evidenced not to be a shell for the purposes of the Directive.
- (10) To ensure effectiveness of the proposed framework, it is necessary to establish appropriate tax consequences for entities that do not have minimal substance for tax purposes. Entities that are presumed to be shell entities 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/EU⁷ and Council Directive 2003/49/EC⁸. 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. 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 to be a shell entity according to this Directive. Such a notice will serve as a warning, that the entity has been lacking substance for the previous tax period. 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, that they should examine the entity more closely before deciding how future transactions with the entity should be treated.

- (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

⁷ 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).

⁸ 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).

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 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.
- (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 Council⁹.

- (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 Council¹⁰.
- (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 Council¹¹ 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.

⁹ 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)

¹⁰ 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)

¹¹ 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 entities in Member States and rules for disallowing certain tax benefits for entities that do not meet those indicators, 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

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 100 000 on a twelve-month basis 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 1 000 000 at the end of the tax period;
- (b) entities with less than 75% of the revenue 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 Council¹²;
- (e) regulated financial entities.

Article 3 **Definitions**

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

- (1) ‘entity’ means any person, other than a natural person, and any legal arrangement regardless of its legal form;
- (2) ‘regulated financial entities’ means any of the following:
 - (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 Council¹³;
 - (b) an investment firm as defined in Article 4(1), point (1), of Directive 2014/65/EU of the European Parliament and of the Council¹⁴;
 - (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 Council¹⁵, including a manager of Euveca under Regulation (EU) No 345/2013 of the European Parliament and of the Council¹⁶, a manager of EuSEF under Regulation (EU) No 346/2013 of the European Parliament and of the Council¹⁷ and a manager of ELTIF under Regulation

¹² 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).

¹³ 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).

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ 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).

- (EU) 2015/760 of the European Parliament and of the Council¹⁸;
- (d) a management company as defined Article 2(1), point (b), of Directive 2009/65/EC of the European Parliament and of the Council¹⁹;
 - (e) an insurance undertaking as defined in Article 13, point (1), of Directive 2009/138/EC of the European Parliament and of the Council²⁰;
 - (f) a reinsurance undertaking as defined in Article 13, point (4), of Directive 2009/138/EC;
 - (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 Council²¹;
 - (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 Council²² and Regulation (EC) No 987/2009 of the European Parliament and of the Council²³ 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 Council²⁴;

¹⁸ 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).

¹⁹ 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).

²⁰ 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).

²¹ 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).

²² 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).

²³ 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).

²⁴ 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).

- (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 Council²⁵;
- (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 Council²⁶;
- (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 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 Council²⁷;
- (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 Council²⁸;
- (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 Council²⁹;
- (s) a crypto-asset service provider as defined in Article 3(1), point (8), of [Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937³⁰] where performing one or more crypto-asset

²⁵ 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).

²⁶ 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).

²⁷ 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)

²⁸ 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)

²⁹ 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)

³⁰ COM/2020/593 final

services as defined in Article 3(1), point (9), of [Regulation 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;
- (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;
 - (b) a person participates in the control of another person through a holding that exceeds 25 % of the voting rights;
 - (c) a person participates in the capital of another person through a right of ownership that, directly or indirectly, exceeds 25 % of the capital;
 - (d) 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 (d), 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 (d), 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 (c) 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.

- (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 Council³¹;
- (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;
- (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 2 of Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937³²];
 - (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;

³¹ 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)

³² COM/2020/593 final

- (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.
- (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.

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.

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, 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 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 paragraphs 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 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 rebut this presumption by showing 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.

2. Members States shall ensure that, where they treat an entity as having rebutted the presumption, 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.
3. After the end of the tax period for which the entity rebutted the presumption successfully, in accordance with paragraph 1, a Member State 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. Such conclusion may include an exemption from the reporting obligations set out in Article 6(1). The entity shall 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.

Article 10

Information regarding shell entities

Member States shall require an entity that is presumed to be a shell entity 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 with the following information:

1. the identification of the entity's shareholders, as defined in Article 3(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.

CHAPTER III TAX CONSEQUENCES

Article 11

Tax consequences in a Member State other than the Member State of the entity

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, shall, in relation to relevant income relating to the tax period to which the reporting refers, 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 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.

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 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.

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.
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 the Member State shall, by means of automatic exchange, communicate such information within 3 months 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 months 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 include regarding each entity information in accordance with points a to e) 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 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].]
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 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.

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.

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 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 2024] 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].

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.

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.