



Council of the European Union  
General Secretariat

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**Interinstitutional files:  
2021/0434 (CNS)**

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**Brussels, 19 May 2022**

**WK 7331/2022 INIT**

**LIMITE**

**FISC  
ECOFIN**

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#### **MEETING DOCUMENT**

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**From:** General Secretariat of the Council  
**To:** Working Party on Tax Questions (Direct Taxation)

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**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  
- Presentation by the European Commission

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Delegations will find attached the presentation prepared by the European Commission for the meeting of the Working Party on Tax Questions (Direct taxation) on 23 May 2022.



“UNSHELL”

# Proposal for a COUNCIL DIRECTIVE

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

COM(2021) 565 final

Working Party on Tax Questions

Presentation DG TAXUD

23 May 2022

# Today's presentation

- It is divided into 2 parts.
- First, we conclude the article-by-article presentation of the proposal. We will cover articles 14 to 20 included. The articles are about enforcement (14-17) and final provisions (18-20).
- Second, we look forward to the main possible solutions/ways to address points raised, building upon feedback and comments received so far.

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# Part 1 – The UNSHELL Directive article-by-article

## Articles 14-20 (chapters V and VI)

# Overview of UNSHELL



Explanatory memorandum

Recitals [22 recitals]

Chapter 1 – General provisions  
[5 articles]

Chapter 2 – Identification of undertakings that do not meet indicators of minimum substance for tax purposes  
[5 articles]

Chapter 3 – Tax treatment of undertakings that do not have minimum substance for tax purposes  
[2 articles]

Chapter 4 – Exchange of information  
[1 article]

Chapter 5 – Enforcement  
[4 articles]

Chapter 6 – Final provisions  
[3 articles]

20 articles

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# Chapter 5 - Enforcement

# Chapter 5 – Enforcement

Article 14 Penalties

Article 15 Request for tax audits

Article 16 Monitoring

Article 17 Reports

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# Chapter 5 – Article 14 - Penalties

2 paragraphs:

- First paragraph makes clear that it is for MS to lay down effective, proportionate and dissuasive penalties and to enforce them (“take all measures necessary to ensure that they are implemented”).
- Second paragraph: penalties have to include an administrative pecuniary sanction of at least 5% of the undertaking’s turnover in the relevant tax year – this sanction is targeted to non-compliant undertakings (not reporting or making a false declaration).

**PENALTY**



# Chapter 5 – Article - 15 Audit

Competent authority of one Member State (MS A) has reason to believe that an undertaking which is resident for tax purposes in another Member State (MS B) has not met its obligations under this Directive.

Step 1

Member State A may request the competent authority of MS B to conduct a tax audit of the undertaking.

Step 2

# Chapter 5 – Article 15 - Audit

The competent authority of the requested Member State (MS B) 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.

Step 3

The competent authority which conducted the tax audit (MS B) 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

Step 4



# Chapter 5 – Article 16 - Monitoring

- A new **reporting requirement** on MS to the Commission is introduced, so that the Commission obtains information.
- The Commission will **evaluate** the information obtained from MS against the main policy objectives of UNSHELL.
- Member States shall communicate the information on a **biannual basis** by 31 December of the tax year following the end of the bi-annual period.”

# Chapter 5 – Article 16 - Monitoring

Information to be provided by MS to the Commission:

- a) number of undertakings that meet the conditions laid down in Article 6(1);
- b) number of undertakings that reported pursuant to Article 7;
- c) penalties imposed pursuant to Article 14 for non-compliance with the requirements of this Directive;
- d) number of undertakings presumed not have minimum substance in accordance with Article 8 and number of undertakings 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) number of cases where an undertaking presumed to have minimum substance was found not to have substantial activity, in particular following an audit;
- h) 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.

# Chapter 5 – Article 17 - Reports

- The Commission will be obliged to present a report by 31 December 2028 on the implementation of UNSHELL. This report shall be presented to the EP and Council.
- The report will take into account the information communicated by MS under article 16.
- The report will be made public.



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# Chapter 6 – Final provisions

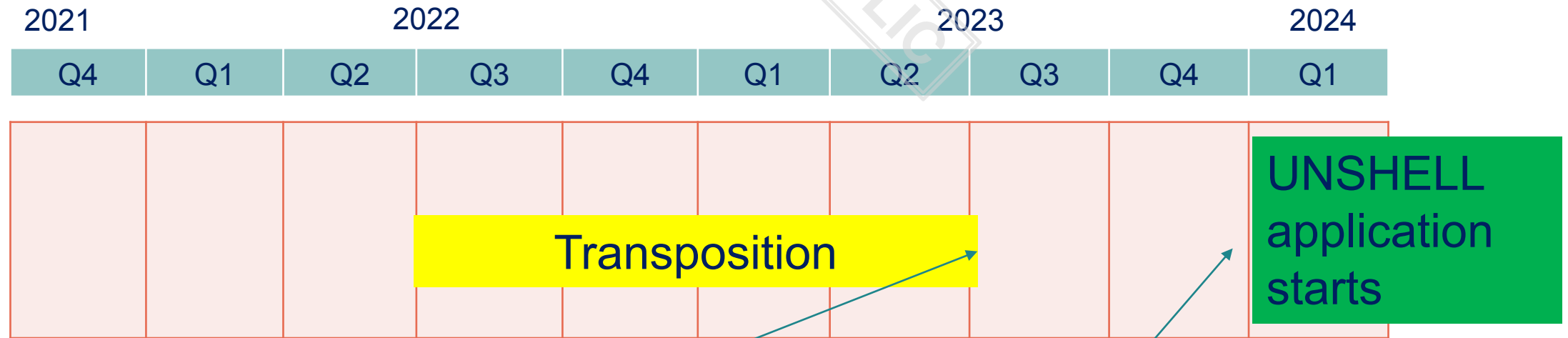
# Chapter 6 – Final provisions

Article 18 Transposition

Article 19 Entry into force

Article 20 Addressees

# Chapter 6 – Article 18, 19 and 20



- UNSHELL shall be transposed by **30 June 2023** at the latest.
- It shall be applicable as of **1 January 2024**.
- It will enter into force on the 20<sup>th</sup> day following its publication on the Official Journal and is addressed to the Member States.



Part 2 –  
**The UNSHELL Directive**  
**Possible solutions/ways**  
**to address points raised**

# UNSHELL: way forward

- 22 December 2021: **UNSHELL is adopted by the Commission.** January HLWP: first, high-level presentation of the proposal to MS.
- Late May 2022: during FR PRES, **4 Council Working Party meetings** already held on the proposal (including today's meeting).
- MS gave feedback (in Council Working Party meetings, bilateral input/meetings, replies to FR PRES questionnaire).
- This presentation is about identified areas where the proposal could be improved.

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# Chapter 1 – General provisions

# Possible solutions/ways to address points raised

- Making clear (e.g. in the scope) that UNSHELL will **not preclude the use of other anti-avoidance / evasion measures** (at MS level or stemming from EU directives).
- **Expand and clarify definitions / key terms** (e.g. « day-to-day operations »).



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# Chapter 2 – Identification of undertaking not meeting indicators of minimum substance

# Possible solutions/ways to address points raised

- Clarify **how the gateway operates**, with particular attention to timing issues (clarify which are the « preceding two tax years »), how to calculate the relevant percentages (averaging).
- Make more operational the **gateway element on « outsourcing »**.
- Prevent confusion with « **beneficial owner** » definition (e.g. by referring to « shareholder »).
- Qualify / strengthen the **carve out on minimum number of employees** (e.g. by specifying that employees have to be tax residents in the EU).
- Ensure the carve out for **regulated financial undertakings** takes into account the business model of the financial sector (e.g. by carving-out second-tier funds owned by regulated financial undertakings).



# Possible solutions/ways to address points raised

- Clarify and make more precise the **indicators of minimum substance**, especially the one on directors/employees and the bank account.
- Ensure that supporting documentary evidence does not need to be shared with tax authorities but **kept by the undertaking at disposal**.
- Make explicit that being cleared under **UNSHELL cannot be an obstacle/bring prejudice** to the prospect for applying other (non UNSHELL) anti-avoidance/evasion measures.
- Introduce procedural **timing/deadlines for handling the rebuttal** (e.g. taxpayers should request the rebuttal within 2 months from reporting and tax authorities take a decision within 3 months from such request).
- Simplify the mechanisms for « avoiding consequences » (e.g. by removing the exemption provision).



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# Chapter 3 – Tax consequences

# Possible solutions/ways to address points raised

- Clarify the **timing of tax consequences** (the « when » issue, e.g. by providing that consequences apply for the year when the report is submitted).
- Ensure that **no existing taxing rights are taken away** (e.g. make clear that MS of the payer can levy withholding tax on a payment towards a shell; and such tax can be deducted from the tax due in the MS of the shareholder(s)).
- Clarify the language concerning tax consequences linked to property – make the distinction clear between the **consequences attached to real estate and to movable property**.
- **Simplify/harmonize consequences in terms of the tax residence certificate**, ensuring legal certainty, transparency (e.g. by eliminating the 2 options and focusing on the « qualified certificate » solution) thus eliminating any spillovers on tax treaties with third countries.



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# Chapter 4 – Exchange of information

# Possible solutions/ways to address points raised

- Ensure tax administrations have **sufficient time** to exchange information and that the process is made as « user friendly » as possible for tax authorities.
- Avoid « data tsunami »: **information exchange exclusively for « shell entities »**. (e.g. no exchanges on entities that fulfill minimum substance or that obtain rebuttal).
- **Avoid mismatches with existing DAC** provisions, re-use as much as possible existing language (on data retention, on data breaches etc.).
- Clarify Commission does **not need access to information** exchanged and ensure **central directory is operational in time** for first exchanges.



Thank you for your attention

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