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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Draft Directive on shell entities
- Note from the Commission: Unshell – a way forward

Delegations will find attached a note on the above subject prepared by the Commission services for the meeting of the Working Party on Tax Questions (High Level) on 11 June 2024.

UNSHELL – A Way Forward

04 June 2024

On 22 December 2021, the Commission submitted a proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (the “UNSHELL“ proposal). Analysis of the proposal was carried out under the consecutive Presidencies. In 2023 it was concluded that further discussions will be needed in order to find compromise solutions on outstanding issues.

This Commission note outlines a new approach for the UNSHELL directive proposal. Delegations are invited to agree to work further on this proposal on the basis of the new approach set out in this Note. Delegations are also welcome to indicate any adjustments that they treat as necessary or propose possible alternative ways forward.

The design of the approach draws on the discussions of delegations at the Council and the points of convergence that arose so far.

The new approach (i) limits reporting obligations to entities in scope that are found to be at high risk of being used in abusive tax schemes, (ii) provides for automatic exchange of the reported information, and (iii) requires Member States receiving information on high-risk entities to use such information by taking administrative measures for the identification of abusive schemes that erode their tax base.

This approach no longer sets out an economic substance test for determining whether an entity is a shell or not. It identifies entities that present a high risk for being involved in a specific abusive tax scheme and in this way, facilitates tax administrations’ work in tackling such schemes. The new approach does not require Member States to apply common tax consequences against shell entities or identified tax abusive schemes. It only creates an obligation to use the exchanged information, in order to investigate structures involving high-risk entities. Member States are expected to apply national anti-tax abuse rules to tackle any identified abusive tax scheme.

The new approach would be combined with a peer review, for Member States to exchange experiences regarding the application of administrative measures, the identified abusive tax schemes and the available national anti-abuse rules.

New Approach

I. Scope of the proposal

All entities resident in a MS should self-assess whether they are captured by one or more of the UNSHELL risk-indicators, **unless they are:**

- Entities with revenues up to 100,000E or book value of assets up to 1,000,000E in a tax year;
- Entities with relevant income less than 75% of total income in a tax year;
- Entities with relevant assets being less than 75% of total assets throughout the tax year;
- Entities with cross-border relevant income less than 60% or relevant income and with book value of cross-border relevant assets less than 60% of total assets' book value;
- Publicly listed entities;
- Regulated financial entities defined in line with the Pillar 2 Directive.

II. Self-assessment by entities in scope

Entities in scope should self-assess whether they are captured by one or more of **the following hallmarks:**

(a) no managing person is (i) a natural person (ii) resident for tax purposes in the MS of the entity (or within distance allowing daily commuting); (iii) qualified and authorised to take binding decisions in relation to the income generating activities/assets of the entity; (iv) actively and independently takes decisions on such activities/assets, and (v) works for no more than 5 unrelated enterprises.

(b) the entity has no premises available for own use in the MS of residence;

(c) the entity has no own and active bank account/electronic store of monetary value in the EU;

(d) the entity has less than 5 FTEs performing the majority of their work in the MS of its residence;

(e) the majority of the meetings of the managing body take place outside the MS of residence.

III. Reporting obligation on high-risk entities

Entities in scope which self-assess that they are captured by either (i) hallmark (a) and two more hallmarks or (ii) at least 4 hallmarks should be considered to pose a high-risk of being involved in tax abuse and required to report in their tax return on the following:

- (a) The hallmarks by which they are captured (tick-the-box) and
- (b) Information on their shareholders and beneficial owners and any MS likely to be concerned by their reporting.

IV. AEOI for high-risk entities

MS receiving information reported by high-risk entities shall exchange such information automatically with all MS. AEOI will take place by regularly (quarterly) uploading on to a **central directory**. It will be made available to all MS.

To facilitate tax administrations in identifying the information relevant to them (e.g., entities with links to the MS), the central directory will allow the **filtering of the information uploaded through relevant research criteria** (hallmarks – MS of residence of shareholders, beneficial owners, etc.).

While the information exchanged under UNSHELL may resemble the hallmarks under DAC6, it still differs in three ways:

1. Reporting is made by the high-risk entity in its tax return (not by the intermediary as in DAC6);
2. The law lays down concrete risk indicators of a specific abusive tax scheme;
3. MS are required to use the exchanged information by taking administrative measures.

V. Application of administrative measures to high-risk entities

MS will use the exchanged information to identify abusive tax schemes. Specifically, MS will be under the obligation to regularly (quarterly) check the information on the central directory (by applying relevant research criteria) in order to identify the high-risk entities linked to structures relevant to them. MS will then apply administrative measures, e.g., tax controls, tax audits or initiate further requests for information, with the aim to identify abusive tax schemes involving these high-risk entities.

If a Member State identifies an abusive tax scheme, they are expected to apply national anti-tax abuse rules, including those deriving from relevant EU directives and tax treaties, to tackle such a scheme. Given that any applicable anti-abuse measures will stem from existing national law, the Directive will not include an explicit requirement for the application of such measures.

VI. Peer-review / evaluation /structured dialogue

MS should exchange their experiences regarding the application of administrative measures in respect of high-risk entities and on any abusive schemes identified.

Such an exchange could be held in the context of an expert group, such as WPIV, with a view to making the application of administrative and subsequently anti-abuse measures within the EU more effective. MS should share with the Commission and between themselves specific statistical information on high-risk entities and measures applied on an annual basis, both administrative and anti-tax abuse measures to tackle tax schemes involving high-risk entities.

After 5 years of the start of application of the Directive the Commission should evaluate the operation of the directive and identify best practices. These can, if appropriate, form the basis for a proposal to amend the directive towards a common approach to entities that do not have substantial economic activity and could be subject to common measures across the EU.

Questions to delegations:

1. Do delegations agree to continue technical discussions on the UNSHELL directive proposal on the basis of the approach outlined in this note?
2. What specific adjustments to this proposal would delegations suggest in order to make it acceptable for your delegation, if any?