Public Consultation – Fighting the Use of Shell Entities and Arrangements for Tax Purposes

- We welcome the opportunity to provide comments on the European Commission's Public Consultation on fighting the use of shell entities and arrangements for tax purposes. Whilst we support the Commission's fight against aggressive tax avoidance practices, we cannot support at the moment a new initiative in this area without a coherent analysis on the series of important anti-avoidance measures that have been taken in the past 5-10 years. We thus strongly encourage the European Commission to start a "fitness check" procedure which, dependent on its results, could feed into an impact assessment for a potential new initiative on shell companies[1].

- If Member States are shown not to properly make use of the various anti-avoidance rules, we support the EU Commission's idea to set up a monitoring mechanism to properly assess and promote the implementation and enforcement of the EU anti-avoidance rules in the EU Member States.

- If additional safeguards are shown to be necessary, the European Commission needs to ensure that any new initiative is targeted exclusively on the use of shell companies for aggressive avoidance practices, and not on companies with legitimate business purposes and be limited to general guidance on the adequate level of economic substance required in relation to a given business activity (as opposed to the application of a "one size fits all" approach.

Anti-Avoidance Measures

We cannot support a new initiative on tackling abusive tax practices through shell companies when a number of significant measures in this domain have only been recently implemented and not evaluated.

Many of the current estimates and reports on corporate tax avoidance date back to a time when several (important) initiatives to counter BEPS had not been in place yet. In the context of the EU, this does not take into account:

- the Anti-Tax Avoidance Directive (I&II),
- the introduction and several revisions to the Directive on Administrative Cooperation (DAC),
- the fourth Anti-Money Laundering Directive,
- EU-list of non-cooperative jurisdictions for tax purposes
- modernisation of transfer pricing rules
- the end of several national harmful tax practices and the introduction of further safeguards as a result of the BEPS project, in particular the (on-going) introduction of the minimum standards (e.g. the principal purpose test of BEPS Action 6).

[1] In line with this, we highlighted the "No opinion" options in Question 3.1 in the public consultation.

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The BEPS project and the ATAD in particular were major initiatives to reduce aggressive profit shifting (in particular through CFC-legislation, prevention of treaty shopping, hybrid mismatches rules, CbC reporting, etc.). We would regret it if the effectiveness and impact of these measures, which were not long ago seen as important milestones, would already be questioned without due analysis. Unless an upcoming assessment by the European Commission shows that the various anti-avoidance rules implemented in the past years have not been adequate to tackle aggressive tax avoidance practices in shell companies, additional legislation is not warranted at the moment. This is a matter of fairness and accountability of public action.

In this respect, we would like to strongly encourage the European Commission to start a "fitness check" procedure on the several anti-avoidance measures taken in the past decade and evaluate their efficiency, effectiveness, coherence and EU added value in terms of tax revenue raised (including how Member States have been implementing such legislation in their audit activity). We do welcome the initial analysis the Commission made on countries' implementation of the ATAD[2] in 2020, and we look further to the announced comprehensive evaluation report, planned to be published by 1 January 2022. There have been evaluation reports[3] on the DACs too which, whilst helpful and pointing towards some positive developments, were too limited in scope (primarily focusing on only DAC 1-2-3) or only covering a few Member States, and by the Commission's own assessment "grounded on limited and in some cases very thin evidence"[4]. A new evaluation should also look at the administrative burden of these measures for businesses.

Legislation such as ATAD, DAC and national BEPS rules all share a common objective and deserve to be evaluated together, under the 'evaluate first'-principle or 'back-to-back' as described in the Better Regulation guidelines, before a new layer of rules is proposed. Such a fitness check would also be particularly relevant in light of the upcoming EU directives implementing Pillar 1 and particularly Pillar 2, where we encourage the European Commission to consider which BEPS-measures can be changed, simplified or even removed when implementing the Pillars.

Enforcement

At the same time, should the European Commission's upcoming analysis show that the issue has not been sufficiently addressed, the question needs to be raised whether this is due to a lack of effective legislation, or indeed a lack of enforcement or cooperation between member states. We refer in this context to the recent European Court of

[2] Report from the Commission to the European Parliament and the Council on the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. https://eur-lex.europa.eu/legal-content /EN /TXT /PDF /?uri= CELEX:52020DC0383&rid=3

[3] Implementation of the EU requirements for tax information exchange – European Implementation Assessment https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662603/EPRS_STU(2021)662603_EN.pdf

[4] European Commission, Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, SWD(2019) 327 final, 2019. http://www.economistiassociati.com/files/2019_staff_working_document_evaluation_on_dac.pdf

Auditors' report on "Exchanging Tax Information in the EU" which argued that the current exchange of information under the DAC between member states' tax authorities was "generally under-used"[5]. If the Commission considers after an evaluation that further action is needed, the focus should be on improving the current tools, rather than adding an additional layer of complexity.

In such a scenario, the Commission's proposal, as mentioned in the public consultation, to set-up an EU monitoring mechanism to ensure that the previous legislative measures taken are properly enforced and implemented has the potential to further encourage EU Member States to enforce anti-avoidance legislation and could also act as a forum for the exchange of best practices and further harmonisation of the rules.

Additional comments

If the Commission, after due analysis of the effectiveness and implementation of previous anti-avoidance measures taken, concludes that additional legislation would be needed to tackle this issue, it is important they take into account the following:

There is currently no universal or EU-wide definition of a shell company, and the term is often wrongly put on equal footing with illegal activities. Further EU-wide recognition of what a "shell company" is and isn't can lead to better data collection on their presence globally and in the EU. As stated in our response to the questionnaire, it is essential that the Commission makes clear that there are different types of 'shell companies', and that their use is neither always illegal nor always motivated by tax purposes. In particular, they are sometimes used for legal, regulatory, accounting or social law reasons or due to human resources constraints, etc. This includes e.g. protecting a company from financial risk, often in the context of a large project; or to own and more easily dispose of assets and associated permits and rights. Such structures often have a low number of employees, because there is simply no need to. Another common reason for establishing holding companies with no or limited substance in large MNEs is to avoid that day-to-day administration related to the ultimate parent's subsidiaries (such as signing of routine documents, etc.) have to be administered by the senior management and/or the Board of Directors. In large MNEs, given the large number of legal entities, such administration can be very voluminous and not manageable in a timely way if it has to be handled by e.g. the Board of Directors of a listed MNE. Another reason for such a structure is to separate the distribution flow from an MNEs subsidiaries for the operational activities and risks carried out in other entities. More examples can be found in our public consultation response.

It is not always easy to distinguish these uses and we recognize the challenges in designing legislation which focuses exclusively on abusive practices, whilst not impacting legitimate business purposes. However, it is clear that any initiative (either legislative or soft law) that obstructs EU-companies from carrying out these legitimate practices will lead to an unfair competitive disadvantage for EU companies. In particular, we would not support a proposal for new additional EU substance requirements when

[5] European Court of Auditors - Exchanging tax information in the EU: solid foundation, cracks in the implementation - https://www.eca.europa.eu/Lists/ECADocuments/SR21_03/SR_Exchange_tax_inform_EN.pdf

these would have a “checklist”/one-size-fits-all approach as very specific and quantified criteria might not be relevant to assess the adequate level of substance for a particular company: substance may differ considerably depending on the activity carried out by the business entity (commercial vs. holding), the sector (digital vs manufacturing) or the phase of its development (start-up vs. maturity). The question of substance is a very complex one, as testified by the ECJ’s case law in the area of tax abuse, and a simplistic “checklist” approach will likely fail to grasp the differences between legitimate uses and illegitimate uses, negatively impacting EU companies. Consequently, substance is a generic concept that must be analyzed on a case-by-case basis and must be commensurate to the business activity carried out by the taxpayer. In addition, as a minimum, any new legislative proposal related to substance requirements should always contain a straightforward safeguard mechanism that allows taxpayers to assert that there are business reasons for the existence of such an entity, in line with ECJ case law and EU principles[6].

In addition, if a new initiative would lead to extra reporting requirements – which we however do not recommend at the moment - the EU Commission should ensure simplicity and avoid creating unnecessary administrative burden and costs for companies which are already facing a high number of existing compliance/reporting obligations for tax purposes. Therefore, a new initiative should follow the administrative proceedings of previous DACs as much as possible (rather than a whole new mechanism), whilst ensuring that there is no “double” reporting burden for shell entities that are already covered by DAC3, DAC4 and DAC6 or are covered by national cooperative compliance programs. In any case, any new reporting requirements would need to be applied to relevant companies and taxpayers directly, as opposed to intermediaries or third parties.

[6] Notably the ECJ decision “Cadbury Schweppes” (C-196/04), Joined cases C-504/16 and C-613/16, decision of 20 December 2017 - *Deister Holding and Juhler Holding*, and Case C-440/17, decision of 14 June 2018, Joined cases C-115/16, *N Luxembourg 1*, C-118/16 *X Denmark*, C-119/16 *C Denmark I*, C-299/16 *Z Denmark*, and Joined Cases C-116/16 *T Denmark* and C-117/16 *Y Denmark*

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Fighting the use of shell entities and arrangements for tax purposes

Fields marked with * are mandatory.

1 Introduction

Several actions taken by the EU over recent years have provided new powerful instruments to tax administrations to tackle the use of abusive (often purely artificial) and aggressive tax structures by taxpayers operating cross-border to reduce their tax liability. However, even after these important developments, legal entities with no or only minimal substance, performing no or very little economic activity continue to pose a risk of being used in aggressive tax planning structures. Such risks of misuse expand to legal arrangements. This is possible because, while substance of legal entities is addressed by the Code of Conduct Group on Business Taxation within the context of specific preferential tax regimes, there are no EU legislative measures which define substance requirements for tax purposes to be met by entities within the EU. Recent investigations conducted by a consortium of journalists brought the issue again to the attention of the general public with a more pressing request to act at EU level to end this practice.

The issue at stake is the use of legal entities with no or minimum substance and no real economic activities, by taxpayers operating cross-border to reduce their tax liability. While entities with no substance and no real economic activities can be used for different abusive purposes (including for criminal ones, e.g. money laundering, terrorist financing, etc.), this initiative would focus on situations where the ultimate objective is to minimise the overall taxation of a group or of a given structure. The European Commission has received several complaints and requests for action from the European Parliament, from citizens, NGOs, journalists and the civil society in general.

In line with Better Regulation principles, the Commission has decided to launch a public consultation designed to gather stakeholders' views on the possible improvements to the EU legal framework in this field.

Responding to the full questionnaire should take about 30 minutes. The questionnaire aims to capture views from all stakeholders on the use and misuse of shell entities and arrangements in the EU for tax purposes. Stakeholders' responses will help the Commission determine if an EU initiative to target shell entities and their misuse for tax purposes is needed as well as its most appropriate design features. The replies will also help identify the main risks as perceived by stakeholders, as well as the priorities for policy actions.

2 About you

* 2.1 Language of my contribution

- ○ Bulgarian
- ○ Croatian
- ○ Czech
- ○ Danish
- ○ Dutch
- ◉ English
- ○ Estonian
- ○ Finnish
- ○ French
- ○ German
- ○ Greek
- ○ Hungarian
- ○ Irish
- ○ Italian
- ○ Latvian
- ○ Lithuanian
- ○ Maltese
- ○ Polish
- ○ Portuguese
- ○ Romanian
- ○ Slovak
- ○ Slovenian
- ○ Spanish
- ○ Swedish

* 2.2 I am giving my contribution as

- ○ Academic/research institution
- ◉ Business association
- ○ Company/business organisation
- ○ Consumer organisation
- ○ EU citizen
- ○ Environmental organisation
- ○ Non-EU citizen

- ○ Non-governmental organisation (NGO)
- ○ Public authority
- ○ Trade union
- ○ Other

* 2.4 First name

Pieter

* 2.5 Surname

BAERT

* 2.6 Email (this won't be published)

p.baert@businesseurope.eu

* 2.10 Organisation name

255 character(s) maximum

BusinessEurope

* 2.11 Organisation size

- ○ Micro (1 to 9 employees)
- ◉ Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ○ Large (250 or more)

2.12 Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

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* 2.13 Country of origin

Please add your country of origin, or that of your organisation.

- ○ Afghanistan
- ○ Åland Islands
- ○ Djibouti
- ○ Dominica
- ○ Libya
- ○ Liechtenstein
- ○ Saint Martin
- ○ Saint Pierre and Miquelon

- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **Fo r the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* 2.15 **Contribution publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

○ **Anonymous**
Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

◉ **Public**
Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

☑ I agree with the personal data protection provisions

3 Problem definition, policy options and impacts

3.1 Despite the recent introduction of new measures against tax avoidance in the EU, tax avoidance seems to remain a problem. Please consider the **relevance of the following possible causes.**

	very relevant	relevant	neither irrelevant nor relevant	not relevant	not relevant at all	no opinion
Inadequate legislation on tax avoidance	○	○	○	○	○	◉
Insufficient information of tax administration on potential tax avoidance structures	○	○	○	○	○	◉
Insufficient capacity of tax administration to process the available information on tax avoidance structures	○	○	○	○	○	◉
Insufficient cooperation between EU Member States	○	○	○	○	○	◉
Insufficient enforcement of existing legislation in Member States	○	○	○	○	○	◉

3.2 The **EU toolbox to fight tax avoidance** has been recently enhanced and new tools came into effect from 2019 and 2020. With which of the following statements do you agree?

- (●) The impact of the new measures is not quantifiable yet. The EU should wait before taking new measures to fight tax avoidance until the impact of the existing measures is measurable.
- ( ) While the impact of the new measures is not quantifiable yet, there is margin for improvement. The EU should take action to complement the existing framework as soon as possible.

3.3 **"Shell" or "letterbox"** entities is a term often used in the tax area to describe **entities with little or no substance** in their place of establishment or elsewhere. Do you agree with this definition?

- ( ) yes
- (●) no

3.4 Please explain your reply.

The term "shell company" has often been used to describe a situation where companies undertake illegal or aggressive tax avoidance practices. While we agree that situations can exist where entities with little or no substance are used for tax purposes, there should be a clear understanding that this is certainly not always the case and that it is perfectly acceptable that a company/entity be set up with minimal substance depending on the activity carried out and on the facts and circumstances, without this immediately creating any legal issue and without this immediately being related to tax avoidance or tax evasion.

3.5 Please indicate the extent to which you agree or disagree with the following statements

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	No opinion
Shell entities are used in the EU mostly for **abusive tax purposes**.	( )	( )	(●)	( )	( )	( )
Current EU rules in the field of taxation already provide tools to tackle aggressive tax planning schemes including through the use of shell entities.	(●)	( )	( )	( )	( )	( )

Current EU rules cannot fully and effectively address the use of shell entities for tax avoidance purposes.	○	○	○	◉	○	○
While the **EU legal framework includes adequate rules** to address the use of shell entities for tax purposes, they are n**ot properly implemented and monitored**	○	○	○	○	○	◉

3.6 Can you provide examples of how shell entities are or can be used in an abusive manner for tax purposes?

3.7 In your opinion, to what extent the following **elements could indicate that a certain entity could be considered a shell entity** for tax planning purposes? Please select one value for each element.

	Very indicative	Indicative	Neither indicative nor not indicative	Not indicative	Not indicative at all	No opinion
Use of trust and company service providers	○	○	◉	○	○	○
Low number of employees	○	○	◉	○	○	○
Lack of own premises	○	○	◉	○	○	○
Lack of own bank account	○	○	◉	○	○	○
Passive income as main source of income (rents, interests, royalties etc.)	○	○	◉	○	○	○
Outsourcing of income generating activities	○	○	◉	○	○	○
Mostly foreign sourced turnover	○	○	◉	○	○	○
Majority of directors non-resident	○	○	◉	○	○	○

3.8 Can you indicate commercial rationales that justify the establishment and operation of shell entities?
Can you provide concrete examples?

None of the indicators described in question 3.7, taken in isolation, are sufficient to draw any final conclusions on whether a company could be considered to be a "shell company" being used for tax avoidance purposes. Whether a situation is abusive or not is essentially a matter of facts and circumstances, and requires a case-by-case analysis.

- A company may be created in order to hold an asset/a class of assets/contracts, notably when there is a need to circumscribe such assets/contracts for legal reasons such as managing risk or for insurance coverage purposes (e.g. when large infrastructure projects are carried out);
- A company may be created with a limited number of employees (or with no employees) when the activity carried out does not require labor force or is not labor-intensive, and/or for cost-saving reasons. It may sometimes be more efficient to resort to outsourcing or using the human resources of other group companies;
- A company may be created with no employees because of social law constraints, in order to avoid the fragmentation of the workforce across different entities. Trade unions may in fact request that the workforce in a group be concentrated within one or a few entities in order to preserve employee rights and benefits or employee-representativeness;
- A company may be set up as a pure equity holding company, which requires minimal resources;
- A company may be set up as a holding company, with minimal resources, in case of joint-ventures (e. g. in order to ring-fence the risk-taking/entrepreneur risk/ownership risk);
- A company may be set up as a holding company, with minimal resources, for financing/intercompany financing purposes;
- A company may be set up as a holding company, with minimal resources, for the management of minority interests that is imposed by law, where an intermediary company is needed to “ring-fence” a listed company;
- As part of a public service delegation contract, public authorities may impose the creation of a dedicated legal entity, for example to simplify its verification by public auditors. This dedicated entity may have only minimal resources as it will subcontract the missions to other entities of the group. Not only will there be a perfectly valid economic reason for the creation of this dedicated entity, but its very existence will be the result of a request from a public authority;
- Some countries do not allow currency conversion or apply exchange controls regulations. In order to manage these legal constraints which are an exogenous factor, a group may set up an “umbrella” entity which will be in charge of redistributing funds between the different subsidiaries;
- Some activities (for instance insurance activities) are highly regulated and it is sometime required that separate entities be created for the exercise of different activities. A group may create an entity with minimal resources whose existence is imposed by the regulator, which will then completely subcontract the activity for which it was created to one or more other entity(ies) of the group;
- Some entities with minimal resources may be “leftovers” from previous restructuring operations that are difficult to liquidate due to local regulations (e.g. local regulators may impose the maintaining of an entity);
- Group cashbox purpose
- Facilitating currency transactions and undertaking the FOREX risk for the group
- Etc.

3.9 Which of the following **business activity** do you consider most likely to be performed by shell entities for tax purposes? You can indicate several replies.

- [ ] Banking activities
- [ ] Insurance activities
- [ ] Financing/leasing activities
- [ ] Holding and managing equity
- [ ] Holding and managing real estate
- [ ] Holding and managing IP assets
- [ ] Headquarters services
- [ ] Investment Fund Management
- [ ] Shipping
- [ ] Off-balance structures

3.10 Please provide examples of any other business activity you consider likely to be performed by shell entities for tax purposes. Please consider for instance situations where a company receives types of income not related to its main business activity (e.g. interests, royalties etc. received by logistics or sales companies).

3.11 Which of the following **legal forms** do you consider likely to be used to create or operate shell entities that will be used for tax purposes? You can indicate several replies.

- [ ] Companies
- [ ] Partnerships with legal personality
- [ ] Partnerships without legal personality
- [ ] Foundations
- [ ] Trusts or fiduciary
- [x] Other

3.12 Please explain your response to the previous question and provide examples.

We expect that shell companies used exclusively for tax purposes are expected to be rarely found in an EU context where various anti-avoidance provisions have been implemented both unilaterally and collectively by EU Member States.

3.13 While Small and Medium Enterprises (SMEs) can also be or make use of shell entities for tax avoidance purposes, an initiative targeting shell entities could risk to put a burden on genuine small business.

For a future intervention, which of the following options would you consider **most appropriate to alleviate any negative spill-overs to SMEs?**

- [ ] Use thresholds (e.g. on turnover or income) to exclude SMEs from the scope of such initiative
- [ ] Include SMEs within the scope of such initiative only to the extent they perform mobile activities
- [ ] No need for specific rules for SMEs
- [ ] Other

3.15 In a scenario where an entity is found not to have substantial economic activity (e.g. because it has some of the features indicated under Q.3.6) in the Member State of residence, in your view, what would be the **most appropriate consequences?**

You can tick more than one reply

- [ ] Denial of any tax advantages/benefits (e.g. relief from double taxation, deductibility of costs, application of of tax treaty benefits) for the entity
- [ ] Denial of any tax advantages for the group of entities to which the shell entity belongs
- [ ] Increased audit risk
- [ ] Making data on the shell entities public (e.g. list of shell entities)
- [ ] Monetary sanctions on the entity
- [ ] Monetary or other sanctions on the directors
- [ ] Monetary or other sanctions on the beneficiaries
- [x] Consequences to be determined by Member States as they deem fit
- [x] Other

3.16 Please elaborate.

We would like to repeat that the indicators described in question 3.7, taken in isolation, are insufficient to draw any final conclusions on whether a company could be considered to be a "shell company" being used for tax avoidance purposes. Whether a situation is abusive or not is essentially a matter of facts and circumstances, and requires a case-by-case analysis. Thus, an "automatic" sanction mechanism (with denial of tax benefits or monetary sanctions, ..) based on a checklist/a set of "one-size-fits-all" indicators is not an effective way forward. As a minimum, any new legislative proposal related to substance requirements should always contain a straightforward safeguard mechanism that allows taxpayers to assert that there are business reasons for the existence of such an entity.

3.17 The use of shell entities for tax avoidance purposes can have impacts. In your view which ones are the **most relevant impacts?**
You can tick more than one reply.

- [ ] Member States do not have the necessary resources to implement public policies
- [ ] Tax burden is distributed unfairly within the society, at the expense of compliant and/or low income taxpayers.
- [x] Unfair competitive disadvantage to tax compliant entities
- [ ] Unfair competitive disadvantage to SMEs that have less access to cross-border tax avoidance structures
- [x] Other impact
- [ ] No opinion

3.18 Please elaborate.

We would like to underline that we answer this question under the scenario where shell entities are indeed used for aggressive tax avoidance purposes. Where they are used for legitimate business purposes, their use can have positive consequences for the general business environment in the EU.

3.19 Are you aware of any **existing national rules** targeting specifically the use of shell entities for tax purposes? Please provide reference.

3.20 **Coordination at EU level**, e.g. on what qualifies as shell entity for tax purposes and how should be treated in terms of taxation, is fundamental to tackle the problem of shell entities in the internal market.
How much do you agree with this statement?

4

3.21 Please provide other **reasons** for which you consider **that the EU should take action** to enhance the fight against tax avoidance through the use of shell entities.

3.22 Please provide other **reasons** for which you consider **that the EU should <u>not</u> take action** to enhance the fight against tax avoidance through the use of shell entities.

A "fitness check" should take place first, evaluating the anti-avoidance rules that were put in place in the past 5 years in terms of their efficiency, effectiveness, administrative burden and additional revenue raised.

3.23 **If the EU took new action** targeted at the use of shell entities for tax avoidance purposes, which of the following **objectives** should be pursued in priority?
You can tick more than one reply.

- [ ] Provide more incentives for voluntary tax compliance to taxpayers akin to use shell entities.
- [x] Promote effective implementation and enforcement of the existing anti-tax avoidance tools.
- [x] Ensure coordination of all Member States on what qualifies as shell entity for tax purposes and how it should be treated in terms of taxation.
- [ ] Promote transparency on shell entities across the EU.
- [x] Monitor the implementation by Member States of any new EU rules targeted at shell entities.
- [ ] All of the above
- [x] Other

3.24 Please indicate other objectives that should be pursued.

Any proposal for new rules tackling shell entities for tax avoidance purposes, should always be preceded by a wide, comprehensive analysis on the effectiveness, implementation and enforcement of the various anti-avoidance measures that have been taken in the past 5 years (ATAD I & II, changes to DAC, BEPS, in particular Action 6 and 7).

3.25 Please provide here any comments regarding your response to the previous question and available examples.

3.26 **If the EU took new action** to target the use of shell entities for tax avoidance purposes, which of the following **means** do you consider most likely to be effective?

- (•) New EU action should be primarily of soft law nature so as to take into account the specific circumstances of each case and the situation of each Member State.
- ( ) New EU action should be of hard law nature, i.e. a new EU Directive. This would ensure the necessary level of coordination in the EU to effectively tackle the problem.

3.27 Please describe any other means or combination thereof that the Commission should consider for EU action in this field.

3.28 **If the EU took no further action in the short-term** to target the use of shell entities for tax avoidance purposes, which of the following **scenarios** do you consider most likely?

- ○ Member States are keen to implement the existing tools against shell entities. In a few years they will have gained the necessary experience to tackle the problem themselves.
- ○ Without EU action targeted at shell entities, the problem will remain.

3.29 If **new requirements** were imposed on EU taxpayers and tax administrations to tackle the use of shell entities for tax avoidance purposes, what would be the **main economic impact** in your view?
You can tick more than one reply.

- ☐ Tax collection across the EU would increase.
- ☐ Resource allocation across the EU would be optimised through better distribution of tax burden.
- ☑ Competitiveness of the internal market would increase.
- ☐ Competitiveness of individual companies would increase.
- ☐ Shell entities would be moved and set up outside the EU to maintain tax avoidance structures.

3.30 Please describe any **further major impacts** you consider likely to arise from a new EU action against shell entities, towards the above stakeholders (taxpayers, tax administrations etc.) or other.

We would like to underline that we answer this question under the scenario where shell entities are indeed used for aggressive tax avoidance purposes. EU-action against aggressive tax practices can of course be warranted and have positive effects if the current anti-avoidance measures are shown to be ineffective. However, any EU-legislation that is unnecessarily put on a previous layer of rules and overreaches its goal by also targeting non-abusive practices will eventually lead to a competitive disadvantage and administrative burden for EU companies.

3.31 If new **monitoring mechanisms** were envisaged to check Member States' implementation of tax avoidance rules against shell entities, what would be the **main consequence** in your view?

- ☑

A level playing field would be encouraged. Member States would have more incentives to implement effectively the rules.

- [ ] Member States would face a new burden, while instead they should be free to implement the rules as best fits with their legislation and practice.

3.32 Please select which of the following you would consider to be an **effective monitoring system** as regards Member States' implementation of EU rules to fight tax avoidance.
You can tick more than one reply.

- [x] Peer review mechanism, e.g. in the context of Code of Conduct Group on Business Taxation
- [ ] Regular publication of anonymized data on compliance of entities in each Member State and on enforcement actions (audits performed, sanctions imposed)
- [x] Commission scoreboard on Member States' performance on the basis of regular reporting by Member States to the Commission
- [ ] Other

4 Final remarks

Although not necessary, you can upload a brief document, such as a position paper in case you think additional background information is needed to better explain your position or to share information about data, studies, papers etc. that the European Commission could consider to prepare its initiative.

Please note that the uploaded document will be published alongside your response to the questionnaire, which is the essential input to this public consultation. The document is optional complement serves as additional background reading to understand your position better.

In case you have chosen in the section "About you" that your contribution shall remain anonymous, please make sure you remove any personal information (name, email) from the document and also from the document properties.

4.1 Please upload your file

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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