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SPECIAL INTEREST SPOTLIGHT SESSIONS

STEP International Client SPECIAL INTEREST GROUP

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DIRECTIVE PROPOSAL UNSHELL / ALSO CALLED AS “ATAD 3”

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

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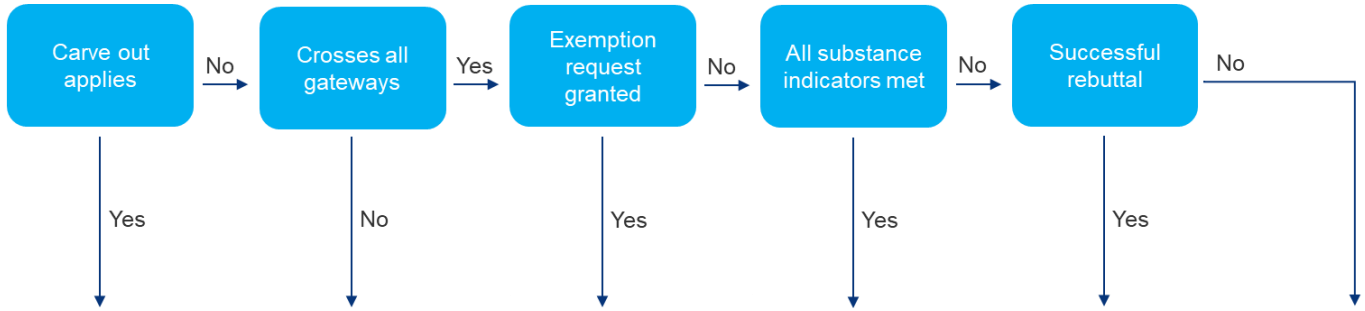
Directive Proposal "Unshell" – 1. Context

- On the 22 December 2021 the European Commission presented a proposal for a Council Directive (COM/2021/565 final), with the goal to prevent the misuse of shell entities for tax purposes – the so-called 'Unshell Directive' proposal.
- This Directive proposal targets passive undertakings who are (deemed) tax resident in an EU Member State and that do not conduct what is considered a relevant economic activity or that do not have minimum substance.
- There are essentially two sides to this proposal:
  - on one hand, a substance assessment;
  - on the other, the tax consequences.

Directive Proposal "Unshell" – 1. Context (cont.)

- The Directive lays down a series of tests that will help Member States to identify undertakings that may be engaged in an economic activity, but which do not have minimal substance and are at risk of being misused for the purpose of obtaining tax advantages – the "substance test". Depending on the outcome of the test, the Directive can have (tax) consequences.



Reporting obligation	No	No	No*	Yes	Yes	Yes
Information exchange	No	No	Yes	Yes	Yes	Yes
Tax consequences	No	No	No	No	No	Yes

* Although the undertaking must provide evidence that the exemption applies.

Directive Proposal "Unshell" – 1. Context (cont.)

- An undertaking considered a shell misused for tax purposes is faced with tax consequences, such as being subject to local withholding tax in the source country of its relevant income, being denied tax residency certificates and denial of access to EU Directives. Furthermore, the undertaking's income may be subject to tax at the level of its shareholder level.

- The European Commission reckons that while there can be valid reasons for the use of legal entities with minimum substance, there is a need for further action to tackle situations where taxpayers evade their obligations under tax law or act against the actual purpose of tax law by misusing undertakings that do not perform any actual economic activity.

Directive Proposal "unshell" – 2. the Steps

Step 1 - "Carve-outs" → Article 6, paragraph 2

1. **Adequate level of transparency**: carves out undertakings subject to an adequate level of transparency, such as listed companies;
2. **Domestic holdings**: carves out holdings owning operational businesses in the same Member State whilst beneficial owners are also tax resident in that Member State;
3. **Subholdings:** carves out holdings tax resident in the same Member State as their shareholder or ultimate parent entity; and
4. **FTEs:** carves out undertakings with at least 5 FTE exclusively carrying out "passive income activities".

If the relevant undertaking is not carved out, it is considered "at risk".

Directive Proposal "unshell" – 2. the Steps

Step 2 - "Gateways" (three cumulative criteria) → Article 6, paragraph 1

1. **Passive element**: assesses whether more than 75% of the revenues in the preceding two tax years consist of passive income, or if more than 75% of the book value of the companies assets consist of assets held for private purposes (if over 1M€), such as immovable property, or of shares);
2. **Cross-border element**: measures whether the entity is mainly engaged in cross-border activities; and
3. **Outsourcing element:** measures whether the entity has sufficient resources to perform its core (management) activities (2-year reference period).

If the relevant undertaking meets all three gateways it is still considered "at risk".

Directive Proposal "unshell" – 2. the Steps (cont.)

- **Step 3 – Exemption if not used for tax reasons → Article 10**

  - evidence to be provided to substantiate that the undertaking does not result in a reduction of the amount of overall tax due by the beneficial owner(s) or the group as a whole (comparison of tax burden with and without the undertaking in the group).

  - The exemption, if provided, is valid during the relevant tax year and may be prorogated for 5 extra years, if the situation of the undertaking remains unchanged during that period.

  - The granting of the exemption is communicated to other EU Member States by way of automatic exchange of information.

Directive Proposal "unshell" – 2. the Steps (cont.)

Step 4 – Substance indicators → Article 7

1. Reporting information on its own premises / premises for its exclusive use;

2. Reporting information regarding its active EU bank account(s); and

3. Reporting information regarding its director(s) or full-time employees

Substance test met only applies to the relevant tax year (annual test). Information on the substance tests being met is automatically exchanged within the EU.

Directive Proposal "unshell" – 2. the Steps (cont.)

Step 5 – Rebuttal → Article 9

- Undertakings not carved-out, crossing all gateways, not exempted and without minimum substance can provide supporting evidence of the business reasons for the existence of the entity, management structure, decision making in the relevant Member State.
- Test is whether the undertaking has performed and continuously had control over, and borne the risks of, the business activities that generated the relevant income or, in the absence of income, the undertaking's assets

- The rebuttal of the presumption may have its effects for 5 years after the relevant year, if the situation of the undertaking remains unchanged during that period;
- The rebuttal is communicated to other EU Member States by way of automatic exchange of information.

Directive Proposal "unshell" – 2. the Steps (cont.)

Step 6 – No rebuttal? Tax consequences → Article 8

No certificate of tax residency would be granted by local tax authorities (or it would be granted with a specific warning);

1. The undertaking would not have access to the EU Directives such as the Parent-Subsidiary and Interest-Royalty Directives;
2. The residence state of the shareholder should apply a look-through approach with regard to the shell undertaking;
3. Source states making payments to the shell undertaking should levy tax based on a look-through approach;
4. Residence state of shell undertaking can levy in accordance with its own tax laws
5. Automatic exchange of information within the EU

Directive Proposal "unshell" – 3. the main issues

- The proposal implies an obvious and considerable additional reporting obligations and compliance to undertakings and tax authorities – particularly since, unlike the proposed pillar two Directive outlining a global minimum tax, there would be no minimum revenue threshold for the application of these rules.

- It is highly questionable whether it is possible to have an harmonized application of this Directive, since there are quite different practices throughout the EU Member States and the vagueness of various concepts laid down in the Directive stands in the way of a harmonized approach.

- The two-year reference period may provide for retroactive effect, but it also does provide for planning opportunities now, in advance of the entering into force of the Directive (where the most recent news suggest that it could be delayed to 1 January 2025).

Directive Proposal "unshell" – 3. the main issues (cont.)

- The "gateways" are broadly construed and based on undefined concepts. In its core, the proposal shifts the burden of proof to the taxpayer, who shall demonstrate that although the gateways may be met it has genuine economic activity, or that there are no tax benefits with the structure. This additional reporting increases the burden further to the taxpayer and is questionable if it is necessary to achieve the objectives at stake.

- Is assessing substance only for undertakings who meet the three gateways effective? What about the undertakings which have remained outside this filter: only anti-abuse local rules and the GAAR? Being outside the filter of the gateways may induce the companies on understanding that they are not shell companies and may attempt to spillover this conclusion to prevent the application of other rules

Directive Proposal "unshell" – 3. the main issues (cont.)

- It is still unclear how this proposal will interact with the ATAD, with each Member-States specific or general anti-abuse provisions and with the double taxation treaties:

  a. If an undertaking rebuts the presumption of being a shell entity or obtains an exemption, does this have spillover effects to counter other anti-abuse measures or the application of the GAAR?

  b. How does this "certification" interact with the limitation of benefits clauses or the principle purpose test?

  c. How may this Directive proposal interact with the double taxation treaties? May a Member State not allow treaty benefits/tax residence certificate due under the rules of a double taxation treaty, based on the fact that a given taxpayer is presumed a shell entity under this Directive? Is this unilateral approach effective?

Q&A

SPECIAL INTEREST SPOTLIGHT SESSIONS

Directive Proposal "unshell" – 4. Q&A (Question 1.)

John Riches:

1. By way of general introduction, Rogério and Rick, what is your sense of the level of 'abuse' of corporate entities within the EU that seems to have been the catalyst for the measure announced in December 2021?

Directive Proposal "unshell" – 4. Q&A (Question 1. – cont.)

RFF:

- The unshell proposal is mostly grounded on the public media coverage arising from the Panama papers, which also had EU replicas (such as Lux files and Malta files), and others (such as Swiss Leaks or Luanda Leaks).

- And, in light of those so-called scandals, there was a need for further action to tackle situations where taxpayers evade their obligations under tax law, or act against the actual purpose of tax law.

Directive Proposal "unshell" – 4. Q&A (Question 1. – cont.)

(cont.) RFF:

- I do agree that the use of conduits with "lack of substance" is coming, step by step, to an end. Either via this initiative or because of other tax rules, which also play a role in tackling entities with minimal economic substance. In fact, and according to the European Commission, it is estimated that €35-70 billion are lost each year in corporate tax avoidance in the EU and that €46 billion are lost each year due to personal international tax evasion

- The main issue here is that the European Commission is taking action while the potential of the other EU and international measures are yet to be tested (namely the two ATADs, the DAC 6 and 7, and BEPS actions), and the far-reaching consequences of this proposal may create a shift in International taxation is aligned with the rest of the world.

Directive Proposal "unshell" – 4. Q&A (Question 1. – cont.)

Rick:

- The Unshell Directive is a next step taken by the EU to combat perceived tax avoidance and evasion. We have seen many over the last years, starting with BEPS and now moving to DAC7, ATAD 3 (Unshell) and Pillar One and Two.
- The main difference with previous measures is that ATAD3 not only targets MNEs and purely corporate structures, but specifically includes family structures and HNWI and their corporate vehicles.
- The question is indeed whether this measure will have the desired effect (given the many escapes), but also how it interacts with other measures and what the effects of other measures will be.

Directive Proposal "unshell" – 4. Q&A (Question 2)

John Riches:

Rick, could you please, walk us through the broad construct of how the multi-level test within the Unshell proposal is intended to work using this helpful chart that you kindly put together?

Directive Proposal "unshell" – 4. Q&A (Question 2. – cont.)

Summary of steps

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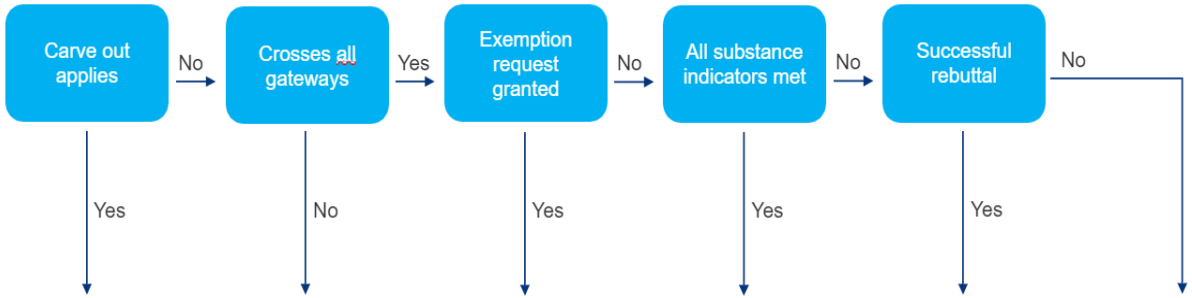

Reporting obligation	No	No	No*	Yes	Yes	Yes
Information exchange	No	No	Yes	Yes	Yes	Yes
Tax consequences	No	No	No	No	No	Yes

* Although the undertaking must provide evidence that the exemption applies.

Directive Proposal “unshell” – 4. Q&A (Question 3.)

John Riches:

2. Can you also help us, Rogério, with your understanding of what is meant by a ‘Shell Company’ and what you understand to be the Commission’s objectives in promulgating ATAD 3?

Directive Proposal "unshell" – 4. Q&A (Question 3. – cont.)

RFF:

- Under the light of this Directive proposal, a "shell entity" is an entity whose economic activity mainly consists of passive activities / earning passive income and which does not meet certain substance requirements. The targets are, obviously, the so-called "post-box companies".

- These entities, seen as without substance, are looked at by the European Commission – and perhaps this is also the general worldwide perception, following scandals such as the Panama Papers, as a means for tax evasion or improper tax planning.

Directive Proposal "unshell" – 4. Q&A (Question 3. – cont.)

(cont.) RFF:

- The guiding light of the European Commission is, therefore, tackling situations where taxpayers allegedly evade their tax obligations or act against the actual purpose of tax law by misusing undertakings that do not perform any actual economic activity.

- The problem at hand is the perception that these shell entities are contributing to lower the taxpayers' overall tax liability and consequently shift the tax burden, or are manipulating the global tax burden, at the expense, (in the simplistic words of the European Commission), of "honest taxpayers".

Directive Proposal "unshell" – 4. Q&A (Question 3. – cont.)

(cont.) RFF:

- And, as this undoubtedly distorts business decisions, the purpose of the European Commission is also tackling unfair tax competition and unfair global distribution of the tax burden.

- To sum up: the Commission's objective is to address those situations where taxpayers allegedly evade their tax obligations or act against the actual purpose of tax law, and to avoid the misuse of undertakings that do not perform any actual economic activity.

Directive Proposal "unshell" – 4. Q&A (Question 4.)

John Riches:

Rick, in circumstances where an undertaking is not carved out or does not cross all the gate-ways, how do groups that are somehow caught in the cross-hairs of the rules but using a bona fide structure able to get out of the directive?

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

- Rick:

a) Requesting an exemption, demonstrating that the existence of the potential 'shell' does not reduce the tax liability of its beneficial owners or of the group as a whole. Business reasons are not relevant in this test. The potential shell is simply ignored. Unclear whether tax treaties or domestic anti-abuse measures may be taken into account. Further unclear whether (future) taxation at the level of the potential shell or at a higher level in the structure may be taken into account.

b) Meeting minimum substance indicators:
   i. Availing of own / exclusive office space
   ii. Availing of active EU bank account
   iii. At least 1 director or majority of FTEs tax resident in Member State of potential shell (or close by) and – in short - qualified to carry out activities in relation to passive income. Director or FTE may not also be employed by or director of a non-associated enterprise (carve-out of trust directors)

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

- Rick:

c) Rebuttal:

i. Demonstrate commercial rationale behind structure
ii. Information about employee profiles
iii. Information on decision making process with regard to passive income

In short, demonstrate that undertaking has performed and had control over, borne risks of the business activities related to passive income or assets.

Directive Proposal “unshell” – 4. Q&A (Question 5.)

John Riches:

3. Can you walk us through the main stream carve outs, Rogério, that apply to exempt multi-level structures within the EU from being caught within the Unshell Directive?

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

RFF:

- The main point of the European Commission is to exclude, these, entities that are commonly used for good commercial reasons, defined in Article 6, paragraph 2 of the Directive proposal.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont) RFF:

- The most common types of entities expressly carved-out from reporting are regulated financial entities, which are defined in a long list provided in paragraph 2 of Article 6.

- The proposal foresees that regulated financial entities are not only the typical regulated financial entities, such as credit institutions and alternative investment funds, insurance and reinsurance undertakings, but also payment and electronic money institutions, crowdfunding or crypto-asset service providers.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- This exclusion, of the regulated financial entities, is understandable, given that these are entities already subject to an adequate control and transparency, which puts these entities not at risk.

- However, it appears that the carve-out provisions are to be seen on a "level by level" (or "structure by structure") basis, and this is to say that it appears that a subsidiary of a carved-out regulated financial entity is not automatically carved-out as well.

- The other carve-outs are not so clear, as they do not relate to assessing if a certain entity falls within the definition of a regulated financial undertaking as foreseen in the proposal.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- The European Commission also apparently puts a number whether the Directive is or is not applied to an undertaking, in fact, undertakings with at least five own full-time employees or members of staff exclusively carrying out the activities generating the relevant income are expressly excluded.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- And it appears that it is not mandatory for any of these to be tax resident in the same Member State or that the two-year lookback period also applies to this carve-out.

- But, the tax residence of the employees is an important topic within the steps of the substance test, namely being a substance indicator. Nevertheless, it appears that an entity would be excluded from the Directive if it has 5 full-time employees tax resident in any European Union country.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- And the entities with holding activities that are resident for tax purposes in the same Member State as the undertaking's shareholder or the ultimate parent entity are also carved-out from the application of the Directive.
- The interpretation of this provision is arguable, as the wording is, also, not clear and there is not, yet, enough guidance on the subject.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- Other carve-out applies to undertakings in which the main activity is holding shares in operational businesses, as long as the subsidiaries and the beneficial owners are located, and tax resident, in the same Member State.

Directive Proposal "unshell" – 4. Q&A (Question 5. – cont.)

(cont.) RFF:

- So, therefore, my advice would be for (i) the assessment to be made on a "level by level" and "entity by entity" approach; (ii) setting out in a clear tabulated form of the jurisdictions of all the relevant persons or entities involved; (iii) the activities foreseen by each company; (iv) and the resources available for each company to fulfill their activities.

Directive Proposal "unshell" – 4. Q&A (Question 35 – cont.)

(cont.) RFF:

- Apart from the carve-outs, this proposal foresees the possibility of applying for an exemption from fulfilling the obligations set forth in the Directive, and also foresees the possibility of rebutting the presumption of a given entity being deemed a shell entity.

Directive Proposal "unshell" – 4. Q&A (Question 3. – cont.)

John Riches:

Could you explain to us, Rick, how double tax treaty might come to the rescue of an entity that is caught by the Unshell proposal in certain instances?

Directive Proposal "unshell" – 4. Q&A (Question 3. – cont.)

- Rick:
  1. Discussion within the EU and individual Member States whether the tax consequences of being a shell entity are allowed under bilateral tax treaties. General discussion whether EU law overrules bilateral agreements. Not all tax treaties may provide for such anti-abuse measures being executed by Member States, especially not vis-à-vis third countries.
  2. Under some treaties, tax treatment may be more favorable in a flow-through scenario than in a direct situation.

Directive Proposal "unshell" – 4. Q&A (Question 4.)

John Riches:

4. Turning now to groups that are caught within the directive and are unable to satisfy the tax authorities that they are structured for non tax reasons, what is, in your opinion, Rogério, the impact of the rules?

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

RFF:

- This Directive proposal increases the compliance burden and, this implies, a new cost for European companies, as it establishes a set of rules which all groups will have to take into account when structuring business across the EU.

- And, it is still unclear if the Directive is to apply to consolidated groups: shall the group be seen as one entity or shall the Directive apply to each of the entities? It appears, nevertheless, that an entity-by-entity approach is advisable.

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

(cont.) RFF:

- If the "gateways" are crossed, the immediate consequence is the compliance obligation of reporting substance indicators in the tax return, as well as information exchange by the tax authorities.

- And should the substance test fail, as well as the rebuttal, then tax consequences may arise!

- The remaining consequences of the Directive will depend on how the entity performs in the substance test.

  If the three gateways are not crossed, there will not be any consequences at all.

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

(cont.) RFF:

- Regarding the tax consequences, they are essentially divided in to tax consequences (i) in the Member State of the undertaking (article 12); or (ii) in the member states other than the one of the entity (article 11).

  (i) At the level of the Member State of the entity, the Member State shall deny the shell entity from tax residence certificates for use outside that Member State. This measure seeks to isolate the shell entity from any treaty benefits which it could be benefitting from.

  (ii) At the level of the other Member States, the consequences will continue to isolate the shell entity from any benefits arising from double taxation treaties, from the Parent Subsidiary Directive or from the Interest and Royalty Directive, as well as a possible "look-through approach" by the Member State of the shareholder.

Directive Proposal "unshell" – 4. Q&A (Question 4. – cont.)

(cont.) RFF:

- In this sense, the tax consequences can be huge within a group's structure, where a previously exempt or tax limited income flow will end-up being subject to tax and, therefore, this will necessarily increase the overall group taxation.
- Notwithstanding, it appears that the consequences are mostly located in the Member State of residence of the shareholders, (where the look-through approach may apply) and in the EU source Member-State, (where that State will not be able to apply the relevant tax treaty or other withholding-tax relief).
- The case of the member-state of the entity, it is not well defined if the shell can apply the participation exemption (Parent Subsidiary Directive) on a dividend received. In my opinion, that may be possible.

Directive Proposal “unshell” – 4. Q&A (Question 5.)

John Riches:

can you give us some practical examples of how structures holding assets for a private family group might be caught by the Unshell proposal?

Directive Proposal "unshell" – 4. Q&A (Question 5 - cont.)

- Rick:
- First off, tax transparent family pooling vehicles/family funds should not fall in scope, as well as purely domestic structures.
- Same applies to corporate entities that are not tax resident and cannot obtain a residency certificate
- Domestic holding structures seem to be out of scope too, as well as holding entities that own passive investments "on the side"
- Entities owning shares may meet part of the gateways, but if no income is generated in preceding two years, should fall out of scope as well

- In scope:
  - Special purpose vehicles holding private assets (boats, airplanes, real estate/holiday homes located cross-border)
  - International subholdings in some cases
  - Royalty structures / IP structures
  - Family structures availing of services being provided by (multi)family office

Directive Proposal “unshell” – 4. Q&A (Question 6.)

John Riches:

5. And, Rogério, what are they key measures companies who might be caught can be taking now to either mitigate the impact of ATAD3 or fall outside its scope in January 2024?

Directive Proposal "unshell" – 4. Q&A (Question 6. – cont.)

RFF:

- First of all, companies should reevaluate the "substance requirements" and their "business structures" to comply with the terms of this Directive proposal, (particularly whether an exemption may apply).

- As already discussed, there are several business models which may be carved-out of the application of the Directive and also some situations where entities can be exempt from fulfilling the obligations set forth in the Directive, and this knowledge shall make an impact in how a business should be structured and going forward.

Directive Proposal "unshell" – 4. Q&A (Question 6. – cont.)

(cont.) RFF:

- But, what should concern us right now is the two-year reference period for the purposes of the application of the gateways, since there are no grandfathering rules which could limit this sort of "retroactive effect", namely if the directive comes into force before January 2nd 2025.

- Namely in what regards the "management of relevant functions" and the "decision-making process" outsourcing may not be a good idea right now, since this gateway foresees a two-year look-back reference period.

Directive Proposal "unshell" – 4. Q&A (Question 6. – cont.)

(cont.) RFF:

- Entities should, therefore, consider insourcing management decisions and relevant functions – or outsourcing to intra-group services (which appear to be out of the scope of this gateway).

- Entities should also consider different income-generating activities. Given the two-year lookback period of the first gateway, diversifying income, to income other than the relevant income for the purposes of the directive.

Directive Proposal “unshell” – 4. Q&A (Question 7.)

John Riches:

Do you see, Rick, any silver lining to the directive that might actually assist clients?

Directive Proposal "unshell" – 4. Q&A (Question 7. – cont.)

- Rick:
  In some cases, tax consequences of being a shell may not be detrimental, as in some situations direct taxation is not worse (or even better) than via a shell company
  Moreover, has the EC with this directive and its preamble clarified the "wholly artificial structure concept" so elementary to many domestic and international anti-abuse measures?
  If an exemption or rebuttal applies, what are effects on other anti-abuse measures? Safe harbor?

Directive Proposal “unshell” – 4. Q&A (Question 8.)

John Riches:

Can double taxation arise based on the “look through approach” and taxation upon receipt of the actual income? What do you think about this Rogério?

Directive Proposal "unshell" – 4. Q&A (Question 8. – cont.)

RFF:

- The "look through approach" foresees that the income shall be taxed without regard to the shell entity, as if it had been paid directly to its shareholder. However, this may imply double taxation issues at several levels, which are, also, addressed in the Directive proposal.
- The first measure to avoid double taxation is that the Member State of the shareholder must allow for a deduction of any tax paid on such income in the Member State of the undertaking.
- And, in situations where the payer of the income to the shell entity is not resident in the EU, the shareholder's Member State shall apply the look-through approach, but without harming any double taxation agreement existing between that Member State and the third State.

Directive Proposal "unshell" – 4. Q&A (Question 8. – cont.)

(cont) RFF:

- On the other hand, in the case of the entity´s shareholder(s) who is(are) not being resident in a EU Member State, the source EU Member State shall apply withholding taxation, but without prejudice of any eventual double taxation agreement.
- At the level of the assets (referred to in Article 4) held under the shell entity:
  - If those assets are Real estate located in a Member State, that Member State may tax those assets as If those were held directly by the shareholder and taking into account any existing double taxation agreement with the State of that shareholder.
  - The shareholder's State may tax, the remaining assets foreseen in Article 4, as if directly held by that shareholder, but without prejudice for any double taxation agreement.

Directive Proposal "unshell" – 4. Q&A (Question 8. – cont.)

(cont.) RFF:

- However, as well was was pointed out in your question, these measures to prevent double taxation are drafted to mitigate the effects of the "look through approach", but they would not apply when the shell entity actually is distributing income to the shareholder, income which was previously already taxed in the hands of the shareholder via the "look-through approach".
- It is apparently clear, "*de jure condendo*", that the shareholder's Member State should give a tax credit for the tax already paid on that portion of income via the look-through approach.
- Let's hope that all this gets clarified prior to the entry into force of the Directive!

Directive Proposal “unshell” – 4. Q&A (Question 9.)

John Riches:

What is the role of advisers in substance/effective management?

Directive Proposal "unshell" – 4. Q&A (Question 9. – cont.)

- Rick:
  Apart from usual question on effective management and tax residency, it is unclear whether acting on advice taken from advisers on matters related to core activities should be considered "outsourcing" in view of the gateways.

Directive Proposal "unshell" – 4. Q&A (Final question for panel)

John Riches:

Final question for panel. What concluding comments would you like to leave us with in terms of your perception as to the merits of this proposal and its likely impact on EU cross-border structuring from 2024 onwards?

Directive Proposal "unshell" – 4. Q&A (Final question for panel – cont.)

RFF:

- From a policy perspective, we should not condemn this fight against the misuse of entities for tax purposes, this Directive Proposal has the merit of putting this topic on the table and of motivating discussions on what we want for our companies within the EU.
- The Directive proposal also has the merit of ensuring further action against tax avoidance and evasion and adding one more building block to the information exchange systems across the EU.
- Notwithstanding, this standalone position by the European Union is problematic, and it is questionable whether the objectives of the Directive Proposal can be met without global (worldwide) cooperation.

Directive Proposal "unshell" – 4. Q&A (Final question for panel – cont.)

(cont.) RFF:

- Additionally, it is also questionable how this Directive will impact EU entities performing cross-border activities with non-EU members, namely in what concerns the application of double taxation treaties with those non-EU Countries.

- This standalone position from the EU may, actually, lower the EU as an investment destination, and may also provoke the evasion of wealth to non-EU countries (it is already difficult to conduct a business within the EU, and now there are additional reporting/compliance obligations to be aware of) .

Directive Proposal "unshell" – 4. Q&A (Final question for panel – cont.)

(cont.) RFF:

- This standalone position from the EU may, actually, lower the EU as an investment destination, and may also provoke the evasion of wealth to non-EU countries (it is already difficult to conduct a business within the EU, and now there are additional reporting/compliance obligations to be aware of)
- But the tax authorities also have reasons to complain: the additional control of the application of this Directive and reporting via exchange of information can increase pressure to Tax Authorities of each Member State, and the fact is that the tax authorities capabilities among Member States differ from one country to the other.
- And lastly, let's hope that these additional burdens on private and public sectors will not imply an unwanted increase in tax competition among the EU Member States!

Directive Proposal "unshell" – 4. Q&A (Final question for panel – cont.)

Rick:
Doubtful whether it has the desired effect and in what form it will be accepted. Member States not aligned and compromise proposals in the making. It will probably be adopted eventually, but the question will be when the 2-year reference period starts.
This may be 2023, in which case the income/asset test and outsourcing criterion will be relevant. For now, look at in sourcing and own premises to start with.

Directive Proposal “unshell”

Thank You !

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