

**Final compromise amendments - Unshell Directive**

***Bold/italics*** text (***underlined*** where a title is concerned or where the change deviates from amendments tabled) and ~~striketrough~~ represents changes to the existing regulations as would have been amended by the Commission proposal. *AMs covered*: AMs that fall if a compromise is adopted. Track changes signalize the changes made from the first shadows meeting to the second one.

**COMP A**

*Article 2*  
**Scope**

This Directive applies to all undertakings that are considered tax resident and are eligible to receive a tax residency certificate in a Member State.

This Directive is without prejudice to other legal acts of the Union.

*Article 3*  
**Definitions**

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

- (1) ‘undertaking’ means any entity engaged in an economic activity, regardless of its legal form, that is a tax resident in a Member State;
- (2) ‘tax year’ means a tax year, calendar year or any other appropriate period for tax purposes;
- (3) ‘revenues’ means the sum of the net turnover, other operating income, income from participating interests, including dividends received from affiliated undertakings, income from other investments and loans forming part of the fixed assets, other interest receivable and similar income as listed in Annexes V and VI to Directive 2013/34/EU of the European Parliament and of the Council<sup>1</sup>;
- (4) ‘Member State of the undertaking’ means the Member State where the undertaking is resident for tax purposes;
- (5) ‘beneficial owner’ means beneficial owner as defined in *Article 2 point 22 of [please insert reference – proposal for a regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing – COM/2021 420 final]*; ~~Article 3, point (6), of Directive (EU) 2015/849 of the European Parliament and of the Council;~~
- (6) ‘undertaking’s shareholders’ means the individuals or entities directly holding shares, interest, stakes, participations, membership rights, entitlement to benefits or any equivalent rights or entitlements in the undertaking and in the case of indirect holdings,

<sup>1</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19)

those individuals or entities holding interest in the undertaking through one or a chain of undertakings none of which fulfils the indicators of minimum substance set out in Article 7(1) of this Directive.

- (6a) **'tax benefit' means a reduction in the obligatory liabilities of an undertaking to the government of tax residency.** (80 S&D)

AMs that fall if COMP is adopted: 76, 79, 80 S&D, 77 The Left, 78 Greens/EFA

## COMP B

### Article 6

#### **The reporting undertakings**

1. Member States shall require that undertakings meeting the following **cumulative** (82 EPP) criteria to report to the competent authorities of Member States in accordance with Article 7:
  - (a) more than ~~75%~~ **65%** (11, 84 EPP, 83 Greens/EFA, 85 S&D) of the revenues accruing to the undertaking in the preceding two tax years is relevant income;
  - (b) the undertaking is engaged in cross-border activity on any of the following grounds:
    - (i) more than ~~60%~~ **55%** (12, 86 EPP, 87 Greens/EFA, 88 S&D) of the book value of the undertaking's assets that fall within the scope of Article 4, points (e) and (f), was located outside the Member State of the undertaking in the preceding two tax years;
    - (ii) ~~at least 60%~~ **more than 55%** (13, 90 EPP, 91 Greens/EFA, 92 S&D) of the undertaking's relevant income is earned or paid out via cross-border transactions;
  - (c) in the preceding two tax years, the undertaking outsourced the administration of day-to-day operations and the decision-making on significant functions **to a third party** (96 Renew).

An undertaking which holds assets that can generate income falling within the scope of Article 4, points (e) and (f), shall also be deemed to meet the criterion set out in point (a) of the first subparagraph, irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years, if the book value of these assets is more than 75% of the total book value of the undertaking's assets.

An undertaking which holds assets that can generate income falling within the scope of Article 4, point (c), shall also be deemed to meet the criterion set out in point (a) of the first subparagraph, irrespective of whether income from these assets has accrued to the undertaking in the preceding two tax years, if the book value of these assets is more than 75% of the total book value of the assets of the undertaking.

2. By derogation from paragraph 1, Member States shall ensure that the **following** undertakings ~~falling within any of the following categories~~ are not subject to requirements of Article 7:

- (a) companies which have a transferable security admitted to trading or listed on a regulated market or multilateral trading facility as defined under Directive 2014/65/EU of the European Parliament and of the Council<sup>2</sup>;
- (b) regulated financial undertakings;
- (c) undertakings that have the main activity of holding shares in operational businesses in the same Member State while their beneficial owners are also resident for tax purposes in the same Member State;
- (d) undertakings with holding activities that are resident for tax purposes in the same Member State as the undertaking's shareholder(s) or the ultimate parent entity, as defined in Section I, point 7, of Annex III to Directive 2011/16/EU;
- ~~(e) undertakings with at least five own full-time equivalent employees or members of staff exclusively carrying out the activities generating the relevant income; (110 Greens/EFA, 111 The Left, 112 Renew, 113 S&D)~~

Point (b) of the first subparagraph shall apply to the following 'regulated financial undertakings':

- (a) a credit institution as defined in Article 4(1), point (1), of Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>3</sup>;
- (b) an investment firm as defined in Article 4(1), point (1), of Directive 2014/65/EU of the European Parliament and of the Council<sup>4</sup>;
- (c) an alternative investment fund manager (AIFM) as defined in Article 4(1), point (b), of Directive 2011/61/EU of the European Parliament and of the Council (2), including a manager of Euveca under Regulation (EU) No 345/2013 of the European Parliament and of the Council<sup>5</sup>, a manager of Eusef under Regulation (EU) No 346/2013 of the European Parliament and of the Council<sup>6</sup> and a manager of Eltif under Regulation (EU) 2015/760 of the European Parliament and of the Council<sup>7</sup>;
- (d) an undertaking for collective investment in transferable securities (UCITS) management company as defined Article 2(1), point (b), of Directive 2009/65/EC of the European Parliament and of the Council<sup>8</sup>;

<sup>2</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (**OJ L 173, 12.6.2014, p. 349–496**).

<sup>3</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

<sup>4</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

<sup>5</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

<sup>6</sup> Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

<sup>7</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

<sup>8</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

- (e) an insurance undertaking as defined in Article 13, point (1), of Directive 2009/138/EC of the European Parliament and of the Council<sup>9</sup>;
- (f) a reinsurance undertaking as defined in Article 13, point (4), of Directive 2009/138/EC;
- (g) an institution for occupational retirement provision as defined in Article 1, point (6) of Directive 2016/2341 of the European Parliament and of the Council<sup>10</sup>;
- (h) pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council<sup>11</sup> and Regulation (EC) No 987/2009 of the European Parliament and of the Council<sup>12</sup> as well as any legal entity set up for the purpose of investment of such schemes;
- (i) an alternative investment fund (AIF) managed by an AIFM as defined in Article 4(1), point (b), of Directive 2011/61/EU or an AIF supervised under the applicable national law;
- (j) UCITS in the meaning of Article 1(2) of Directive 2009/65/EC;
- (k) a central counterparty as defined in Article 2, point (1), of Regulation (EU) No 648/2012 of the European Parliament and of the Council<sup>13</sup>;
- (l) a central securities depository as defined in Article 2(1), point (1), of Regulation (EU) No 909/2014 of the European Parliament and of the Council<sup>14</sup>;
- (m) an insurance or reinsurance special purpose vehicle authorised in accordance with Article 211 of Directive 2009/138/EC;
- (n) ‘securitisation special purpose entity’ as defined in Article 2, point (2), of Regulation (EU) No 2017/2402 of the European Parliament and of the Council<sup>15</sup>;
- (o) an insurance holding company as defined in Article 212(1), point (f), of Directive 2009/138/EC or a mixed financial holding company as defined in Article 212(1), point (h), of Directive 2009/138/EC, which is part of an insurance group that is subject to supervision at the level of the group pursuant

<sup>9</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

<sup>10</sup> Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

<sup>11</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

<sup>12</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

<sup>13</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

<sup>14</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

<sup>15</sup> Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

to Article 213 of that Directive and which is not exempted from group supervision pursuant to Article 214(2) of Directive 2009/138/EC;

- (p) a payment institution as defined in point (d) of Article 1(1) of Directive (EU) 2015/2366 of the European Parliament and of the Council<sup>16</sup>;
- (q) an electronic money institution as defined in point (1) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council<sup>17</sup>;
- (r) a crowdfunding service provider as defined in point (e) Article 2(1) of Regulation (EU) 2020/1503 of the European Parliament and of the Council<sup>18</sup>;
- (s) a crypto-asset service provider as defined in Article 3(1), point (8), of [the proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937<sup>19</sup>] where performing one or more crypto-asset services as defined in Article 3(1), point (9), of [the proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937].

*AMs that fall if COMP is adopted: 11, 12, 13, 14, 15, 16, 82, 84, 86, 90, 95, 102, 109, 116 EPP, 98, 100, 103, 111, 117 The Left, 85, 88, 92, 93, 104, 107, 108, 113, 115, 119 S&D, 96, 105, 112 Renew, 81, 83, 87, 89, 91, 97, 99, 101, 106, 110, 118, 120 Greens/EFA, 94, 114 ECR*

## COMP C

### Article 7

#### *Indicators of minimum substance for tax purposes*

1. Member States shall require that undertakings meeting the criteria laid down in Article 6(1) declare in their annual tax return, for each tax year, whether they ***if they do not*** (~~122 EPP~~) meet the following indicators of minimum substance:
  - (a) the undertaking has own premises in the Member State, ~~or~~ premises for its exclusive use ***or premises shared with entities of the same group***; (123 EPP)
  - (b) the undertaking has at least one own and active bank account ***or e-money account*** (126 S&D) in the Union ***through which the relevant income is received***; (125 EPP)
  - (c) one of the following indicators:
    - (i) One or more directors of the undertaking:

<sup>16</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35)

<sup>17</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7)

<sup>18</sup> Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (OJ L 347, 20.10.2020, p. 1)

<sup>19</sup> COM/2020/593 final

- (1) are resident for tax purposes in the Member State of the undertaking, or at no greater distance from that Member State insofar as such distance is compatible with the proper performance of their duties;
  - (2) are ~~qualified and~~ (130 EPP) authorised to take decisions in relation to the activities that generate relevant income for the undertaking or in relation to the undertaking's assets;
  - ~~(3) actively and independently use the authorisation referred to in point (2) on a regular basis; (17 EPP)~~
  - ~~(4) are not employees of an enterprise that is not an associated enterprise and do not perform the function of director or equivalent of other enterprises that are not associated enterprises; (131 EPP)~~
  - (ii) the majority of the full-time equivalent employees of the undertaking **have their habitual residence as defined by Regulation (EC) No 593/2008** ~~are resident for tax purposes (134 Greens/EFA)~~ in the Member State of the undertaking, or **are** at no greater distance from that Member States insofar as such distance is compatible with the proper performance of their duties, and such employees are qualified to carry out the activities that generate relevant income for the undertaking.
2. Undertakings referred to in paragraph 1 shall accompany their tax return declaration with documentary evidence. The documentary evidence shall include the following information:
- (a) address and type of premises;
  - (b) amount of gross revenue and type thereof;
  - (c) amount of business expenses and type thereof;
  - (d) type of business activities performed to generate the relevant income;
  - (e) the number of directors, their qualifications, authorisations and place of residence for tax purposes or the number of full-time equivalent employees performing the business activities that generate the relevant income and their qualifications, their place of residence for tax purposes;
  - (f) outsourced business activities;
  - (g) bank account number, any mandates granted to access the bank account and to use or issue payment instructions and evidence of the account's activity.
- (ga) ***an overview of the structure of the undertaking and associated enterprises and any significant outsourcing arrangements, including the rationale behind the structure, (141 S&D) described in the context of a standardized format;***
  - (gb) ***a summary report of the documentary evidence submitted under this paragraph. This summary shall include:***
    - ***a brief description of the nature of the activities of the undertaking;***

- *the number of employees on a full-time equivalent basis;*
- *the amount of profit or loss before and after taxes. (147 S&D)*

#### Article 8

##### ***Presumption of minimum substance for tax purposes***

1. An undertaking that declares to meet all the indicators of minimum substance set out in Article 7(1) and provides the ~~satisfactory~~ **(18 EPP) required** supporting documentary evidence in accordance with Article 7(2) shall be presumed to have minimum substance for the tax year.
2. An undertaking that declares not to meet one or more of the indicators set out in Article 7(1) or does not provide ~~satisfactory~~ **the required** (19 EPP) supporting documentary evidence in accordance with Article 7(2) shall be presumed not to have minimum substance for the tax year.

*AMs that fall if COMP is adopted: 17, 18, 19, 122, 123, 125, 130, 131, 135 EPP, 121, 124, 126, 128, 132, 137, 139, 140, 141, 145, 147 S&D, 127, 133, 136, 142, 144 The Left, 129, 134, 138, 143, 146, 148, 149 Greens/EFA,*

#### **COMP D**

#### Article 9

##### ***Rebuttal of the presumption***

1. Member States shall take the ~~appropriate~~ **necessary** (150 EPP) measures to allow undertakings that are presumed not to have minimum substance under Article 8(2) to rebut this presumption, ***without undue delay and excessive administrative costs,*** (150 EPP) by providing any additional supporting evidence of the business activities which they perform to generate relevant income.
2. For the purposes of paragraph 1, undertakings shall provide the following additional evidence:
  - (a) a document allowing to ascertain the ~~commercial~~ **business** (151 EPP) rationale behind the establishment of the undertaking ***in the Member State where the activity is performed;*** (152 EPP)
  - (b) information about the ***full-time, part-time, and freelance*** (154 S&D) employee profiles, ~~including~~ ***namely*** (153 EPP) the level of their experience, their decision-making power in the overall organisation, role and position in the organisation chart, the type of their employment contract, their qualifications and duration of employment, ***safeguarding high levels of data protection and privacy;*** (153 EPP)
  - (c) concrete evidence that decision-making concerning the activity generating the relevant income is taking place in the Member State of the undertaking.
3. A Member State shall treat an undertaking as having rebutted the presumption if the evidence that the undertaking has provided under paragraph 2 proves that 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.

- 3a. ***The Member State shall consider the request for the rebuttal of the presumption within a period of 9 months after the introduction of the request and it shall be considered as accepted in the absence of answer from the Member State after the 9-month period. (155 EPP)***
4. After the end of the tax year for which the undertaking rebutted the presumption successfully, in accordance with paragraph 3, a Member State may consider for a period of five years that the undertaking has rebutted the presumption on the condition that the factual and legal circumstances of the undertaking remain unchanged during this period.

*AMs that fall if COMP is adopted: 150, 151, 152, 153, 155 EPP, 154 S&D, 156 Greens/EFA*

## **COMP E**

### *Article 10 Exemption*

1. A Member State shall take the appropriate ***necessary*** (158 EPP) measures to allow an undertaking that meets the criteria laid down in Article 6(1) to request, ***without undue delay and excessive administrative costs,*** (158 EPP) an exemption from its obligations under this Directive if the existence of the undertaking does not reduce the tax liability of its beneficial owner(s) or of the group, as a whole, of which the undertaking is a member.
  2. A Member State may grant that exemption for one tax year if the undertaking provides sufficient and objective evidence that its interposition does not lead to a tax benefit for its beneficial owner(s) or the group as a whole, as the case may be. That evidence shall include information about the structure of the group and its activities, ***including a list of its employees working on full-time equivalence.*** (159 S&D) That evidence shall allow to compare the amount of overall tax due by the beneficial owner(s) or the group as a whole, as the case may be, having regard to the interposition of the undertaking, with the amount that would be due under the same circumstances in the absence of the undertaking.
  3. After the end of the tax year for which an exemption was granted in accordance with paragraph 2, a Member State may extend the validity of the exemption for five years on the condition that the factual and legal circumstances of the undertaking, including of the beneficial owner(s) and the group, as the case may be, remain unchanged in the relevant period.
- 3a. ***The Member State shall consider the exemption request within a period of 9 months after the introduction of the request and it shall be considered as accepted in the absence of answer from the Member State after the 9-month period. (161 EPP)***

### *Article 11*

#### ***Tax consequences of not having minimum substance for tax purposes in Member States other than the Member State of the undertaking***

1. Member States other than the Member State of the undertaking shall disregard any agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, in force with the Member State of the

undertaking as well as Articles 4, 5 and 6 of Directive 2011/96/EU and Article 1 of Directive 2003/49/EC, to the extent that those Directives apply due to the undertaking being deemed to be resident for tax purposes in a Member State, where the following conditions are met:

- (a) an undertaking is presumed not to have minimum substance;
- (b) an undertaking does not rebut the presumption referred to in point (a) for a tax year.

2. The Member State of the undertaking's shareholder(s) shall tax the relevant income of the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s) and deduct any tax paid on such income at the Member State of the undertaking, where the following conditions are met:

- (a) the relevant income accrues to an undertaking that is presumed not to have minimum substance;
- (b) the undertaking does not rebut the presumption referred to in point (a);
- (c) both the undertaking's shareholders and the payer are resident for tax purposes in a Member State.

The first subparagraph shall apply notwithstanding any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with another Member State.

Where the payer is not resident for tax purposes in a Member State, the Member State of the undertaking's shareholder(s) shall tax the relevant income accruing to the undertaking in accordance with its national law as if it had directly accrued to the undertaking's shareholder(s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force between the Member State of the undertaking's shareholders and the third country jurisdiction of the payer;

Where the undertaking's shareholder(s) is not resident for tax purposes in a Member State, the Member State of the payer of this income shall apply withholding tax in accordance with its national law, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the third country jurisdiction of the undertaking's shareholder(s).

3. Where property referred to in Article 4 is owned by an undertaking that is presumed not to have minimum substance and does not rebut this presumption:

- (a) the Member State where property referred to in Article 4, point (e) is situated shall tax such property according to its national law, as if such property was owned directly by the undertaking's shareholder(s), without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction of the undertaking's shareholder(s);
- (b) the Member State of the undertaking's shareholder(s) shall tax such property in accordance with its national law as if the undertaking's shareholder(s) owned it directly, without prejudice to any agreement or convention that provides for the elimination of double taxation of income, and where applicable, capital, in force with the jurisdiction where the property is situated.

*AMs that fall if COMP is adopted: 157, 160, 162, 163 Greens/EFA, 158, 161 EPP, 159, 164*

**COMP F***Article 12****Tax consequences of not having minimum substance for tax purposes in the Member State of the undertaking***

Where an undertaking does not have minimum substance for tax purposes in the Member State where it is resident for tax purposes, that Member State shall ~~take any of the following decisions: deny any request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State.~~ (20 EPP, 165 Greens/EFA)

- (a) ~~deny a request for a certificate of tax residence to the undertaking for use outside the jurisdiction of this Member State;~~ (21 EPP, 166 Greens/EFA)
- (b) ~~grant a certificate of tax residence which prescribes that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, and of international agreements with a similar purpose or effect and of Articles 4, 5 and 6 of Directive 2011/96/EU and Article 1 of Directive 2003/49/EC.~~ (22 EPP, 167 The Left, 168 Greens/EFA)

***When denying such certificate, the Member State shall issue an official statement duly justifying such decision and prescribing that the undertaking is not entitled to the benefits of agreements and conventions that provide for the elimination of double taxation of income, and, where applicable, capital, or of international agreements with a similar purpose or effect and of Articles 4, 5 and 6 of Directive 2011/96/EU and Article 1 of Directive 2003/49/EC.*** (23 EPP, 170 Greens/EFA, 172 ECR)

***In cooperation with Member States, the Commission shall ensure that those tax consequences are well articulated in relation to existing bilateral tax conventions with third countries so that they receive the information on the presumed shell-companies.*** (171 Renew)

*AMs that fall if COMP is adopted: 20, 21, 22, 23 EPP, 165, 166, 168, 170 Greens/EFA, 167, 169 The Left, 171 Renew, 172 ECR*

**COMP G***Article 13****Amendments to Directive 2011/16/EU***

Directive 2011/16/EU is amended as follows:

- (1) in Article 3, point 9 is amended as follows:
  - (a) point (a) is replaced by the following:
    - “(a) for the purposes of Article 8(1) and Articles 8a to 8ad, the systematic communication of predefined information to another Member State,

without prior request, at pre-established regular intervals; for the purposes of Article 8(1), reference to available information relates to information in the tax files of the Member State communicating the information, which is retrievable in accordance with the procedures for gathering and processing information in that Member State;”

(b) point (c) is replaced by the following:

“(c) for the purposes of provisions of this Directive other than Article 8(1) and (3a) and Articles 8a to 8ad, the systematic communication of predefined information provided in points (a) and (b) of this point.”

(2) In Section II of Chapter II, the following Article 8ad is added:

*“Article 8ad*

***Scope and conditions of mandatory automatic exchange of information on undertakings required to report on indicators of minimum substance***

1. The competent authority of a Member State, which receives information from an undertaking established in its territory in accordance with Article 7 of Council Directive [OP] (insert full title and OJ reference)\* shall, by means of automatic exchange, and within 30 days from receipt of that information, communicate such information to the competent authorities of all other Member States in accordance with paragraph 4 and applicable practical arrangements adopted pursuant to Article 21.
2. The competent authority of a Member State, which certifies that an undertaking has rebutted the presumption in accordance with Article 9 of Directive [OP] or that an undertaking is exempt in accordance with Article 10 of that Directive shall, by means of automatic exchange, and within 30 days from such certification, communicate such information to the competent authorities of all other Member States, in accordance with applicable practical arrangements adopted pursuant to Article 21.
3. The competent authority of a Member State, which concludes including by way of an audit, under the national law of such Member State, that an undertaking does not meet the indicators of minimum substance laid down in Article 7 of Directive [OP] shall, by means of automatic exchange, and within 30 days from the date when the outcome of the audit becomes definitive, communicate such information to the competent authorities of all other Member States, in accordance with applicable practical arrangements adopted pursuant to Article 21.
4. The information to be communicated by a competent authority of a Member State pursuant to paragraph 1 regarding each undertaking shall include the following:
  - (a) the tax identification number (TIN) of the undertaking required to report pursuant to Article 6 of Directive [OP];
  - (b) ***In case of lack of TIN***, the VAT number, where available, of the undertaking required to report pursuant to Article 6 of Directive [OP];
  - (c) the identification of the undertaking’s shareholders and the beneficial owner(s) of the undertaking, as defined in Article 3, points 5 and 6;
  - (d) the identification of the other Member States, if any, likely to be concerned by the reporting of the undertaking;
  - (e) the identification of any person in the other Member States likely to be affected by the reporting of the undertaking;

- (f) the declaration provided by the undertaking, in accordance with Article 7(1);
  - (g) summary of ***the declaration and, where appropriate, (175 S&D)*** the evidence provided by the undertaking in accordance with Article 7(2).
5. Without prejudice to paragraph 4, the information to be communicated by a competent authority of a Member State pursuant to paragraph 2 shall also include the following:
- (h) the certification by the competent authority of the Member State that the undertaking has rebutted the presumption under Article 9 of Directive [OP] or that the undertaking is exempt from reporting in accordance with Article 10 of that Directive;
  - (i) a summary of the additional evidence considered relevant by the competent authority to issuing the certification that the presumption has been rebutted under Article 9 of Directive [OP] or that the undertaking is exempt from reporting under Article 10 of that Directive.
6. Without prejudice to paragraph 4, the information to be communicated by a competent authority of a Member State pursuant to paragraph 3 shall also include the audit report where such report is issued by the competent authority.
- 6a. *Where the competent authority of a Member State pursuant to paragraph 1, 2 or 3 identifies other Member States likely to be concerned by the reporting of the undertaking, the communication referred to in those paragraphs shall include a specific alert to those Member States deemed concerned. (176 S&D)***
7. To facilitate the exchange of information referred to in paragraphs 4, 5 and 6, the Commission shall, by means of implementing acts, adopt the practical arrangements necessary for the implementation of paragraphs 1 to 6 of this Article, including measures to standardise the communication of the information set out in paragraphs 4, 5 and 6 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).
8. For the purposes of paragraphs 1 to 5 of this Article, ‘undertaking’ shall mean undertaking as defined in Article 3, point (1) of Directive [OP].
9. Information processed shall be retained for 5 years and in any case no longer than necessary to achieve the purposes of this Directive.
10. Competent authorities of each Member State shall be considered to be data controllers and the Commission shall be considered to be data processor.
11. Member States in the event of an unauthorised disclosure of information referred to in points (a) – (f) of paragraph 4 may decide to suspend, as a mitigating measure, the exchanges of information under this Directive with the Member State where the unauthorised disclosure occurred.”
- (3) in Article 20, paragraph 5 is replaced by the following:
- “5. The Commission shall, by means of implementing acts, adopt standard forms, including the linguistic arrangements, in the following cases:
- (a) for the automatic exchange of information on advance cross-border rulings and advance pricing arrangements pursuant to Article 8a before 1 January 2017;
  - (b) for the automatic exchange of information on reportable cross-border arrangements pursuant to Article 8ab before 30 June 2019;

- (c) for the automatic exchange of information on undertakings required to report on indicators of minimum substance pursuant to Article 8ad before 1 January 2024.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).

Those standard forms shall not exceed the components for the exchange of information listed in Article 8a(6), Article 8ab(14) and Article 8ad(4), (5) and (6), and such other related fields which are linked to these components which are necessary to achieve the objectives of Articles 8a, 8ab and 8ac, respectively.

The linguistic arrangements referred to in the first subparagraph shall not preclude Member States from communicating the information referred to in Articles 8a, 8ab and 8ad in any of the official languages of the Union. However, those linguistic arrangements may provide that the key elements of such information shall also be sent in another official language of the Union.”;

- (4) in Article 21, paragraph 5 is replaced by the following:

- “5. The Commission shall by 31 December 2017 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8a(1) and (2) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 31 December 2019 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ab(13), (14) and (16) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The Commission shall by 30 June 2024 develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated in the framework of Article 8ad(1), (2) and (3) shall be recorded in order to satisfy the automatic exchange provided for in those paragraphs.

The competent authorities of all Member States shall have access to the information recorded in that directory. The Commission shall also have access to the information recorded in that directory, however within the limitations set out in Articles 8a(8) and 8ab(17). The Commission shall, by means of implementing acts, adopt the necessary practical arrangements for the implementation of the first, second and third subparagraph of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 26(2).

Until that secure central directory is operational, the automatic exchange provided for in Article 8a(1) and (2), Article 8ab(13), (14) and (16) and Article 8ad(1), (2) and (3) shall be carried out in accordance with paragraph 1 of this Article and the applicable practical arrangements.”.

## CHAPTER V ENFORCEMENT

### *Article 14 Penalties*

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

Member States shall ensure that those penalties include an administrative pecuniary sanction of at least ~~5%~~ 2% (26 EPP) of the undertaking's ~~turnover~~ *revenue* (182 EPP) in the relevant tax year, if the undertaking that is required to report pursuant to Article 6 does not comply with such requirement for a tax year within the prescribed deadline *and an administrative pecuniary sanction of at least 4 % of the undertaking's revenue if the undertaking that is required to report pursuant to Article 6* (181 S&D) makes a false declaration in the tax return under Article 7. *In case of zero or low revenue, defined as below a threshold determined by the national tax authority not going below a minimum threshold set by the Commission in an implementing act, the penalty should be based on the undertaking's total assets.* (184 Renew, 183 Greens/EFA).

*The implementing act referred to in paragraph 2 shall be adopted in accordance with the examination procedure referred to in Article 18a.*

AMs that fall if COMP is adopted: 24, 25, 26, 174, 177, 182 EPP, 173, 179 The Left, 175, 176, 181 S&D, 178, 180, 183 Greens/EFA, 184 Renew

## COMP H

### *Article 15 Request for joint (185 EPP) tax audits*

Where the competent authority of one Member State has reason to believe that an undertaking which is resident for tax purposes in another Member State has not met its obligations under this Directive, the former Member State may, *upon detailing of such reasons*, (188 EPP) request the competent authority of the latter to conduct a *joint* tax audit of the undertaking *following the procedures laid out in Article 12a of Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation.* (27, 186 EPP, 187 Greens/EFA)

*If the requesting competent authority cannot conduct a joint tax audit due to legal reasons*, (28, 190 EPP, 189 Greens/EFA) the competent authority of the requested Member State shall initiate ~~it~~ *a national audit* within one month from the date of receipt of the request and conduct ~~the tax audit~~ *it*, in accordance with the rules governing tax audits in the requested Member State.

The competent authority which conducted the tax audit 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.

*AMs that fall if COMP is adopted: 27, 28, 185, 186, 188, 190 EPP, 187, 189 Greens/EFA*

## **COMP I**

### *Article 16* **Monitoring**

1. Member States shall communicate the following information to the Commission for each tax year:
  - (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), ***broken down into joint audits and national audits***, (29, 191 EPP, 192 Greens/EFA)
  - (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.Member States shall communicate to the Commission any other information necessary for monitoring and evaluating the implementation of this Directive upon request by the Commission.
2. Member States shall communicate the information listed in paragraph 1 on a bi-annual basis by 31 December of the tax year following the end of the bi-annual period.

### *Article 17* ~~Reports~~ **Review** (198 Greens/EFA)

1. ***By [OJ: please add date:5 years after date of transposition of this Directive] the Commission shall submit*** ~~By 31 December 2028, the Commission shall present a~~ report to the European Parliament and the Council on the implementation ***and operation*** (198 Greens/EFA) of this Directive. ***If appropriate, the report shall be***

*accompanied by a review (198 Greens/EFA) in view to increase the effectiveness of this directive (198 Greens/EFA) and a legislative proposal amending this Directive. (195 EPP)*

- 1a. *The report shall review and assess the impact of this Directive on tax revenues in Member States, on tax administration's capacities (198 Greens/EFA) and in particular, whether there is a need to amend this Directive and whether it would be appropriate to add a substance indicator based on pre-tax profit per employee in art. 7 and to extend the obligation to report on indicators of minimum substance for tax purposes set out in art. 7 to regulated financial undertakings and, if necessary, review the exemption granted to them in art. 6 (2b).*
2. When drawing up the report, the Commission shall take into account the information communicated by the Member States pursuant to Article 45 16. (197 Greens/EFA)
3. The Commission shall publish the report on its website.

## **CHAPTER VI FINAL PROVISIONS**

### *Article 18 Transposition*

1. Member States shall adopt and publish, by [30 June 2023] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.  
They shall apply those provisions from [1 January 2024].  
When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
1. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### *Article 18a Committee procedure*

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

<i>AMs that fall if COMP is adopted: 29, 30, 191, 195, 199, 200 EPP, 192, 194, 197, 198 Greens/EFA, 193 The Left, 196 S&amp;D</i>
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### *COMP J - recitals*

Whereas:

- (1) Ensuring fair and effective taxation in the internal market and tackling tax avoidance and evasion remain high political priorities in the Union. While recent years saw important progress in this area, especially with the adoption of Council Directive 2016/1164<sup>10</sup> concerning anti-tax avoidance and the expansion of scope of Council Directive 2011/16/EU<sup>11</sup> on administrative cooperation *in the field of taxation*, (1 EPP, 31 Renew) further measures are necessary to tackle specifically identified practices of tax avoidance and evasion *including through the misuse of shell entities*, which are not fully captured by the existing legal framework of the Union. *In this regard, the Pandora Papers' revelations reported on the creation of shell companies with the purpose of moving money between bank accounts, avoiding taxes and carrying out financial crimes, including money laundering, and circumventing EU sanctions for Russian oligarchs.* (31 Renew) In particular, multinational groups often create undertakings with no minimal *economic* (1 EPP) substance, to lower their overall tax liability, including by shifting profits away from certain high-tax Member States in which they carry out economic activity and create value for their business. This proposal complements the progress achieved in corporate transparency through requirements concerning beneficial ownership information introduced by the anti-money laundering framework, which address situations where undertakings are created to conceal true ownership, whether of the undertakings themselves or of the assets they manage and own, such as real estate or property of high value.
- (1a) *There can be valid reasons for the use of companies with minimum economic substance.* *Therefore, it is important to guarantee a proportionate legal framework that safeguards the situation of small and medium-sized enterprises (SMEs) that use legal structures to promote investments, comply with national laws or operate in different national markets while, at the same time, legislating in concrete, on the misuse of shell entities to avoid taxation.* (2 EPP); *the quality and completeness of data are therefore essential in order to reap the greatest benefits from this Directive.* (Renew 43)
- (1b) *The lack of an international instrument on the misuse of shell entities for tax purposes creates a significant loophole in the global efforts to combat tax fraud and evasion and aggressive tax planning.* (3 EPP, 32 ECR) *In addition, it creates an uneven level playing field among businesses* (33 EPP) *The absence of such an instrument confirms the importance of the legal standards laid down in this Directive. It is essential to guarantee that the obligations provided for in this Directive are proportionate and effective from a taxation point of view, preserving the competitiveness of European undertakings.* (3 EPP, 32 ECR)
- (1c) *The misuse of shell entities for tax purposes leads to a reduction in tax liability and the tax loss within the Union. It is therefore essential that this Directive set ambitious and proportionate standards for the definition of common minimum substance requirements, for the improvement of exchange of information between national tax administrations and for the dissuasion of the use of shell entities promoted by certain intermediaries.* (4 EPP, 33 ECR)
- (2) It is acknowledged that undertakings with no minimal substance may be set up in a Member State with the main objective of obtaining a tax advantage, notably by eroding the tax base of another Member State, *creating a window of opportunity for aggressive tax planning.* (5 EPP) While some Member States have developed a legislative or administrative framework to protect their tax base from such schemes, the relevant rules often have a limited effect, as they only apply in the territory of a single Member State and do not effectively capture situations that involve more than one Member State. Furthermore, the national rules that apply in this field significantly differ across the

Union while some Member States have no rules at all, to tackle the misuse of undertakings with no or minimal substance for tax purposes. ***It is therefore important to create a Union-wide legal approach to ensure a framework for safeguarding the integrity of the internal market (35 ECR) in full respect of the highest standards of accessibility, simplification and transparency (75 EPP).***

- (3) It is necessary to lay down a common framework, in order to strengthen Member States' resilience against practices of tax avoidance and evasion linked to the use of undertakings which do not perform an economic activity even if presumably they are engaged with economic activity and therefore do not have any or have only minimal substance for tax purposes. This is done in order to ensure that undertakings lacking minimal substance are not used as instruments of tax evasion or tax avoidance. As those undertakings may be established in one Member State but may be used with the effect of eroding the tax base of another Member State, it is critical to agree on a common set of rules for determining what should be considered as insufficient substance for tax purposes in the internal market as well as for delineating specific tax consequences linked to such insufficient substance. Where an undertaking has been found to have sufficient substance under this Directive, this should not prevent the Member States from continuing to operate ***more stringent minimum substance rules and other (37 Greens/EFA; 36 The Left)*** anti-tax avoidance and evasion rules, provided that these are consistent with Union law.
- (3a) ***For the success of this Directive, it is of utmost importance that the capacities of tax administrations are reinforced and that the exchange of information be improved across the Union. It is necessary that Member States share the relevant information to which they have access, implement systems supporting the exchange of that information and as a final step, enforce proposed sanctions against non-complying entities. In support of this Directive, the Commission should suggest specific activities within the Fiscalis programme. (7 EPP, 39 ECR, 44 Renew, 69 EPP)***
- (4) To ensure a comprehensive ***and proportionate (41 S&D)*** approach, the rules should apply to ***all (41 S&D)*** undertakings in the Union which are taxable in a Member State, regardless of their legal form and status, as long as they have their residence for tax purposes in a Member State and are eligible to obtain a certificate of tax residence in that Member State. ***This broad scope is, therefore, mitigated by a set of standards regarding the economic activity of the undertakings comprehended in this Directive. (42 EPP)***
- (5) To ensure the proper functioning of the internal market, the proportionality and effectiveness of potential rules, it would be desirable to limit their scope to undertakings which are at risk of being found to lack minimal substance and used ***mainly to obtain ~~with the main objective of obtaining~~ (46 ECR)*** a tax advantage. It would therefore be important to establish a gateway criterion, in the form of a set of three cumulative, indicative conditions, in order to conclude which undertakings are sufficiently at risk as aforementioned to justify that they be subjected to reporting requirements. ***Undertakings should do the gateway test themselves in the form of a self-assessment. (8 EPP, 46 ECR)*** A first condition should enable the identification of undertakings presumably engaged mainly in geographically mobile economic activities, as the place where such activities are actually carried out is usually more challenging to identify. Such activities normally give rise to important passive income flows. Hence, undertakings, which income consists predominantly of passive income flows would meet this condition. It should also be taken into account that entities holding assets for private use, such as real estate, yachts, jets, ***art artworks (46 ECR)***, or equity alone, may have no income for longer periods of time, but still enable significant tax benefits

by way of owning those assets. As purely domestic situations would not pose a risk for the good functioning of the internal market and would be best addressed at domestic level, a second condition should focus on undertakings engaged in cross-border activities. Engagement in cross-border activities should be established having regard, on the one hand, to the nature of the transactions of the undertaking, domestic or foreign, and on the other, to its property, given that entities that only hold assets for private, ~~non-business~~, (46 ECR) use may not engage in transactions for a considerable time. Additionally, a third condition should point out to those undertakings which have no or inadequate own resources to perform core management activities. In this regard, undertakings that do not have adequate own resources tend to engage third party providers of administration, management, correspondence and legal compliance services or enter into relevant agreements with associated enterprises for the supply of such services in order to set up and maintain a legal and tax presence. Outsourcing of certain ancillary services only, such as bookkeeping services *alone* (46 ECR), while core activities remain with the undertaking, would not suffice in itself for an undertaking to meet this condition. While such service providers might be regulated for other, non-tax purposes, their obligations for such other purposes cannot always mitigate the risk that they enable the set up and maintenance of undertakings misused for tax avoidance and evasion practices.

- (6) It ~~would be fair is fair and proportionate~~ (50 EPP) to exclude from the envisaged rules undertakings whose activities are subject to an adequate level of transparency *and tax supervision* (51 S&D) and therefore do not present a risk of lacking substance for tax purposes. Companies having a transferable security admitted to trading or listed on a regulated market or multilateral trading facility as well as certain financial undertakings which are heavily regulated in the Union, directly or indirectly, and subject to increased transparency requirements and supervision, should equally be excluded from the scope of this Directive. Pure holding undertakings which are situated in the same jurisdiction as the operational subsidiary and their beneficial owner(s) are not likely to serve the objective of obtaining a tax advantage either. Similar is the case of sub-holding undertakings which are situated in the same jurisdiction as their shareholder or ultimate parent entity. On this basis, they should also be excluded. **This exclusion applies explicitly to the undertakings regulated or presenting little risk of lacking substance. This exclusion is to be seen as entity-by-entity and not broadened to cover a whole group.** ~~Undertakings that engage an adequate number of persons, full-time and exclusively, in order to carry out their activities should equally not be considered to lack minimal substance. While they are not reasonably expected to pass the gateway criterion, they should be excluded explicitly for purposes of legal certainty.~~
- (7) To distinguish amongst undertakings which are at risk of being found to lack substance for tax purposes and ensure that the rules capture only undertakings that lack substance for tax purposes, undertakings should provide information on their resources in the Member State where they are resident for tax purposes. Such information is necessary to verify that the undertaking has resources and actually performs economic activity in the Member State of its tax residence and that there is sufficient nexus between the income or the assets of the undertaking and that Member State.
- (8) To facilitate implementation of this Directive, undertakings *comprehended in the scope of this Directive and* (52 EPP) at risk of being found to lack substance and used with the main objective of obtaining a tax advantage should declare, in their annual tax return, that they possess a minimum level of resources, ~~such as namely~~ people and premises in the Member State of tax residence, and provide documentary evidence *if that is the case. The requirement relating to premises in a Member State has to take*

*into account the growing prevalence of remote working, for which legitimate enterprises downscale their premises and move away from retaining exclusive premises.* (53 S&D) While it is recognised that different activities may require a different level or type of resources, a common minimum level of resources would be expected under all circumstances. This assessment should solely aim at identifying the substance of undertakings for tax purposes and does not question the role that “trust or company service providers”, as defined in Directive (EU) 2015/849 of the European Parliament and of the Council<sup>12</sup>, have in the identification of money laundering, its predicate offences and terrorist financing. Conversely, the absence of a minimum level of resources may be considered to indicate a lack of substance where an undertaking is already at risk of being found to lack substance for tax purposes. To ensure compatibility with relevant international standards, a common minimum level should draw on the existing Union and international standards on substantial economic activity in the context of preferential tax regimes or in the absence of corporate taxation<sup>13</sup>, as developed in the context of the Forum on Harmful Tax Practices. It is necessary to provide for submission of documentary evidence with the tax return in support of the declaration of the undertaking that it disposes a minimum of resources. It is also necessary in order to allow the administration to form a view based on the facts and circumstances of the undertaking and decide whether to initiate an audit procedure.

- (9) To ensure tax certainty *and stability* (54 EPP), it is imperative to lay down common rules on the content of undertakings’ declarations. Undertakings that pass the gateway criterion and are consequently subject to reporting requirements should be presumed not to have sufficient substance for tax purposes if they also declare not to possess one or more of the elements that cumulatively constitute a minimum level of substance, or do not provide the required supporting evidence. Undertakings that declare to possess all the elements of the minimum level of substance and provide the required supporting documentation should instead be presumed to have minimal substance for tax purposes and should incur no further obligations and consequences under this Directive. This, however, should be without prejudice to any applicable law and the right of the administration to perform an audit, including on the basis of the supporting documentation, ~~and possibly, arrive at a different conclusion.~~ (54 EPP) *To allow Member States to efficiently allocate tax administration’s resources, Member States may consider for a period of three years that define a period of time during which the undertaking is presumed to have minimum substance on the condition that the factual and legal circumstances of the undertaking remain unchanged during this period.* (55 Greens/EFA)
- (10) ~~It is recognised that~~ The evaluation of whether an undertaking is actually performing economic activities relevant for tax purposes or serves mainly tax avoidance or evasion purposes, is ultimately a matter of facts and circumstances. (56 EPP) This should be assessed on a case by case basis in respect of each specific undertaking. Therefore, undertakings presumed not to have minimal substance for tax purposes should be entitled to prove the contrary, including to prove that they do not serve primarily tax objectives, and rebut such presumption. After fulfilling their reporting obligations under this Directive, they should provide ~~additional~~ *the necessary* (56 EPP) information to the administration of the Member State where they reside for tax purposes. While they may provide any additional information that they deem appropriate, it is essential to set common requirements of what may constitute appropriate additional evidence and should thus be required in all cases. Where the Member State, based on such additional evidence, considers that an undertaking has rebutted a presumption of lack of substance in a satisfactory manner, it should be able to issue a decision to certify that the undertaking has minimal substance for tax purposes in accordance with this Directive.

Such decision may remain valid for the period during which factual and legal circumstances of the undertaking remain unchanged and up to ~~6~~ 5 years (57 Greens) from the time the decision is issued. This will allow to limit the resources allocated to cases that have been evidenced not to be a shell for the purposes of the Directive.

- (11) As the objective of this Directive is to prevent tax avoidance and evasion ~~that are likely to flourish~~ (58 EPP) through actions by undertakings without minimal substance, and in order to ensure tax certainty and enhance the proper functioning of the internal market, it is paramount to provide for a possibility of exemptions for undertakings which meet the gateway criterion but yet whose interposition has no actual advantageous impact on the overall tax position of the undertaking's group or of the beneficial owner(s). For that reason, such undertakings should be entitled to request the administration of the Member State, where they reside for tax purposes, to issue a decision which exempts them from complying with the proposed rules altogether and upfront, ***without requiring the undertaking to perform the substance test (59 EPP), if it can prove the lack of tax benefit for the entity at stake.*** Such exemption should also be limited in time, to allow the administration to verify on a regular basis that the factual and legal circumstances justifying the exemption decision remain valid. At the same time a potential extended duration of such decision will allow to limit the resources allocated to cases that should be exempt from the scope of the Directive.
- (12) To ensure tax certainty and fair taxation in the internal market, it would be appropriate to explicitly lay down the rules that specify the treatment for tax purposes of income flowing to or from undertakings which have been found to lack minimum substance for tax purposes and have not provided evidence to the contrary or evidence that they do not serve the objective of obtaining a tax advantage. Such income should be taxable in the Member State where the undertaking's shareholder(s) reside for tax purposes, as if it were paid directly to such shareholder(s). To prevent the risk of double taxation, tax paid on such income in the Member State of the undertaking, if any, should be taken into account and deducted from the tax payable at the Member State of the undertaking's shareholder(s). If the undertaking's shareholders do not reside for tax purposes in a Member State, such income should be taxable in the jurisdiction of residence for tax purposes of the payer, as if it were paid straight to the undertaking's shareholder(s). Rules of equivalent effect should apply to situations where there are no income flows. In particular, this could occur in the case of holding immovable or other property of very high value for private purposes alone or of pure equity holdings. Considering that there is a risk that several undertakings without minimal substance are set up in a chain, it is also essential to exclude that the income is deemed taxable in the jurisdiction of a shareholder that is itself an undertaking without minimal substance. The allocation of taxing rights in accordance with agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital concluded between a Member State and a third country should not be affected by this Directive.
- (13) To ensure effectiveness of the proposed framework, it is necessary to establish appropriate tax consequences for undertakings that do not have minimal substance for tax purposes. Undertakings that have crossed the gateway criterion and are presumed to be lacking substance for tax purposes while, additionally, have not provided evidence to the contrary or evidence that they do not serve the objective of obtaining a tax advantage, should not be allowed to benefit from the provisions of agreements and conventions that provide for the elimination of double taxation of income, and where applicable, capital, to which the Member State of their tax residence is a party and from any other agreements, including provisions in international agreements for the

promotion and protection of investments, with equivalent purpose or effect. Such undertakings should not be allowed to benefit from Council Directive 2011/96/EU<sup>20</sup> and Council Directive 2003/49/EC<sup>21</sup>. To this effect, those undertakings should not be entitled to a certificate of tax residence to the extent that this serves to obtain those benefits. The Member State where the undertaking is resident for tax purposes should therefore deny to issue a certificate of tax residence **and issue a statement regarding the grounds on which the decision was based** ~~Alternatively, that Member State should be able to issue such certificate while indicating, by means of a warning, that it should not be used by the undertaking to obtain tax benefits as above.~~ (9 EPP, 62 ECR, 63 Greens/EFA) This denial of a certificate of tax residence, ~~or alternatively the issue of a special certificate of tax residence,~~ (9 EPP) should not set aside the national rules of the Member State of the undertaking with regard to the tax residence and relevant obligations linked thereto. It would rather serve to communicate to other Member States, and third countries, that no relief or refund should be granted with regard to transactions involving this undertaking based on any treaty with the Member State of the undertaking or Union directives, if applicable.

- (13a) ***The European Commission and Member States should make sure that these tax consequences are articulated in a consistent manner in relation to existing bilateral tax conventions concluded between Member States and third countries.*** (66 Renew)
- (14) Considering that undertakings without minimal substance may be used for the purpose of obtaining a tax advantage to the detriment of a Member State other than the one of their residence for tax purposes, the relevant information should be shared with the competent authorities of other Member States. To ensure that all interested Member States have timely access to such information, the information should be exchanged automatically through the common communication network ('CCN') developed by the Union. In this context, information should be recorded in a secure central directory on administrative cooperation in the field of taxation available to all Member States. Member States should be required to implement a series of practical arrangements, including measures to standardise the communication of all requisite information through the creation of a standard form. This should also involve specifying the linguistic requirements for the envisaged exchange of information and upgrading the CCN accordingly. Where necessary, following the stage of mandatory automatic exchange of information under this Directive, a Member State should be able to rely on Article 5 of Council Directive 2011/16/EU as regards the exchange of information on request to obtain additional information on reporting undertakings from the Member State to which such undertakings would be liable to have reported this information. Considering that the sooner replies to requests for information are received, the more effective they are, it is appropriate to ensure that replies to requests for information are provided swiftly.
- (15) ***Considering that the Directive 2011/16/EU on Administrative Cooperation (DAC) laid down the rules and procedures for cooperation between Member States on the exchange of information between tax administrations of the Member States, notably the automatic exchange of information for tax purposes on income and assets, this Directive*** should therefore be amended accordingly ***allowing Member States to***

<sup>20</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 345, 29.12.2011, p. 8).

<sup>21</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157, 26.6.2003, p. 49).

*automatically exchange the information received in the framework of this Directive.*  
(70 Renew)

- (16) In order to improve effectiveness, Member States should lay down penalties against the violation of the national rules that transpose this Directive. Such penalties should be effective, proportionate and dissuasive. To ensure tax certainty and a minimum level of coordination across all Member States, it is necessary to fix a minimum monetary penalty, also taking into account the situation of each specific undertaking. The envisaged rules rely on *a self-assessment performed* by the undertakings ~~as regards to determine~~ (71 ECR) whether or not they meet the gateway criteria. To achieve effectiveness of the provisions, incentivising adequate compliance across the Union, and taking into account that a shell undertaking in one Member State may be used to erode the tax base of another Member State, it is important that any Member State has the right to request another Member State to conduct *joint* (Green/EFA 73) tax audits of undertakings at risk ~~for of~~ (71 ECR) not fulfilling minimum substance as defined in this Directive. ~~Accordingly, to reinforce effectiveness, it is essential that the requested Member State has an obligation to carry out such audit and to share information on the outcome, even where there is no finding of 'shell' entity. Joint audits allow for the pooling of expertise, thereby ensuring a complete determination of the facts and promoting acceptance of the audit results. Council Directive (EU) 2021/514<sup>1a</sup> created a uniform framework for joint audits and therefore, in appropriate cases, they should be used.~~ (10, EPP, 71 ECR, 72 EPP, 73 Greens/EFA)
- (17) As the proper implementation and enforcement of the proposed rules in each Member State is critical for the protection of other Member States' tax base, such implementation and enforcement should be monitored by the Commission. Member States should therefore communicate to the Commission on a regular basis, specific information, including statistics, on the implementation and enforcement in their territory of national measures adopted pursuant to this Directive.
- (18) In order to evaluate the effectiveness of the proposed new rules as well as their impact on tax revenues in Member States and on tax administration's capacities, the Commission should prepare an evaluation on the basis of the information provided by Member States and other available data. The Commission's report should be published and, if appropriate, accompanied by a review in view to increase the effectiveness of this directive and by a legislative proposal amending this Directive.
- (19) In order to ensure uniform conditions for the implementation of this Directive and Directive 2011/16/EU, in particular for the automatic exchange of information between tax authorities, implementing powers should be conferred on the Commission to adopt a standard form with a limited number of components, including the linguistic arrangements, the necessary practical arrangements for upgrading the central directory on administrative cooperation in the field of taxation. Those powers, as provided in the Directive 2011/16/EU, should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>22</sup>.

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<sup>22</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13)

- (20) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 of the European Parliament and of the Council<sup>23</sup>.
- (21) Any processing of personal data carried out within the framework of Directive 2011/16/EU should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>24</sup> and Regulation (EU) 2018/1725. Data processing is set out in Directive 2011/16/EU solely with the objective of serving a general public interest, namely the matters of taxation and the purposes of combating tax fraud, tax evasion and tax avoidance, safeguarding tax revenues and promoting fair taxation, which strengthen opportunities for social, political and economic inclusion in Member States.
- (22) Since the objective of this Directive cannot sufficiently be achieved by the Member States but can rather, by reason of the fact that such undertakings are normally established in one Member State but are used in a manner impacting the tax base of one or more other Member States, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

*AMs that fall if COMP is adopted: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 33, 42, 50, 52, 54, 56, 58, 59, 69, 72, 74, 75 EPP, 40, 41, 45, 51, 53, 65 S&D, 31, 43, 44, 66, 70 Renew, 37, 38, 47, 48, 55, 57, 60, 63, 68, 73 Greens/EFA, 32, 34, 35, 39, 46, 62, 71 ECR, 36, 49, 61, 64, 67 The Left*

<sup>23</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39)

<sup>24</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1)