SVENSKT NÄRINGSLIV

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Vår referens/dnr: SN 2022-4

Er referens/dnr: Fi2021/04067

Stockholm, 2022-02-03

Remiss av EU-kommissionens förslag till rådets direktiv med regler för att motverka missbruk av bolag som saknar substans av skatteskäl samt ändring av direktiv 2011/16/EU, COM (2021) 565 final

Föreningen Svenskt Näringsliv har beretts tillfälle att avge yttrande över angivna direktivförslag och ansluter sig till vad Näringslivets Skattedelegation anfört i bifogat yttrande.

SVENSKT NÄRINGSLIV

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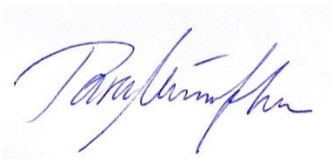

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Your reference: Fi2021/04067

Stockholm, 2022-02-03

The European Commission proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU, COM(2021) 565 final

Opinion

Näringslivets skattedelegation (NSD) welcomes and supports the European Commission's work against aggressive tax avoidance and evasion practices. However, as several significant measures in this area have only recently been implemented and insufficiently evaluated, NSD cannot support a new initiative on tackling abusive tax practices through shell entities.

NSD does not agree with the Commission's conclusion that existing tax instruments at the EU level do not target the use of shell entities for aggressive tax avoidance practices. In our view, such a conclusion requires a coherent analysis of the series of important anti-avoidance rules implemented in the past years, that indicates that the current measures are inadequate to tackle aggressive tax avoidance practices in shell entities. If an additional layer of potentially unnecessary EU legislation is added to existing legislation, there is an imminent risk of overlapping rules that could lead to severe tax consequences for fully legitimate companies.

Many of the current estimates and reports on corporate tax avoidance date back to a time when several important initiatives to counter tax avoidance had not yet been implemented. The BEPS project (especially Action 6 and 7) and the ATAD I[1] and II[2], were major initiatives to reduce aggressive profit shifting (in particular through CFC-legislation, prevention of treaty shopping, hybrid mismatches, CbC-reporting, etc.). Not long ago, these initiatives were considered important milestones. As such, NSD believes that the effectiveness and impact of these measures, should not be brought into question without proper analysis.

[1] Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[2] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

Furthermore, it is of utmost importance that no EU-legislation undermines the principle of legal certainty. In Swedish tax law, the burden of proof falls almost exclusively on the tax authorities when it comes to imposing penalties. However, as the proposal is drafted, the burden of proof is fully placed on the taxpayer. In addition, the criteria to determine whether an entity has minimum substance are subjective and ambiguous. This does not only increase the administrative burden for the taxpayer but also leads to a high degree of uncertainty and unpredictability. NSD finds this unacceptable.

NSD urges the Swedish Government to oppose the current proposal and instead encourage the Commission to start a "fitness check" procedure on the several anti-avoidance measures taken in the past decade. An adequate evaluation of the efficiency, effectiveness and EU added value, in terms of tax revenue raised (including how Member States have implemented such legislation in their audit activity), of the existing rules needs to be made before further complexity is added to existing complexity. Legislation such as ATAD, DAC[3] and national BEPS rules all share a common objective and deserve to be evaluated together, under the 'evaluate first'-principle or 'back-to-back' as described in the Better Regulation Guidelines[4]. This needs to be done, before a new layer of rules and additional safeguards, that may not even be needed, is proposed.

Background

On December 22, 2021, the Commission presented a legislative proposal for a Directive setting out rules to prevent the misuse of shell entities for tax purposes (COM (2021) 565 final). This initiative was announced by the European Commission on March 18, 2021, in a Communication on Business Taxation for the 21st Century".[5] The Communication sets out both a long-term and short-term vision to promote a robust, efficient and fair business tax system in the EU. This proposal is one of the short-term initiatives.

The proposal in short

The main aim of the proposal is to introduce an EU-wide "minimum substance test", including a reporting obligation for taxpayers, to assist Member States in identifying undertakings engaged in economic activity, but which do not have or only have minimal substance and, according to the Commission, are misused to obtain tax advantages (so called shell entities). The purpose of the proposal is to discourage using and creating shell entities within the EU.

The Commission proposes a seven-step approach which will determine if an entity, resident for corporate income tax purposes in a Member State, should be considered a "shell" and the consequences of such a classification. An entity that does not meet all the minimum substance requirements and fails to provide evidence showing that they have commercial, non-tax motives, risks tax consequences such as loss of tax benefits provided by the Parent-

[3] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[4] Commission staff working document Better Regulation Guidelines.
[5] COM (2021) 251 final.

Subsidiary Directive[6], the Interest and Royalties Directive[7] and bilateral tax treaties. In addition, the tax administration has the possibility to deny issuing tax residency certificates. The Directive also envisages automatic exchange of information, through the amendment of the Directive on administrative cooperation 2011/16/EU (DAC)[8], as well as the possibility for a Member State to request another Member State to conduct a tax audit.

The proposal complements existing anti-tax-avoidance rules that, with respect to shell entities, are considered ineffective by the Commission.

General comments

NSD believes that it is paramount that the corporate tax system in the EU is conducive to investment, growth, and job creation. The tax system needs to ensure efficiency to support a stronger and more competitive economy. For these reasons, it is essential to create a more favorable tax environment for businesses that ensures tax certainty by reducing compliance costs and administrative burdens. All measures aimed at fighting tax avoidance and aggressive tax planning must therefore go hand in hand with creating a competitive tax environment for businesses.

NSD does not believe that the harmonization of a set of substance requirements for shell entities in the EU, is sufficient to offset the risk of the new rules having a negative impact on the business climate in the Union. In our view, introducing such rules will instead lead to a competitive disadvantage for EU companies. The Commission's Impact Assessment lacks significant information on the proposal's potential effects on companies, and does not quantify any increasing costs, even though the Commission expressly states that the proposal will lead to additional reporting requirements.

It is crucial that any proposal regarding new tax avoidance rules is preceded by a wide, comprehensive analysis of the effectiveness, implementation and enforcement of the various anti-avoidance measures that have been introduced in the past decade. In the context of the EU this includes:

- The Anti-Tax Avoidance Directive (I[9]&II[10]),
- The introduction and several revisions to the Directive on Administrative Cooperation (DAC)[11],

[6] 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.
[7] 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.
[8] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
[9] Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
[10] Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.
[11] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

- The fourth[12] and fifth[13] Anti-Money Laundering Directive,
- The EU-list of non-cooperative jurisdictions for tax purposes,
- The modernization of transfer pricing rules,
- The end of several national harmful tax practices and the introduction of further safeguards as a result of the BEPS project, in particular the (on going) introduction of the minimum standards (e.g., the principal purpose test of BEPS Action 6).

There have been evaluation reports[14] on the DACs which, whilst helpful and pointing towards some positive developments, were too limited in scope (primarily focusing on only DAC 1-3) or only covering a few Member States, and according to the Commission's own assessment "grounded on limited and in some cases very thin evidence".[15] NSD believes that a new evaluation should be made which also looks at the administrative burden of these measures for businesses. Another step in the right direction was the initial analysis the Commission made on countries' implementation of the ATAD 2020[16] (not yet published). However, NSD believes that these evaluations are inadequate, and that the Commission needs to make a fair assessment of whether there is a need for new tax avoidance measures especially targeting shell entities.

Furthermore, NSD is deeply concerned about the vague nature and use of the term "shell entities". As testified by the ECJ's case law in the area of tax abuse, the question of substance is very complex. Due to the lack of universal or EU-wide definition, the term is often wrongly equated with illegal activities. NSD believes that the proposed seven-step approach, a form of "checklist" approach, is an insufficient tool to differentiate legitimate use from illegitimate use. The inaccuracy of such a system may negatively impact EU companies.

NSD wants to emphasize that substance is a generic concept that must be analyzed on a case-by-case basis and must be commensurate to the taxpayer's business activity. There are several legitimate reasons to create companies with minimal substance, for example:

- A company may be set up as a pure equity holding company, which requires minimal resources;
- A company may be created with limited number of employees (or with no employees) when the activity carried out does not require labor force or is not labor-intensive, and/or for cost-saving reasons. It may sometimes be more efficient to resort to outsourcing or using the human resources of other group companies;

[12] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.
[13] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.
[14] Implementation of the EU requirements for tax information exchange – European Implementation Assessment.
[15] European Commission, Evaluation of the Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, SWD(2019) 327 final, 2019.
[16] Report from the Commission to the European Parliament and the Council on the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

- A company may be created with no employees because of social law constraints, to avoid fragmentation of the workforce across different entities. Trade unions may in fact request that the workforce in a group be concentrated within one or a few entities in order to preserve employee rights and benefits or employee-representativeness;
- A company may be created in order to hold an asset/a class of assets/contracts, notably when there is a need to circumscribe such assets/contracts for legal reasons such as managing risk or for insurance coverage purposes (e.g. when large infrastructure projects are carried out);
- A company may be created as a holding company, with minimal resources, in case of joint ventures (e.g., in order to ring-fence the risk-taking/entrepreneur risk/ownership risk);
- A company may be created as a holding company, with minimal resources, for financing/intercompany financing reasons.

NSD believes that the Commission fails, in a sufficient manner, to clarify that there are different types of “shell entities”, and that their use is neither always illegal nor always motivated by tax purposes. This distinction is essential since companies with minimal substance, when used for legitimate business purposes, can have positive consequences for the general business environment in the EU. In addition, the proposal places the burden of proof on the taxpayer, i.e., the company must show that it is not a shell entity. Given the complexity and uncertainty surrounding the new rules, NSD is concerned that this will result in tax consequences and damage to company goodwill, even for companies with perfectly legitimate business purposes.

In general, NSD believes that the proposal does not consider the complexity in determining “substance”. For example, the criteria in Article 9(2)(b) about providing information regarding employees, does not consider that some companies, with fully legitimate reasons, can be created with limited number of, or sometimes no, employees (see examples listed above). NSD wants to emphasize that what is to be considered substance differs considerably depending on the activity carried out by the business entity (commercial vs. holding), the sector (digital vs. manufacturing), or the phase of its development (start-up vs. maturity).

To avoid unnecessary administrative burden for taxpayers as well as tax administrations in relation to entities created for sound business reasons, it is essential that the “gateway test” in Article 6 (1) is based solely on objective criteria with no room for uncertainty or interpretation. However, this is not the case, especially regarding the third criteria, Article 6 (1)(c). The way the administration/decision-making test is currently drafted, it includes a grey scale where the taxpayer and the tax administration may have different views regarding the threshold. It is unclear whether it exclusively targets situations where the company is stand-alone with no outsourcing whatsoever or has outsourced all its operations.

NSD wants to emphasize that it is of utmost importance that no EU-legislation undermines the principle of legal certainty. In Swedish tax law, the burden of proof falls almost exclusively on the tax authorities when it comes to imposing penalties. However, as the proposal is drafted, the combination of the burden of proof fully placed on the taxpayer the subjective and ambiguous criteria determining whether an entity has minimum substance or not, does not only increase the administrative burden for the taxpayer but also leads to a high degree of uncertainty and unpredictability. NSD finds this unacceptable.

To minimize the risk of fully legitimate companies being subject to severe tax consequences, it is crucial that a legislative proposal related to substance requirements always contains straightforward safeguard mechanisms that allows taxpayers to show that there are business reasons for the existence of such an entity, in line with ECJ case law and EU principles.[17]

We note that the proposal includes a safeguard mechanism, the rebuttal of the presumption in Article 9. This enables companies presumed not to have minimum substance for tax purposes, to rebut the presumption of having no minimum substance by proving that they have commercial, non-tax motives for having the entity. We find it positive that such a provision is included. However, the process surrounding such a rebuttal is not only administratively burdensome for companies, but it is also open for arbitrary assessment in the Member States. The same goes for the possibility of exemption in Article 10. To minimize the administration for taxpayers and tax administrations, the reporting requirements should only apply to entities where there is a risk of tax avoidance and evasion. In this regard, Article 6 (2) is important since a company that falls under one of the derogations in the article is not in scope and is consequently released from the reporting requirements laid down in the proposal, including the ones relating to the rebuttal and the exemption. However, in our view the scope of the derogations is also unclear, not appropriately determined and not fully complete.

According to the derogation in Article 6 (2)(d), only ”holding activities”, which is not defined, in a legal entity in the same jurisdiction as the ultimate parent entity are exempt. NSD questions the limitation of the exemptions to holding activities. The tax consequences of receiving the relevant income in a subsidiary that is resident in the same jurisdiction as the ultimate parent entity should be the same as if received directly by the ultimate parent entity, regardless of which relevant income is at hand. Thus, there should be no risk for tax avoidance in these cases. In addition, NSD is of the opinion that the derogation should cover all legal entities with relevant income which are resident in the same jurisdiction as the ultimate parent entity. For example, in a group with an ultimate parent entity resident in Sweden, not only a Swedish holding company but also a Swedish treasury company should fall under the exemption.

Furthermore, the beneficial owner definition in Article 6 (2)(c) refers to the fourth Anti-Money Laundering Directive (2015/849/EU).[18] That definition, in turn, does not cover situations where the ultimate parent entity is a listed entity. In several parts of the proposal, it is unclear what the requirements are if there is no beneficial owner since the ultimate parent entity is listed (see for example Article 10).

In our view, some of the criteria in the proposal are outdated, e.g., the requirement to have a bank account in Article 7 (1)(b). Many MNE:s have a treasury company that acts as an inhouse bank removing the need for subsidiaries to have their own accounts. In fact, the world is moving even further in this direction with the possibility of virtual bank accounts and

[17] Notably the ECJ decision “Cadbury Schweppes” (C-196/04), Joined cases C-504/16 and C-613/16, decision of 20 December 2017 - Deister Holding and Juhler Holding, and Case C-440/17, decision of 14 June 2018, Joined cases C-115/16, N Luxembourg 1, C-118/16 X Denmark, C-119/16 C Denmark I, C-299/16 Z Denmark, and Joined Cases C-116/16 T Denmark and C-117/16 Y Denmark.
[18] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

payment on behalf of structures. The same goes for Article 7 (1)(a), regarding having own premises for exclusive use. Many groups use the same premises for operational companies and holding companies.

Another crucial concern for NSD, is the lack of a “grandfathering” rule for legacy structures with a pre-clearance procedure. Many entities exist for historical reasons and cannot readily be eliminated due to cost and complexity. It can be difficult and almost impossible to eliminate a European holding company without triggering exit tax charges in third countries. Some foreign jurisdictions have domestic rules that allow them to charge an exit tax based on the uplift in value created over many years. Such exit tax could therefore be massive. For instance, many Swedish groups still have Dutch holding companies in their structure, created before 2004, when Sweden had not yet introduced participation exemption. However, as the proposal is drafted, such a motive may not be enough to get an exemption under Article 10, even though these types of holding companies are not used for any improper tax purposes. Thus, if Swedish groups are forced to dismantle their European holding companies because of this proposal, they will be exposed to a potential exit tax charge.

Specific comments

Penalties

The construction of Article 14 is similar to the corresponding articles of the DAC6 and DAC7 directives respectively. This is particularly the case regarding the last sentence of the first paragraph, which has the same wording in all three directives. NSD therefore assumes that it is up to each Member State to design a sanction system and exemption grounds.

It is stated that if required reporting is not submitted within the prescribed time limit or if the declaration contains false information, a fee of five per cent of the undertaking’s turnover shall be paid. In the proposed wording, the term false declaration is used, which from a Swedish point of view is not a common term in tax law. According to NSD, the concept of false declaration does not correspond to the concept of incorrect information but refers to a more limited area of application where it is rather a question of an intentional procedure.

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