*18 August 2021*

**3. Problem definition, policy options and impacts**

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

| | Very relevant | Relevant | Neither irrelevant nor relevant | Not relevant | Not relevant at all | No opinion |
|---|---|---|---|---|---|---|
| Inadequate legislation on tax avoidance | | | | | | **X*** |
| Insufficient information of tax administration on potential tax avoidance structures | | | | | | **X*** |
| Insufficient capacity of tax administration to process the available information on tax avoidance structures | | | | | | **X*** |
| Insufficient cooperation between EU Member States | | | | | | **X*** |
| Insufficient enforcement of existing legislation in Member States | | **X** | | | | |

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

**X** The impact of the new measures is not quantifiable yet. The EU should wait before taking new measures to fight tax avoidance until the impact of the existing measures is measurable.

o While the impact of the new measures is not quantifiable yet, there is margin for improvement. The EU should take action to complement the existing framework as soon as possible.

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

- ○ yes
- **X** no

**3.4 Please explain your reply**

*The terms "shell" and "letterbox" entities, defined as entities with little or no substance in their place of establishment or elsewhere, are far too vague and overbroad to be used as the basis for tax standards. Furthermore, the proposed definition reflects a presumption that entities are used for tax purposes if they have relatively little or no substance, meaning that they reflect some of the hallmarks listed in Question 3.7. This presumption is completely unfounded.*

*We strongly support compliance with rules to prevent tax evasion and tax avoidance; however, as we explain in more detail in our response to Question 3.8, in real estate investment funds, entities with little substance generally have a very justifiable business purpose. The OECD has explicitly recognised this in article 6 of the OECD Model Tax Convention on Income and Capital (Model Treaty) as well as in the Tax Challenges Arising from Digitalisation – Report on Pillar Two (Blueprint), which acknowledges the legitimate use of non-CIVs, including regulated funds and unregulated funds managed by a regulated manager/AIFM, and their holding structures/Special Purpose Vehicles (SPVs).*

*We would also mention here that in response to Question 3.1, above, we checked "no opinion" to four questions regarding relevance of possible causes of the unsupported conclusion that "tax avoidance seems to remain a problem". Further explanation of the basis of this conclusion should be provided, as it seems highly debatable or in any case premature. We further note in this regard that the General Anti-Avoidance Rules (GAAR) in EU Anti-Tax Avoidance Directive I, which reflect the recommendations of the OECD's Base Erosion and Profit Shifting Programme, already provide clear prohibitions against anti-avoidance behaviour that are being scrupulously adhered to in our industry.*

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

| | Strongly agree | Agree | Neither agree nor disagree | Disagree | Strongly disagree | No opinion |
|---|---|---|---|---|---|---|
| Shell entities are used in the EU mostly for **abusive tax purposes**. | | | | | | **X*** |
| **Current EU rules in the field of taxation already provide tools** to tackle aggressive tax planning schemes including through the use of shell entities. | | **X** | | | | |
| **Current EU rules cannot fullyand effectively address** the use of shell entities for tax avoidance purposes. | | | | **X** | | |
| While the **EU legal frameworkincludes adequate rules** to address the use of shell entitiesfor tax purposes, they are n**ot properly implemented and monitored** | | **X** | | | | |

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

*As we noted in our response to Question 3.4, the term "shell entities", defined as entities with little or no substance in their place of establishment or elsewhere, is far too vague and overbroad to be used as the basis for EU tax standards, much less a discussion of how they are used in an abusive manner for tax purposes. We explain in more detail in our response to Question 3.8 that in real estate investment funds, entities with little substance generally have a very legitimate business purpose.*

*As stated above, the OECD has explicitly acknowledged this in article 6 of the OECD Model Tax Convention on Income and Capital (Model Treaty) as well as in the Tax Challenges Arising from Digitalisation – Report on Pillar Two (Blueprint), which recognise the legitimate use of non-CIVs, including regulated funds and unregulated funds managed by a regulated manager/AIFM, and their*

*holding structures/Special Purpose Vehicles (SPVs) and carves them out of the minimum tax recommendations.*

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

| | Very indicative | Indicative | Neither indicative nor not indicative | Not indicative | Not indicativ eat all | No opinion |
|---|---|---|---|---|---|---|
| Use of trust and company service providers | | | **X** | | | |
| Low number ofemployees | | | **X** | | | |
| Lack of own premises | | | **X** | | | |
| Lack of own bankaccount | | | **X** | | | |
| Passive income as main source of income(rents, interests, royalties etc.) | | | **X** | | | |
| Outsourcing of income generating activities | | | **X** | | | |
| Mostly foreign sourced turnover | | | **X** | | | |
| Majority of directorsnon-resident | | | **X** | | | |

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

*The hallmarks above do not necessarily relate to the purpose for establishing a holding company or SPV; even more importantly, entities with these hallmarks are not necessarily used for tax purposes.*

*The primary purpose of real estate non-listed funds is to enable collective investment in real estate assets for multiple investors. As the OECD has recognised in the 2010 CIV report and BEPS recommendations and the EU has recognised in ATAD 1, cross-border tax rules should put investors in real estate non-CIVs in the same tax position that they would be in if they had invested in the underlying real estate assets directly. In other words, there should be tax neutrality between a direct investment in real estate and an investment in real estate via a non-listed real estate vehicle.*

*A real estate non-listed fund generally holds its real estate investments through one or more (controlled) special purpose companies (SPCs) for a number of legitimate commercial and legal reasons. These reasons include the protection of the real estate fund from the liabilities of and potential claims against the fund's immovable property assets as well as facilitating debt financing, including debt by third-party lenders.*

*These SPCs ensure isolation of the liabilities of and potential legal claims against each asset or relatively small group of assets. It is important, however, that the interposition of such SPCs does not cause an additional tax burden that would not arise if the investments where held directly by subjecting the investment income to double taxation.*

*A main concern underpinning the current Commission consultation is the risk that investors can use shell structures to avoid or unethically minimise tax. However, income derived from real estate assets owned by a real estate fund is typically subject to full taxation in the country where the real estate is physically located, while the fund structure is designed to facilitate the collective investment and provide for tax neutral income distribution to its investors that is then subject to tax treatment under their domestic tax laws.*

*Therefore, even if they have many or even all the hallmarks listed in Question 3.7, these entities should be analysed based on the commercial purpose for which they were put in place and not be automatically considered as being used for tax purposes.*

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

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

- Off-balance structures

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

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

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

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

*As with Question 3.10, we feel strongly that this question reflects a disturbing example of fuzzy thinking. The notion that shell entities may be likely to use certain legal forms for tax purposes is very similar to asking "what type of cars are most likely to be used by bank robbers?" in order to support a conclusion that people driving those cars are probably bank robbers. It is simply illogical and not supportable by empirical data.*

*The vast majority of entities used in holding and managing real estate, our industry, are established for legitimate business reasons, regardless of their legal form, even though they may have some tax implications. The fact that they have tax implications does not support the conclusion that they are established for tax purposes, and certainly not for tax avoidance purposes.*

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

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

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

**3.14 Please elaborate if you replied "other" to the previous question.**

*The assumption underlying Question 3.13, is that only large entities engage in tax avoidance. We strongly disagree and we call on the Commission to provide evidence to support this unwarranted assumption.*

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

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

**3.16 Please elaborate.**

*As we noted in our response to Question 3.4 and 3.6, the terms "shell entities" and "letterbox entities" defined as entities with little or no substance and/or no substantial economic activity in their place of establishment or elsewhere are far too vague and overbroad to be used as the basis for tax standards, much less support the conclusion that they are used in an abusive manner for tax purposes. Furthermore, as we pointed out in response to Question 3.8, the suggested hallmarks do not necessarily relate to the purpose for establishing a holding company or SPV and, even more importantly, entities with these hallmarks are not necessarily used for tax purposes.*

*We explained further in our response to Question 3.8, in real estate investment funds, entities with little substance and possibly "no substantial economic activity" generally have a very legitimate business purpose. The OECD has explicitly recognised this in article 6 of the OECD Model Tax Convention on Income and Capital (Model Treaty) as well as in the Tax Challenges Arising from Digitalisation – Report on Pillar Two (Blueprint), which recognises the legitimate use of regulated funds and their holding structures/Special Purpose Vehicles (SPVs) and carves them out of the minimum tax recommendations.*

*While increased scrutiny of entities with little or no substance and/or no substantial economic activity in their place of establishment may be appropriate, we believe that the outcome of this scrutiny and consequences should be determined by Member States.*

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

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

**3.18 Please elaborate.**

*Tax avoidance attempted by whatever means has a number of detrimental impacts on society and the economy, including those mentioned above, and we strongly support efforts to detect and punish tax avoidance through appropriate legal sanctions. Our only concern in the current consultation is the unwarranted assumption that seems to underly many or all of the questions, which is that entities with little or no substance and/or "no substantial economic activity" in their place of establishment or elsewhere are clearly established to avoid tax. That is simply not the case, as we have explained elsewhere; these entities may have been established for entirely legitimate commercial and legal reasons.*

*As noted elsewhere, in the institutional real estate investment industry, these reasons include protecting the real estate fund from the liabilities of and potential claims against the fund's immovable property assets as well as facilitating debt financing, including debt by third-party lenders. These SPCs ensure isolation of the liabilities of and potential legal claims against each asset or relatively small group of assets. It is important that the interposition of such SPCs does not cause an additional tax burden that would not arise if the investments where held directly or subject investment income to double taxation. However, a real estate fund established for long-term investment typically has little need for extensive staff or premises given the nature of the activity being undertaken.*

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

*All EU Member States are required to adopt measures under the General Anti-Abuse Rules provisions of Anti-Tax Avoidance Directive (ATAD). The rules currently in place, which are broadly drafted, are increasingly interpreted by Member States to target entities without a commercial purpose. In addition, recently implemented DAC6 rules create an obligation to report potentially aggressive tax structures.*

*Examples of some other specific related national rules targeting the use of holding companies or other special purpose vehicles are in the Netherlands where holding and finance companies that do not meet certain thresholds are subject to an automatic exchange of information between the authorities of the jurisdictions involved. Another example is in Luxembourg, where a lack of substance can trigger increased scrutiny regarding a possible breach of transfer pricing rules and a requirement to exchange information.*

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

*On a scale of 1-5, "3".*

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

*Co-ordination at the EU level can, in principle, yield significant advantages such as creating a level playing field and a common rule book if done intelligently. The determination of what qualifies as a shell entity for tax purposes and how it should be treated in terms of taxation should not be limited to the EU, however, and should also apply to non-EU entities with activity in the EU.*

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

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

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

**3.24 Please indicate other objectives that should be pursued.**

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

*Relating perhaps more to Question 3.20, we believe that co-ordination at the EU level can, in principle, yield significant advantages such as creating a level playing field and a common rule book if done intelligently. We believe, however, that no new regulations are needed to achieve this and that the objectives listed in 3.23 can be achieved on the basis of existing anti-avoidance legislation. The European Commission can achieve significant progress simply by promoting effective implementation of these rules in the EU Member States.*

*As we have stated elsewhere, we are concerned that this questionnaire reflects a pattern of thinking within the Commission that shell entities are always used for tax avoidance purposes, which ignores the legitimate commercial and legal use of entities that may have little or no substance and/or "no substantial economic activity" in their place of establishment or elsewhere.*

*In any case, we believe that the determination of what types of entities are being used for tax avoidance, along with how they should be treated, should not be limited to the EU but should also apply to non-EU entities with activities in the EU.*

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

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

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

*While hard law, or rules, can be very effective in some situations, we believe that the complex and nuanced nature and purpose of holding and finance structures require that any new EU action should be principles-based and therefore primarily of soft law nature so as to take into account the specific circumstances of each case and the situation of each Member State.*

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

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

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

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

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

*The major impacts on stakeholders that are likely to arise from new EU action against shell entities are difficult to assess as they would necessarily depend on a number of assumptions. Although as we indicated in our response to Question 3.28, we believe that Member States are keen to implement the existing tools against shell entities and in a few years will have gained the necessary experience to tackle the problem themselves. Some of the existing tools are not even in effect yet and will only come into effect on 1 January 2022.*

*We do support the adoption of an EU directive that reflects the recommendations made by the OECD in BEPS Pillar I and II. We believe they reflect a good understanding of the difference between entities, including what could be deemed "shell entities" under the definition proposed in this consultation, that are used for tax avoidance purposes and those that are used for legitimate business and legal reasons as we have explained elsewhere. Therefore, we support the OECD's recommendations for policing entities used for tax avoidance purposes.*

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

- **X** A level playing field would be encouraged. Member States would have more incentives to implement effectively the rules.
- o Member States would face a new burden, while instead they should be free to implement the rules as best fits with their legislation and practice.

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

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

**3.33 Please describe any other monitoring mechanism as regards Member States' implementation that you consider appropriate and effective.**

*In principle, we support mechanisms to monitor Member State implementation of existing EU rules to fight tax avoidance. This could be an effective way to prevent a "race to the bottom" between Member States seeking to attract business. The effectiveness of such mechanisms depends very much on the details of the rules adopted and should be based on appropriate definitions with proportionate sanctions to avoid a "witch hunt" mentality.*

*A good example of what we believe is an effective existing mechanism to fight tax avoidance is DAC6, which encourages reporting of potentially aggressive tax structures and information sharing between Member States.*

**4. Final remarks**

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

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

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

**4.1 Please upload your file**

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

[The following statement uploaded to response as pdf document]

*18 August 2021*

***About INREV: the European Association for Investors in Non-Listed Real Estate Vehicles***

*INREV is the European Association for Investors in Non-Listed Real Estate Vehicles. We provide guidance, research and information related to the development and harmonisation of professional standards, reporting guidelines and corporate governance within the non-listed property funds industry across Europe.*

*INREV currently has approximately 460 members. Our member base includes institutional investors from around the globe including pension funds, insurance companies and sovereign wealth funds, as well as investment banks, fund managers, fund of funds managers and advisors representing all facets of investing into non-listed real estate vehicles in the UK and the rest of Europe. Our fund manager members manage more than 500 non-listed real estate investment funds, as well as joint ventures, club deals and separate accounts for institutional investors.*

***Statement***

*We hope the views we have expressed in response to the questions in the consultation reflect a few clear points. The first is that the primary purpose of real estate non-listed funds is to enable collective investment in real estate assets for multiple institutional investors such as pension funds and insurance companies. Second, it is an important principle of tax policy that cross-border tax rules should put these investors in the same tax position that they would be in if they had invested in the underlying real estate assets directly. In other words, there should be tax neutrality between a direct*

*investment in real estate and an investment in real estate through a non-listed real estate vehicle, a principle that has been recognised by the OECD in its 2010 CIV report and BEPS recommendations, by the EU in ATAD 1, and by EU Member States.*

*Third, a non-listed real estate fund generally holds its real estate investments through one or more (controlled) special purpose companies (SPCs) for a number of legitimate commercial and legal reasons. These reasons include the protection of the real estate fund from the liabilities of and potential claims against the fund's immovable property assets as well as facilitating debt financing, including debt by third-party lenders.*

*These SPCs ensure ring-fencing of the liabilities of, and potential legal claims against, each asset or relatively small group of assets. To maintain the principle of tax neutrality, it is important that the interposition of SPCs does not cause an additional tax burden that would not arise if the investments where held directly by subjecting the investment income to double taxation. We note further that the income derived from real estate assets owned by a real estate fund is typically subject to full taxation in the country where the real estate is physically located, while the fund structure is designed to facilitate the collective investment and provide for tax neutral income distribution to its investors which is then subject to tax treatment under their domestic tax laws.*

*Finally, the institutional investors and fund managers in our industry are strong proponents of ethical tax policy and behaviour. In addition to their own internal ethical tax policies, through INREV, our industry has adopted a Code of Tax Conduct (https://www.inrev.org/guidelines/module/EN/code-of-tax-conduct?find=504#inrev-guidelines) that is consistent with the guidelines and principles of the UN Investors' Recommendations on Corporate Tax Disclosure, the OECD's Guidelines for multinational enterprises, the OECD's Building Better Tax Control Framework and the sustainability reporting standard on tax, GRI 207: Tax 2019.*

*The Commission is clearly concerned about the risk that investors can use shell structures or other arrangements to avoid or unethically minimise tax. We share this concern but see the approach suggested by the questions in the questionnaire to be misguided. If the Commission adopts overbroad tax measures that label certain sectors or structures as shell entities used for tax purposes, it runs the risk of unintentionally sweeping up a number of entities that have been adopted for legitimate business purposes, even if they have many or even all the hallmarks listed in Question 3.7. For example, a real estate fund established for long-term investment typically has little need for extensive staff or premises given the nature of the activity being undertaken. We strongly believe that these entities and their characteristics should be analysed considering the commercial context and purpose for which they were put in place. They should not be automatically considered as being used for tax purposes based solely on a "checklist" of organisational characteristics.*